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COMMENTS

THE PSYCHIATRIC EXPERT IN THE CRIMINAL TRIAL: ARE BIFURCATION AND THE RULES CONCERNING OPINION TESTIMONY ON ULTIMATE ISSUES CONSTITUTIONALLY COMPATIBLE?

INTRODUCTION

Evidentiary rules and court decisions have attempted to rationalize and crystalize legal issues. The desire to minimize confusion and further justice has been the impetus to these endeavors. One confusion-causing factor has been the use of psychiatric expert testimony in the criminal trial. Courts and legislatures have raised doubts concerning the scientific validity of psychiatry. Evidentiary rules and court decisions have therefore imposed restrictions upon the admissibility of psychiatric expert testimony. The difficulty arises when specific intent and insanity are key issues in a criminal trial. Each issue deals with a state of mind or a mental purpose, and psychiatry is the science that deals most closely with these issues.

This Comment deals chiefly with specific intent crimes. It will be helpful to keep an example in mind while reading. Wisconsin defines first-degree murder as an act in which one "causes the death of another human being with intent to kill

that person or another."¹ Intent to kill means the "mental purpose to take the life of another human being."²

The basic scope of this Comment is the bifurcated trial system and the use of a psychiatrist's opinion on ultimate issues within that system. There is a discussion of Federal Rule of Evidence 704³ and state statutes and case law which emulate its recent revision. The Comment also addresses the constitutionality of bifurcation, psychiatric expert opinion testimony, and the operational nexus between these concepts. The Comment concludes with some proposals that attempt to alleviate confusion and make their function more constitutionally acceptable.

The aim of this Comment is not to delve deeply into the present state of the insanity defense nor to discuss the various theories on insanity. Its chief goal is to provide some insight into the procedural and evidentiary devices which surround the bifurcated trial and highlight the value of psychiatric expert testimony.

I. THE BIFURCATED TRIAL SYSTEM

It has been stated that "[b]ifurcation is nothing more than a procedural device, analytically a pure form without substantive impact and value free in terms of whether it is 'pro prosecution' or 'pro defense.'"⁴ The United States Supreme Court has noted that two-part jury trials are uncommon in federal jurisprudence being neither constitutionally nor procedurally

1. WIS. STAT. § 940.01(1) (1985-86). Section 940.01(1) provides as follows: "Whoever causes the death of another human being with intent to kill that person or another is guilty of a Class A felony." *Id.* A "Class A" felony carries a penalty of life imprisonment. *See* WIS. STAT. § 939.50(3)(a) (1985-86). In contrast, the Model Penal Code defines murder as follows: "[C]riminal homicide constitutes murder when: (a) it is committed purposely or knowingly; or (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. . . ." MODEL PENAL CODE § 210.2(1) (1962).

2. WIS. STAT. § 940.01(2) (1985-86). Section 940.01(2) provides: "In this chapter 'intent to kill' means the mental purpose to take the life of another human being." *Id.* *See generally* MODEL PENAL CODE § 2.02 (1962). Section 2.02 of the Model Penal Code defines "purposefully," "knowingly" and "recklessly" as they are used in relation to culpability.

3. *See infra* note 86.

4. Gallivan, *Insanity, Bifurcation and Due Process: Can Values Survive Doctrine*, 13 LAND & WATER L. REV. 515, 518 (1978).

mandated.⁵ Yet several states have provided for such procedural devices for many years. In *State ex rel. La Follette v. Raskin*⁶ the Wisconsin Supreme Court expressed bifurcation in this manner:

While some cases refer to a "bifurcated trial," "split trial," "two-part trial," or a "trial with a sequential order of proof" indiscriminately, such terms are not necessarily synonymous. A bifurcated trial or a split trial, as opposed to a unitary trial, sometimes means complete separate trials before the same or different juries resulting in partial determinations of the controversy. While they are not common they are not unknown in the law.⁷

Simply stated, bifurcation is the separation of the issues of guilt and insanity into two distinct proceedings.

A. The State Approach

During the late 1800's, the Wisconsin legislature passed a law which provided for insanity and guilt issues to be tried separately and in that order.⁸ The Wisconsin Supreme Court upheld the statute as not constitutionally violative, saying that it was "the most practical and convenient method of disposing of the whole case."⁹ However, in 1911 the legislature repealed bifurcation¹⁰ and not until 1967 were the issues of insanity and guilt tried separately.¹¹ Section 971.175 of the Wisconsin Stat-

5. *Spencer v. Texas*, 385 U.S. 554, 568 (1967).

6. 34 Wis. 2d 607, 150 N.W.2d 318 (1967).

7. *Id.* at 614-15, 150 N.W.2d at 322.

8. WIS. REV. STAT. ch. 191, §§ 4697-99 (1878); see also MacBain, *The Insanity Defense: Conceptual Confusion and the Erosion of Fairness*, 67 MARQ. L. REV. 1, 25 (1983). Professor MacBain's article will be used throughout this Comment. Contained therein is an in-depth look at the present state of the insanity defense in Wisconsin. His conclusion differs from the conclusion offered by this article, but much of Professor MacBain's analysis will shed light on this area of the law for the reader.

9. *Bennett v. State*, 57 Wis. 69, 78, 14 N.W. 912, 916 (1883).

10. Act of May 31, 1911, ch. 221, § 1, 1911 Wis. Laws 225-26; see also MacBain, *supra* note 8, at 25 n.140.

11. *Raskin*, 34 Wis. 2d 607, 150 N.W.2d 318.

utes¹² is a codification of *Raskin* which calls for a sequential order of proof.¹³

California and Colorado each have some form of a bifurcated trial system. The California system¹⁴ was added to the statutes in 1927 and, although amended throughout the ensuing years, has had judicial support with a liberal interpretation of the legislature's intent.¹⁵ Colorado's bifurcated trial stat-

12. WIS. STAT. § 971.175 (1985-86) provides:

Sequential order of proof.

When a defendant couples a plea of not guilty with a plea of not guilty by reason of mental disease or defect, there shall be a separation of the issues with a sequential order of proof before the same jury in a continuous trial. The guilt issue shall be heard first and then the issue of the defendant's mental responsibility. The jury shall be informed of the 2 pleas and that a verdict will be taken upon the plea of not guilty before the introduction of evidence on the plea of not guilty by reason of mental disease or defect. This section does not apply to cases tried before the court without a jury.

13. A sequential order of proof is merely another way of stating a separation of issues with certain procedural and evidentiary rules applying to each issue. Section 971.175 requires the guilt issue to be heard first. At that time, the elements of the crime charged are addressed; the presence of any mental disease or defect is irrelevant and evidence thereto is inadmissible. The issue of any mental abnormality is addressed in the second phase after a guilty verdict is returned in the first phase. The proof of mental disease or defect continues with submission of evidence to the same jury which addressed the guilt issue. The order of submission of evidence moves in sequence with the order in which the issues are addressed. See *supra* note 12 for the full text of WIS. STAT. § 971.175 (1985-86). See generally 21 AM. JUR. 2D *Criminal Law* § 73 (1981) for a discussion of the procedure in split trial systems.

14. CAL. PENAL CODE § 1026(a) (West 1986). Section 1026(a) provides in part: Pleas of insanity; separate trials; presumption of sanity; trial of sanity issue; verdict; . . .

(a) When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, the defendant shall first be tried as if only such other plea or pleas had been entered, and in that trial the defendant shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed. If the jury shall find the defendant guilty, or if the defendant pleads only not guilty by reason of insanity, then the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried, either before the same jury or before a new jury in the discretion of the court. In that trial, the jury shall return a verdict either that the defendant was sane at the time the offense was committed or was insane at the time the offense was committed. . . .

Id. As to the admission of evidence concerning conclusive presumptions, see *infra* note 137.

15. See Gallivan, *supra* note 4, at 532-35. At the time of the enactment of California's bifurcated trial system the Penal Code also provided that lunatics and insane persons were not capable of committing crimes. *Id.* at 533 n.71. In combination with the evidentiary restriction this section was in clear violation of due process by denying the defendant the opportunity to enter evidence on the defense of insanity. *People v. Wells*,

ute¹⁶ had been in force prior to the 1983 enactment which expressed a clear intent to separate the issues of insanity and guilt.¹⁷ Its goal was to eliminate many constitutional challenges when the issues of insanity and guilt were addressed in a unitary trial.¹⁸ States such as Arizona and Wyoming have had bifurcated trial systems. Both the Arizona Supreme Court¹⁹ and the Wyoming Supreme Court²⁰ have held their respective procedures to be constitutionally deficient as to due process.²¹

The procedure of a bifurcated system is jurisdictional. This Comment's main focus will be on Wisconsin, but the approach other states follow will serve as a point of contrast and criticism. In order to activate Wisconsin's bifurcated system the defendant must "couple[s] a plea of not guilty with a plea of not guilty by reason of mental disease or defect."²² A continuous trial will ensue wherein a sequential order of proof²³

33 Cal. 2d 330, 202 P.2d 53 (1949), is an example of the court's liberal interpretation of the statutes. The court was able to avoid constitutionality problems by slightly side-stepping the legislative intent and interpreting the procedural aspect in a more constitutional framework. See Gallivan, *supra* note 4, at 532-35; see also Louisell & Hazard, *Insanity as a Defense: The Bifurcated Trial*, 49 CALIF. L. REV. 805, 816-22 (1961).

16. COLO. REV. STAT. § 16-8-104 (1985). Section 16-8-104 provides as follows: "Separate trial of issues. The issues raised by the plea of not guilty by reason of insanity shall be tried separately to different juries, and the sanity of the defendant shall be tried first." *Id.*; see also Louisell & Hazard, *supra* note 15, at 824-26 (discussion of Colorado's bifurcated system and its judicial and legislative treatment).

17. See *People v. King*, 181 Colo. 489, 510 P.2d 333 (1973).

18. *Lewis v. Thulemeyer*, 189 Colo. 139, ___, 538 P.2d 441, 443 (1975).

19. See *State v. Shaw*, 106 Ariz. 103, 471 P.2d 715 (1970); see also Gallivan, *supra* note 4, at 530.

20. See *Sanchez v. State*, 567 P.2d 270 (Wyo. 1977); see also Gallivan, *supra* note 4, at 538-42.

21. In *Shaw*, the Arizona Supreme Court reviewed the controlling statutes, one providing for bifurcation without admission of evidence of insanity in the guilt phase, and the other statute which called for intent, as an element of a crime, to be possessed or manifested by a person with a sound mind. *Shaw*, 106 Ariz. at ___, 471 P.2d at 721. The court found the restrictive evidentiary rule to be violative of due process by not allowing the defense to enter evidence and by relieving the State of proving an element of the crime charged. *Id.*; see also Gallivan, *supra* note 4, at 529-31. In *Sanchez*, the Wyoming Supreme Court struck down that state's bifurcation statute because it did not offer the defendant an opportunity to present a defense to the element of intent. The rebuttable presumption of intent became irrebuttable in violation of the defendant's right to due process. *Sanchez*, 567 P.2d at 279; see also Gallivan, *supra* note 4, at 538-42.

22. WIS. STAT. § 971.175 (1985-86). See *supra* note 12 for the full text of the statute.

23. See *supra* note 13.

will be heard, first upon the guilt issue and then upon the mental responsibility issue. The jury, having knowledge of both pleas, will render a verdict upon the guilt issue first. The admission of evidence concerning the plea of not guilty by reason of mental disease or defect is not permitted until and unless the jury returns a guilty verdict on the first issue. It should be remembered that the state must prove all elements of the crime charged beyond a reasonable doubt as required by the due process clause of the fourteenth amendment.²⁴

In contrast, the California system²⁵ calls for separate trials. The defendant must join a plea of not guilty by reason of insanity with another plea to the crime charged. The first trial will be on the crime charged and during that trial the accused will be conclusively presumed to have been sane at the time the offense was committed. Upon a guilty verdict, the issue of insanity will be resolved by a second trial.

In Colorado the single plea of not guilty by reason of insanity includes the pleas of not guilty to the crime charged.²⁶ However, in that state the issue of insanity is tried first to a separate jury.²⁷ Upon a finding that the accused was sane at the time that the alleged crime was to have occurred, the

24. *In re Winship*, 397 U.S. 358, 364 (1970). Section 1.12(1) of the Model Penal Code sets forth that "[n]o person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt. In the absence of such proof, the innocence of the defendant is assumed." MODEL PENAL CODE § 1.12(1) (1962). This is an accurate interpretation of the often misunderstood concept of "presumption of innocence." Presumption of innocence is technically not a presumption, but merely an alternative phrasing of the government's burden of proving each element beyond a reasonable doubt.

25. See *supra* note 14.

26. COLO. REV. STAT. § 16-8-103(1) (1986) provides:

Pleading insanity as a defense.

(1) The defense of insanity may only be raised by a specific plea entered at the time of arraignment; except that the court, for good cause shown, may permit the plea to be entered at any time prior to trial. The form of the plea shall be: "Not guilty by reason of insanity"; and it must be pleaded orally either by the defendant or by his counsel. A defendant who does not raise the defense as provided in this section shall not be permitted to rely upon insanity as a defense to the crime charged, but, when charged with a crime requiring a specific intent as an element thereof, may introduce evidence of his mental condition as bearing upon his capacity to form the required specific intent. The plea of not guilty by reason of insanity includes the plea of not guilty.

27. COLO. REV. STAT. § 16-8-104 (1985). See *supra* note 16 for the text of the statute.

court will "set the case for trial on the issues raised by the plea of not guilty."²⁸

B. Reasons for Bifurcation Legislation

The impetus for enactment of bifurcation legislation is the existence of evidentiary problems. The controversy surrounding expert testimony²⁹ when the mental state of the accused is in question has led to the development of these procedural devices. In calling for a bifurcated trial, the Wisconsin Supreme Court has noted that several problems could be eliminated. "[P]roblems which usually occur during examination and cross-examination of the expert witness concerning the basis of his opinion"³⁰ would be avoided. Because the issue of guilt is not present, "the procedure which invites the improper use of evidence for its collateral effect is eliminated."³¹ In reference to the California procedure, a commentator noted that such legislation was "[o]riginally introduced to reduce the possibility of confusing and sidetracking the jury with the psychiatric testimony necessitated by the insanity defense."³² Protection of the defendant's fifth amendment privilege against self-incrimination³³ offers another advantage since the defendant's comments at the psychiatric examination cannot be offered into evidence at the guilt phase.³⁴

28. COLO. REV. STAT. § 16-8-105(3) (1985).

29. See *infra* notes 78-83 and accompanying text. See generally Ladd, *Expert Testimony*, 5 VAND. L. REV. 414 (1951-52).

30. *Raskin*, 34 Wis. 2d at 626, 150 N.W.2d at 328; see *supra* note 13 and accompanying text.

31. *Raskin*, 34 Wis. 2d at 626, 150 N.W.2d at 328.

32. Comment, *Psychiatry v. Law in the Pre-Trial Mental Examination: The Bifurcated Trial and Other Alternatives*, 40 FORDHAM L. REV. 827, 848 (1971-72).

33. The fifth amendment to the United States Constitution provides:

No person shall be held to answer for capital, or otherwise infamous crime, unless on a presentation of indictment of a Grand Jury, except in cases arising in land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor to be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

34. See Comment, *supra* note 32, at 849; see also WIS. STAT. § 971.18 (1985-86). Section 971.18 provides a statutory restriction on the admissibility of statements made for the purposes of examination.

C. *The Psychiatrist's Role in the Bifurcated Trial System*

It would seem evident that the psychiatric expert's role in the criminal trial is critical and yet controversial. Between evidentiary and procedural rules this role has been severely limited. Conceivably each phase of a bifurcated trial could have psychiatric involvement. Dealing initially with Wisconsin, the psychiatric expert could offer testimony on matters of criminal intent or responsibility in the guilt phase.³⁵ However, in *Steele v. State*,³⁶ the Wisconsin Supreme Court excluded from the guilt phase of the trial "expert opinion testimony tending to prove or disprove the defendant's capacity to form the requisite criminal intent."³⁷ The court held the testimony to be incompetent, irrelevant and nonprobative.³⁸ However, the United States Court of Appeals for the Seventh Circuit held that "in Wisconsin psychiatric testimony is relevant evidence on issues regarding a defendant's mental state including the question of whether the defendant had the capacity to form specific as opposed to general intent."³⁹ The court also found psychiatric testimony to be competent.⁴⁰ This disagreement between the Wisconsin Supreme Court and the Seventh Circuit has fueled a controversy and general defiance by each court of the other's view concerning this area.

The second phase of the bifurcated trial system in Wisconsin entails the adjudication of insanity issues. It is the role of the psychiatrist to attempt to define or classify the particular mental disease or defect, or to determine if there is one at all, and then to inform the trier of fact.

A third phase may be necessary in particular instances. In such a "trifurcated" system the psychiatrist could examine the defendant and testify as to future dangerousness or testify as

35. See generally Comment, *Admissibility of Psychiatric Testimony in the Guilt Phase of Bifurcated Trials: What's Left After the Reforms of the Diminished Capacity Defense?*, 16 PAC. L.J. 305 (1984-85).

36. 97 Wis. 2d 72, 294 N.W.2d 2 (1980).

37. *Id.* at 98, 294 N.W.2d at 14.

38. *Id.* at 97, 294 N.W.2d at 13.

39. *Hughes v. Mathews*, 576 F.2d 1250, 1257 (7th Cir. 1978). Although the *Hughes* decision was prior to the *Steele* holding, the Seventh Circuit's reasoning is judicially honest and sound, and, in light of this Comment, more constitutionally acceptable.

40. *Id.* at 1258.

to the proper disposition of an adjudicated insane defendant.⁴¹ The third phase is generally where the disposition of one who is adjudged insane is determined.

D. Challenges of the Bifurcated Trial System

The basis of most challenges of the bifurcated trial system has been on due process grounds.⁴² Due process concerns have been used "both to demand and to condemn the procedure."⁴³ The basic objection deals with the handling of the intent issue when it is an essential element of the crime charged.

In most criminal charges, intent is an essential element of guilt; since insanity is held to negate this requisite intent, the defendant cannot be found guilty if insane. Therefore, the exclusion of the insanity plea as a defense in the first segment [phase] of a bifurcated trial may be seen as a denial of the right to disprove a material element of the crime.⁴⁴

In Wisconsin the defendant is presumed to be sane at the time the alleged act was to have been committed.⁴⁵ This presumption holds true for the guilt phase. It is a rebuttable presumption but the restrictions on the admissibility of evidence make the rebuttable aspect suspect. This will be more fully developed below.⁴⁶

41. The Wisconsin Supreme Court has overruled its previous holding which required a third phase to be added to the proceeding to determine whether a defendant found "not responsible" is "presently suffering from mental illness and is in need of institutionalized treatment." See *State v. Field*, 118 Wis. 2d 269, 347 N.W.2d 365 (1984) (overruling *State ex rel. Kovach v. Schubert*, 64 Wis. 2d 612, 219 N.W.2d 341 (1974)); Introductory Comment, *Wis. Jury Instruction-Criminal* 601-62 (1985). However, an adjudicated insane individual is entitled to some treatment of his illness. See generally H. WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* ch. 9, § 4 (1954); Kozol, *Dangerousness in Society and Law*, 13 U. Tol. L. Rev. 241 (1981-82); Comment, *Punishment Versus Treatment of the Guilty But Mentally Ill*, 74 J. CRIM. L. & CRIMINOLOGY 428 (1983).

42. See generally Annotation, *Necessity or Propriety of Bifurcated Criminal Trial on Issue of Insanity Defense*, 1 A.L.R. 4th 884 (1980). This annotation discusses the necessity and propriety of the bifurcated criminal trial, providing views for and against such a system. Several constitutional challenges from various jurisdictions are highlighted.

43. Comment, *Due Process and Bifurcated Trials: A Double-Edged Sword*, 66 NW. U.L. Rev. 327 (1971-72).

44. *Id.* at 328-29 and accompanying footnotes.

45. *State v. Schweider*, 5 Wis. 2d 627, 94 N.W.2d 154 (1959).

46. See *infra* notes 128-31 and accompanying text; see also *supra* note 21.

In California the defendant is conclusively presumed to be sane at the time the alleged act was to have been committed.⁴⁷ In Colorado the insanity issue is resolved first. If there is a second phase (the second phase being guilt determination), the trier of fact has already found the defendant to be sane so no presumption will arise.

Proponents of the bifurcated trial argue that such a system is needed to guarantee both procedural and substantive due process rights.⁴⁸ They contend that the pure controversial nature of psychiatric testimony gives rise to the protections afforded by such a system. The prejudicial effect that the collateral use of expert testimony could create warrants such protections.⁴⁹

II. PSYCHIATRIC EXPERT TESTIMONY

Psychiatric testimony has been shown to be an important factor in the criminal trial. In reviewing state statutes and court decisions the United States Supreme Court has recognized "that when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense."⁵⁰ The defendant's mental state can become an issue in several stages of a criminal proceeding. The evidence proffered by a psychiatrist in these stages is invaluable. Because the need for psychiatric assistance and testimony is so profound, it has gained constitutional support and has constitutional underpinnings.

A. Constitutional Concerns

The concept of fundamental fairness⁵¹ encompasses evidentiary considerations:

47. CAL. PENAL CODE § 1026(a) (1986). See *supra* note 14 for the text of the statute.

48. See Comment, *supra* note 43, at 329.

49. See *supra* notes 30-34 and accompanying text.

50. *Ake v. Oklahoma*, 470 U.S. 68, 80 (1985).

51. See *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968). The Court discussed the concept of fundamental fairness extending from rights in the fifth and sixth amendments, as they pertain to criminal proceedings, and applied to the state via the fourteenth amendment. The Court noted that the concept was phrased in a number of

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.⁵²

Where a rule of law, be it a substantive or procedural rule, deprives the defendant of a witness or her testimony, the due process clause of the fourteenth amendment is violated.⁵³ An essential ingredient to a fair trial is the right to offer testimony.⁵⁴

The Court in *In re Winship*⁵⁵ explicitly held "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of *every fact necessary to constitute the crime with which he is charged*."⁵⁶ For the crime of first-degree murder the specific intent to kill is an element that must be proven under this burden of proof.⁵⁷ In-

ways, basically, "whether a right is among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'; and whether it is 'basic in our system of jurisprudence'; and whether it is 'a fundamental right, essential to a fair trial.'" *Id.* (citations omitted).

52. *Washington v. Texas*, 388 U.S. 14, 19 (1967).

53. *See generally Webb v. Texas*, 409 U.S. 95 (1972).

54. *In re Oliver*, 333 U.S. 257, 273 (1948).

55. 397 U.S. 358 (1970).

56. *Id.* at 364 (emphasis added).

57. As far back as 1897, the United States Supreme Court has held that the prosecution must prove sanity beyond a reasonable doubt. *Davis v. United States*, 165 U.S. 373, 378 (1897). Where specific intent is an element of the crime charged the prosecution must prove that element beyond a reasonable doubt. *Winship*, 397 U.S. at 364. However, when the State makes insanity an affirmative defense, the defendant must prove his insanity by some lesser quantum of proof; on the federal level, by clear and convincing evidence. It is important to note, however, that the Supreme Court in *Leland v. Oregon*, 343 U.S. 790 (1952), held that a state was permitted to require a defendant to prove beyond a reasonable doubt that he was insane if he makes that defense an issue. The Court did not see this burden of proof as "violat[ing] generally accepted concepts of basic standards of justice." *Leland*, 343 U.S. at 799. *But see* *United States v. Voice*, 627 F.2d 138 (8th Cir. 1980), where the court held that the presumption of sanity is dispelled when evidence of insanity is entered; this subjects the prosecution to prove sanity beyond a reasonable doubt. *Voice*, 627 F.2d at 148; *see also* *United States v. Samuels*, 801 F.2d 1052, 1054-55 (8th Cir. 1986); 18 U.S.C. § 20 (1984). *See infra* note 88 for the text of Section 20.

tent is a state of mind.⁵⁸ Professional interpretation of that state of mind can be helpful to both the defense and the prosecution. The prosecution may need a psychiatric expert to offer proof of this state of mind; the defense to rebut the state's expert witness and to establish a defense through the proof of insanity. To deprive either party of this expert, whether it be assistance or testimony of the expert, would cause a deficiency that does not meet constitutional requirements: the prosecution's need to meet the beyond-a-reasonable-doubt standard and the defense's right to present witnesses to establish a defense.

In *Ake v. Oklahoma*,⁵⁹ the United States Supreme Court constitutionally guaranteed a psychiatrist for an indigent defendant.⁶⁰ The Court, in describing the role of the psychiatrist, said:

[P]sychiatrists gather facts, both through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question.⁶¹

It is arguable from this statement that the Supreme Court views psychiatric testimony concerning the defendant's mental state at the time of the alleged commission to be valuable evidence. The Court also states that through investigation, interpretation, and testimony, the psychiatrist can assist the

58. In Wisconsin, the intent to kill is defined as "the mental purpose to take the life of another human being." WIS. STAT. § 940.01(2) (1985-86). The Model Penal Code defines "purposely" as a "conscious objective" and "knowingly" as the accused being "aware" of his conduct. MODEL PENAL CODE § 2.02(2) (1962). It is a logical connection between intent and the particular mentality of the accused, whether it be termed as "consciousness," "awareness," or "mental purpose." Intent determination requires an examination of mental faculties at the particular time. The state of mind is key to intent determination. See generally Annotation, *Admissibility of Expert Testimony as to Whether Accused Had Specific Intent Necessary for Conviction*, 16 A.L.R.4th 666 (1982).

59. 470 U.S. 68 (1985).

60. For a comprehensive discussion on the indigent defendant's constitutional right to a psychiatric expert, see Note, *An Indigent Criminal Defendant's Constitutional Right to a Psychiatric Expert*, 1984 U. ILL. L. REV. 481; see also Note, *infra* note 79.

61. *Ake v. Oklahoma*, 470 U.S. 68, 80 (1985).

lay juror in making an informed determination.⁶² The mere fact that both state and federal legislatures have enacted procedural rules and substantive law concerning the psychiatrist's role in the criminal justice system also suggests the importance of this issue.⁶³ The use of psychiatric testimony in various stages of a criminal proceeding exhibits the degree of reliability the judicial system places upon such evidence.

B. General Admissibility of Psychiatric Expert Testimony

The main concerns with psychiatric expert testimony are relevancy, competency, probative value, and state justifications for limiting the admission of the evidence. The proffered evidence in *Steele v. State*⁶⁴ was excluded as neither relevant, competent nor probative. In *Hughes v. Mathews*,⁶⁵ the court "recognized the due process right of the defendant to present relevant and competent evidence in the absence of a valid state justification for excluding such evidence."⁶⁶

1. Relevancy

Relevant evidence is both material and probative.⁶⁷ Relevant evidence is evidence having the tendency to establish a fact in consequence. A fact in consequence includes facts which comprise direct evidence of an element of a claim or defense, facts from whose establishment may be inferred facts amounting to elements of claims or defenses, and facts bearing circumstantially upon the evaluation of the probative value given to other evidence in the case.⁶⁸ When the mental state of an accused is an element of the crime charged it can be assumed that psychiatric testimony would have a tendency to

62. *Id.* at 80-81.

63. *See id.* at 78-79 n.4; *see also* Lewin, *Mental Disorder and the Federal Indigent*, 11 S.D.L. REV. 198 (1966) (an in-depth look at the devices under the federal system for the indigent criminal defendant to obtain psychiatric assistance).

64. 97 Wis. 2d 72, 294 N.W.2d 2 (1980).

65. 576 F.2d 1250 (7th Cir. 1978).

66. *Id.* at 1259.

67. *See* FED. R. EVID. 401. Rule 401, identical to WIS. STAT. § 904.01 (1985-86), provides: "Definition of 'Relevant Evidence': 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

68. M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 401.1 (2d ed. 1986).

establish that element. Psychiatric testimony from both parties will enable the jury to make the most accurate determination of the issues before it.⁶⁹ Where the crime charged mandates proof of a specific intent, first-degree murder as an example, the state must go forward with evidence to prove this intent beyond a reasonable doubt.⁷⁰ Providing the jury with the evidence relevant to resolving this issue is a major goal of procedural rules.

2. Competency

The competency of the psychiatric testimony is the next issue. If scientific or specialized knowledge will aid the trier of fact to determine a fact in issue and if the witness is properly qualified as an expert by his or her knowledge, skill, experience, training, or education, then that witness may testify as to that issue.⁷¹ The question of competency of the evidence may also bear heavily upon the trustworthiness of psychiatric testimony. In *Hughes v. Mathews*,⁷² the court addressed this by pointing out Wisconsin's extensive use of psychiatric testimony. This evidence is admitted in the second phase of the bifurcated trial where the chief issue is insanity. Expert testimony is also used in civil commitment proceedings and in competency hearings to determine capacity to stand trial. The *Steele v. State*⁷³ court could not agree with this contention, seeing the *Hughes* court as "bootstrapping" its conclusion. If the evidence embraces a fact in issue, if the psychiatric expert witness is properly qualified, and if the testimony is viewed as trustworthy, the evidence should be viewed as competent.

69. See *Ake*, 470 U.S. at 81.

70. See generally *United States v. Staggs*, 553 F.2d 1073 (7th Cir. 1977).

71. See FED. R. EVID. 702. Rule 702, identical to WIS. STAT. § 907.02 (1985-86), provides:

Testimony by Experts.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

See generally C. MCCORMICK, MCCORMICK ON EVIDENCE §§ 13, 61-71 (E. Cleary 3d ed. 1984).

72. 576 F.2d 1250 (7th Cir. 1978).

73. 97 Wis. 2d 72, 294 N.W.2d 2 (1980).

Application of the test laid out in *Frye v. United States*,⁷⁴ or an offer of proof that satisfies the court, or the pure credibility of the witness and the nature of her examination and procedures, may help establish trustworthiness.

3. Probative Value

The next issue raised is whether the probative value of psychiatric testimony is significantly outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.⁷⁵ If the prejudice, confusion, or risk of misleading the jury outweighs the probative value of the psychiatric testimony, then the testimony is not admissible even though it may be relevant evidence. It is conceded that the potential dangers of psychiatric testimony could be significant. However, it would be more acceptable to control the admission of the evidence and provide proper jury instructions than to exclude the evidence entirely. The probative value of this evidence is also significant when it embraces an element of the crime and has an educating effect on the trier of fact.

4. Justifications for Exclusions

The last issue to consider is the legitimacy of a state's justification for excluding this evidence. The right to present relevant and competent evidence is not absolute. The right may "bow to accommodate other legitimate interests in the criminal trial process."⁷⁶ Any proffered justification must come under strict scrutiny. The *Hughes* court addressed two justifications for excluding psychiatric testimony on the issue of in-

74. 293 F. 1013 (D.C. Cir. 1923). The test set out in *Frye* is applied to determine admissibility of a scientific principle or discovery. If the principle or discovery has gained acceptability in the particular field in which it belongs, then it is admissible. *Id.* at 1014; see also Comment, *The Admissibility of Novel Scientific Evidence: The Current State of the Frye Test in Wisconsin*, 69 MARQ. L. REV. 116 (1985-86).

75. FED. R. EVID. 403. Rule 403, identical to WIS. STAT. § 904.03 (1985-86), provides:

Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

76. *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

tent offered by the State of Wisconsin.⁷⁷ The first fear was that guilty people who were legally sane would be found to be criminally irresponsible because psychiatric testimony convinced the trier of fact that there was no specific intent for first-degree murder. This argument ignores the lesser included offense of second-degree murder and makes hasty assumptions as to the guilt and sanity of the accused. The second fear was that the admission of such testimony on intent would undermine the integrity of Wisconsin's bifurcated trial system. Within this concern is the desire not to duplicate evidence. This concern is valid, but when the exclusion of psychiatric testimony is taken to the extreme, as in *Steele*,⁷⁸ the integrity of the bifurcated trial system is marred rather than protected. The exclusion of evidence that would shed light on an essential element of a crime or a core element of an affirmative defense does not further the goals of a bifurcated system.

Many positions have stood as justifications for excluding otherwise relevant and competent psychiatric expert testimony. As the United States Supreme Court has observed, "[p]sychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness."⁷⁹ Due to the varying schools of thought within the community of psychiatrists, there is bound to be disagreement. Professor Bernard L. Diamond of the University of California, Berkeley, contends that the growth in confusion in the psychiatric profession has resulted greatly from the increase in knowledge about mental illness.⁸⁰ He predicts that "the evidentiary value of psychiat-

77. *Hughes*, 576 F.2d at 1258-59.

78. *Steele*, 97 Wis. 2d at 72, 294 N.W.2d at 2.

79. *Ake*, 470 U.S. at 81. For a detailed discussion of *Ake*, see generally Note, *The Indigent Defendant's Right to Psychiatric Assistance: Ake v. Oklahoma*, 105 S. Ct. 1087 (1985), 17 N.C.C.L.J. — (1987).

80. Diamond, *From Durham to Brawner, A Futile Journey*, 1973 WASH. U.L.Q. 109, 115. In *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972), the court examined various criteria for insanity and the testimony related to those criteria. *Brawner* "permits the introduction of expert testimony as to abnormal condition if it is relevant to negative, or establish, the specific mental condition that is an element of the crime." *Id.* at 1002.

ric testimony will become less, rather than more, credible in the coming decades.”⁸¹ Dr. Frederick A. Fosdal quotes a noted Wisconsin law professor, saying “[i]n general, it is not at all apparent that psychiatrists know any more than does the layman about whether the defendant had an intent to kill when the act causing death was committed.”⁸²

However, Dr. Fosdal concludes that “the proper role of the psychiatrist on the issue of intent [is] to be the provider of relevant clinical data about the defendant, the background and circumstances of the offense, and a discussion of the factors that caused or allowed the offense to take place.”⁸³ In *Ake*, the Court stated that “[p]erhaps because there often is no single, accurate psychiatric conclusion on legal insanity in a given case, juries remain the primary factfinders on this issue, and they must resolve differences in opinion within the psychiatric profession on the basis of the evidence offered by each party.”⁸⁴ An informed jury is better than an uninformed one. Jurors receiving expert testimony from both parties are more informed than those without the benefit of such testimony. Educating jurors with this testimony will make them better able to address and determine the issues before them.

III. EXPERT OPINION ON ULTIMATE ISSUES

The bifurcated trial system has ingrained within it the psychiatric profession. The jurisdictions that have recognized the value of this system have a special duty to ensure the proper role of the psychiatric expert within that system. This role of the expert has been severely limited through legislative enactments and judicial decisions. The latest enactment on the federal level deals with expert opinion on ultimate issues. Given that the federal courts do not operate under a bifurcated trial system, the new Federal Rule of Evidence 704⁸⁵ will not have as great an impact as it would in state “bifurcated trial” juris-

81. Diamond, *supra* note 80, at 115.

82. Fosdal, *Diminished Capacity, Intent and Psychiatric Testimony*, 52 WIS. B. BULL., Apr. 1979, at 23 n.24.

83. *Id.* at 24.

84. *Ake*, 470 U.S. at 81.

85. FED. R. EVID. 704, amended by the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Title II, § 406, 98 Stat. 2067, (1984). For the full text of Rule 704, see *infra* note 86.

dictions. The fear is that these states will adopt this amendment to Rule 704.

A. Recent Amendment to Federal Rule of Evidence 704

The rule of opinion on ultimate issues was amended by the Comprehensive Crime Control Act of 1984 to add that no expert witness may offer testimony of the defendant's mental state or condition which is an element of the crime charged or of a defense thereto.⁸⁶ This amendment was intended "to eliminate the confusing spectacle of competing expert witnesses testifying to directly contradictory conclusions as to the ultimate legal issue to be found by the trier of fact."⁸⁷ Together with the amendment to Rule 704, insanity was made an affirmative defense with the defendant having the burden of proving insanity by clear and convincing evidence.⁸⁸ Expert testimony is now limited to "presenting and explaining their diagnoses, such as whether the defendant had a severe mental

86. FED. R. EVID. 704 provides:

Opinion on Ultimate Issue

(a) *Except as provided in subdivision b*, testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) *No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.*

Id. (emphasis added to show the additions to the preexisting Rule). Wisconsin's relevant provision is identical to the pre-amendment Federal Rule. WIS. STAT. § 907.04 (1985-86).

87. S. REP. NO. 225, 98th Cong., 2d Sess. 230, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 3182, 3412.

88. 18 U.S.C. § 20 (1984). Section 20 provides for an insanity defense as follows:

(a) *Affirmative defense.* — It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

(b) *Burden of proof.* — The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

Id. Section 20 was added by Pub. L. No. 98-473, Title II, § 402(a), 98 Stat. 2057 (1984). *See generally supra* note 57 and accompanying text. For a thorough treatment of the Comprehensive Crime Control Act of 1984, see B. GEORGE, THE COMPREHENSIVE CRIME CONTROL ACT OF 1984: CONTEMPORARY FEDERAL CRIMINAL PRACTICE (1986).

disease or defect and what the characteristics of such disease or defect, if any, may have been.”⁸⁹ The last sentence of Rule 704(b), “[s]uch ultimate issues are matters for the trier of fact alone,”⁹⁰ indicates the clear intention of the amendment.

The American Psychiatric Association advocates such a limitation.⁹¹ Psychiatrists are medical experts, not legal experts. When they are requested to make leaps in logic by drawing probable relationships between medical concepts and legal and moral constructs, an impermissible joining of medicine and law occurs. These leaps in logic confuse the jury and ultimately do injustice to psychiatry and criminal defendants. However, the psychiatrist must still be permitted to testify fully as to the defendant’s diagnosis, mental state, and motivation at the time of the alleged act, but the legal determi-

89. See *supra* note 87.

90. FED. R. EVID. 704. See *supra* note 86 for the text of the rule.

91. The following statement is the position of the American Psychiatric Association, a position which the legislature believes is a good basis for the limitation on expert testimony in insanity cases.

[I]t is clear that psychiatrists are experts in medicine, not the law. As such, it is clear that the psychiatrist’s first obligation and expertise in the courtroom is to “do psychiatry,” i.e., to present medical information and opinion about the defendant’s mental state and motivation and to explain in detail the reason for his medical-psychiatric conclusions. When, however, “ultimate issue” questions are formulated by the law and put to the expert witness who must then say “yea” or “nay,” then the expert witness is required to make a leap in logic. He no longer addresses himself to medical concepts but instead must infer or intuit what is in fact unspeakable, namely, the probable relationship between medical concepts and legal or moral constructs such as free will. These impermissible leaps in logic made by expert witnesses confuse the jury. Juries thus find themselves listening to conclusory and seemingly contradictory psychiatric testimony that defendants are either “sane” or “insane” or that they do or do not meet the relevant legal test for insanity. This state of affairs does considerable injustice to psychiatry and, we believe, possibly to criminal defendants. In fact, in many criminal insanity trials both prosecution and defense psychiatrists do agree about the nature and even the extent of mental disorder exhibited by the defendant at the time of the act.

Psychiatrists, of course, must be permitted to testify fully about the defendant’s diagnosis, mental state and motivation (in clinical and common sense terms) at the time of the alleged act so as to permit the jury or judge to reach the ultimate conclusion about which they and only they are expert. Determining whether a criminal defendant was legally insane is a matter for legal fact-finders, not for experts.

American Psychiatric Association Statement on the Insanity Defense, p. 14 (as approved by the Board of Trustees) (December 1982), *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 3182, 3413 (footnote omitted).

nations and conclusions as to insanity are to be left to the factfinders.

The amendment "reflects a Congressional judgment that the law has been too favorable to criminal defendants in permitting them to fashion psychiatric defenses."⁹² Much of the enthusiasm behind the change comes from a wave of criticism that arose due to the attempted assassination of President Ronald Reagan by John W. Hinckley, Jr., and Hinckley's successful use of the insanity defense.⁹³ This criticism arose largely because "[t]he public believes that the insanity defense is commonly relied upon and frequently successful. However, insanity is rarely claimed and even more rarely successful."⁹⁴

B. Recent Court Interpretations

To date, there have been several court decisions addressing the application of Rule 704(b) which concerns the scope of this Comment. In *United States v. Prickett*,⁹⁵ the United States District Court of Ohio stated:

While under Rule 704(b) an expert may testify as to the defendant's severe mental disease or defect and the characteristics of such a condition, he or she is not to offer the jury a conclusion as to whether said condition rendered the defendant unable to appreciate the nature and quality or the wrongfulness of his acts. 18 U.S.C. § 20 (1984). Rather, under Rule 704(b), the latter is an "ultimate issue" to be determined solely by the jury on the basis of the evidence presented.⁹⁶

In that case the defendant challenged the application of the rule as being a violation of article I, section 9 of the United

92. S. SALTZBURG & K. REDDEN, *FEDERAL RULES OF EVIDENCE MANUAL* 691 (4th ed. 1986).

93. *Id.* See generally L. CAPLAN, *THE INSANITY DEFENSE AND THE TRIAL OF JOHN W. HINCKLEY, JR.* (1984).

94. MacBain, *supra* note 8, at 7-8; see also *id.* nn. 29-30; S. HALLECK, *THE MENTALLY DISORDERED OFFENDER* ch. 4 (1986) (prepared under contract for the U.S. Department of Health and Human Services).

95. 604 F. Supp. 407 (S.D. Ohio 1985), *aff'd*, 790 F.2d 35 (6th Cir. 1986). In this case the defendant gave notice that he was going to rely on the insanity defense and introduce expert testimony as to his mental condition at the time of the alleged crimes as that testimony had a bearing upon guilt.

96. *Id.* at 409.

States Constitution,⁹⁷ which prohibits *ex post facto*⁹⁸ laws. The court viewed Rule 704(b) as having no effect upon the crime charged nor on the quantity or degree of proof required.⁹⁹ The court recognized the disadvantage to the defendant's ability to introduce expert testimony, but held that such a disadvantage stemming from a procedural change, as the amendment to Rule 704 was determined to be, is not in violation of the Constitution.¹⁰⁰ The court concluded:

[E]xpert testimony in the instant case may address the mental illness of Defendant and the characteristics, if any, of that mental illness. Expert testimony may not be introduced, however, with respect to an expert's inferences or opinion that, at the time of the alleged crimes, Defendant was (1) sane; (2) insane; (3) lacked substantial capacity to know the wrongfulness of his conduct; or (4) lacked substantial capacity to conform his conduct to the requirements of the law which he is charged with violating.¹⁰¹

The court clearly admits the disadvantage to the defendant. The court's conclusion as to the scope of the expert opinion on ultimate issues makes this disadvantage more profound. With insanity now being an affirmative defense and the burden of proof being upon the defendant, the disadvantage to the defendant is much greater in light of the limitation on expert testimony. Conceivably, much of the permissible testimony can be excluded if shown to create inferences by the expert. With first-degree murder where the element of premeditation must be proven,¹⁰² the exclusion of testimony as to mental state may relieve the government of an element that it

97. U.S. CONST. art. I, § 9, cl. 3 provides: "No Bill of Attainder or *ex post facto* Law shall be passed."

98. "Ex post facto" is defined as "(a)fter the fact; by an act or fact occurring after some previous act or fact, and relating thereto." BLACK'S LAW DICTIONARY 520 (5th ed. 1979). An *ex post facto* law is "(a) law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed." *Id.*; see also *Weaver v. Graham*, 450 U.S. 24, 29 (1981).

99. *Prickett*, 604 F. Supp. at 410.

100. *Id.* See within the case the court's discussion of United States Supreme Court decisions concerning procedural changes and *ex post facto* laws. *Id.* at 409-10.

101. *Id.* at 410-11.

102. See 18 U.S.C. § 1111 (1982); see also *Beardslee v. United States*, 387 F.2d 280 (8th Cir. 1967).

must prove beyond a reasonable doubt. This is a clear violation of *In re Winship*.¹⁰³

In the second case, *United States v. Frisbee*,¹⁰⁴ the United States District Court for the Northern District of California dealt chiefly with two issues; the first embraces the question of whether Section 20¹⁰⁵ of the United States Code limits admissibility of evidence negating the existence of specific intent, and the second issue addresses what the scope of Rule 704(b) is in relation to negating specific intent and to the insanity defense. The court found that section 20 was "not intended to limit the admissibility of evidence negating the existence of specific intent; rather, the court [found] that the section [was] intended to narrowly restrict situations in which mental disease or defect will excuse an otherwise guilty defendant."¹⁰⁶ The court drew support for this finding from the intent of the legislature through interpreting its legislative history. The court also noted that "evidence used to negate the existence of an element of the crime would not traditionally be considered part of an affirmative defense because the evidence is used to show innocence, as opposed to excuse or justify an otherwise criminal act."¹⁰⁷

In review of the scope of Rule 704(b), the court looked again at legislative history and intent. The court suggests that Congress recognized a distinction between evidence to negate specific intent and evidence supporting a finding of insanity.¹⁰⁸ If any distinction exists, it is a slight distinction. Both specific intent and the issue of insanity are the ultimate issues to be

103. 397 U.S. 358 (1970). See *supra* note 24 and accompanying text. They may also be a violation of the burden and product shifting requirements. See *infra* text accompanying notes 136-51.

104. 623 F. Supp. 1217 (N.D. Cal. 1985). The defendant, indicted for first-degree murder, gave notice that he intended to introduce expert testimony relating to mental disease or defect to negate specific intent. In both this and the *Prickett* case, the parties were required to give notice of their intention to offer expert testimony relating to mental disease or defect bearing upon the issue of guilt. See FED. R. CRIM. P. 12.2(b). In *Prickett*, the defendant relied upon the insanity defense and the intended evidence was to address specific intent and insanity. *Prickett*, 604 F. Supp. at 409. In *Frisbee*, the defendant did not rely on the insanity defense and the proffered testimony was to negate specific intent. *Frisbee*, 623 F. Supp. at 1219.

105. 18 U.S.C. § 20 (1984). See *supra* note 88 for the text of the statute.

106. *Frisbee*, 623 F. Supp. at 1220.

107. *Id.*

108. *Id.* at 1222.

resolved by the jury. Rule 704(b) excludes expert opinion and inference on mental state when it addresses an element of the crime charged or a defense thereto. Supporting evidence such as diagnoses and factual bases are admissible but their usefulness is questionable.

The court concluded that limited expert testimony concerning requisite mental state is admissible in first-degree murder trials. The limitation is that the testimony cannot be in the form of opinion or inference on the ultimate issue of specific intent. "Moreover, the court will instruct the jury that the testimony may only be considered on the issue of whether the defendant possessed the specific intent necessary for a first-degree murder conviction"¹⁰⁹ and not to consider general intent necessary for a lesser crime.

The Fourth Circuit Court of Appeals in *United States v. Mest*¹¹⁰ also held that the retrospective use of Rule 704(b) was not an ex post facto law.¹¹¹ Mest contended that the new enactment changed the degree or amount of testimony permitted by the psychiatric expert. The court ruled that "[t]he change, rather, is to whether either of these categories of witnesses can instruct the trier of fact (in this instance, the jury) as to what its findings should be on the factual questions about which the witness could before and can now testify."¹¹² What the court missed by such an interpretation is that an opinion by a psychiatric expert does not *instruct* the jury on how to find, but rather provides them with the necessary information to make an intelligent and rational decision. The jury receives less testimony than it should.

In *United States v. Windfelder*,¹¹³ the Seventh Circuit Court of Appeals addressed the application of Rule 704(b) to a non-defendant and to the intent of that non-defendant. "[T]hese opinions [by IRS experts] are not precluded by Rule

109. *Id.* at 1224.

110. 789 F.2d 1069 (4th Cir. 1986).

111. *Id.* at 1071-73. Mest appealed his conviction of first-degree murder. At trial, when defense counsel attempted to ask a defense expert witness to give an opinion as to Mest's ability to discern the wrongfulness of his actions and the capacity to conform his behavior, the prosecution successfully objected to the admission of such opinion on the basis of Rule 704(b). *Id.* at 1071.

112. *Id.* at 1072.

113. 790 F.2d 576 (7th Cir. 1986).

704(b) because Laurretta Windfelder [was] not a defendant in this case and her intent [was] not an element of the crimes charged."¹¹⁴ The court did, however, uphold Rule 704(b) when they found error in the admission of testimony as to the intent of Donald Windfelder to understate his income.¹¹⁵

In *United States v. Alexander*,¹¹⁶ the Eleventh Circuit Court of Appeals addressed challenges to Rule 704(b) from an *ex post facto*¹¹⁷ argument and an equal protection argument.¹¹⁸ Alexander relied on the insanity defense against the two count indictment for unlawful possession of stolen public assistance checks.¹¹⁹

The *ex post facto* argument was addressed and had the same result as in *Prickett* and *Mest*. As for the equal protection argument, Alexander "contend[ed] that the statute [was] unconstitutional because it limit[ed] her fundamental right to present witnesses in her behalf and because there [were] no compelling reasons to justify that limitation."¹²⁰ The court saw this argument as falling more appropriately in due process grounds,¹²¹ but went on to discuss the compelling interest which the court found to exist from interpreting the legislative history.¹²² The court honestly attempted to adhere to the liberal approach toward the admissibility of evidence relating to the issue of insanity.

Defendants should be free, as Alexander was in this case, to question expert witnesses extensively concerning their diagnosis of the defendant's mental condition, its symptoms and treatment, and the effect such condition or illness may have on a defendant's mental state. In addition, any relevant medical records or reports should be admitted into evidence

114. *Id.* at 581. The defendant, Donald Windfelder, was convicted of understating his income on his federal income tax return and of understating the estate of his deceased aunt in preparing her estate tax return. *Id.* at 577-78.

115. *Id.* at 582.

116. 805 F.2d 1458 (11th Cir. 1986).

117. *Id.* at 1461-62.

118. *Id.* at 1462-64.

119. *Id.* at 1460. Alexander had been given two checks to cash. She obtained false identification cards by using the names on the checks and making up social security numbers. Evidence was presented that showed that Alexander had suffered from, and had been treated for, mental illness for several years. *Id.*

120. *Id.* at 1462.

121. *Id.*

122. *Id.* at 1462-63.

and the defendant should be allowed to question an expert witness about them so they may be explained or interpreted for the jury. Only in this manner may the jury be sufficiently informed to make a decision on the defendant's legal sanity. The operation of Rule 704(b) makes it essential that juries be completely informed. A liberal approach towards the admissibility of evidence relating to the issue of insanity ensures this.¹²³

The court called Alexander a "beneficiary of this liberal approach."¹²⁴

The court's analysis was judicially honest but unfortunately nearsighted. The information which they see as admissible under Rule 704(b) is only facial. It merely touches the surface, leaving the jury to formulate their own opinion based upon insufficient evidence. In order to explain this type of evidence, the expert invariably would need to express an opinion on certain documents, theories and diagnosis. The combination of these pieces of evidence impact on an ultimate issue. It is conceivable, then, that opinions related to this evidence could be excluded under Rule 704(b). The lack of such explanation and opinionated summation leaves the jury to speculate as to the meaning of such evidence. The court in *Alexander* may have thought that their reasoning was sound, but they did not foresee the profound disadvantage in the practical application of their decision.

C. California's Similar Statutory Provision

The State of California has a similar provision. Its evidence rule is similar to the former Rule 704 on the federal level and does not have the revised provision contained in Rule 704(b).¹²⁵ However, a provision in the Penal Code operates much the same as Rule 704(b).¹²⁶ A recent California Court of Appeals decision discusses the relationship between

123. *Id.* at 1464.

124. *Id.*

125. CAL. EVID. CODE § 805 (West 1986). Section 805 provides: "Opinion on ultimate issue: Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." *Id.* This provision is substantially similar to the former FED. R. EVID. 704 and to WIS. STAT. § 907.04 (1985-86), except for the elimination of the word "inference." See *supra* note 86.

126. CAL. PENAL CODE § 29 (West 1986). Section 29 provides:

these two statutory provisions.¹²⁷ The defendant contended that section 29, along with sections 25 and 28 of the Penal Code, violated her constitutional right to effectively present a defense by preventing her from entering evidence showing that she did not have the requisite specific intent for first-degree murder. Section 29 was upheld by a previous decision as a "legitimate legislative [determination] on the admissibility of certain classes of evidence [which did] not deprive a defendant of his or her right to present a defense."¹²⁸ The defendant also argued that Evidence Code section 805¹²⁹ is controlling over Penal Code section 29¹³⁰ and therefore expert testimony reaching ultimate issues of mental state should be admissible. The court rejected that argument holding that the more specific provision, Penal Code section 29, is controlling over the more general provision, Evidence Code section 805.¹³¹ The court also concluded that section 29 "[does] not contravene any constitutional due process rights of defendant to use witnesses or to equal protection. Likewise, [it does] not relieve the prosecution of its burden of proof."¹³²

As set forth below, Rule 704(b) and the *People v. Whitler*¹³³ decision, in conjunction with the related statutory provisions, violate constitutional due process. Likewise, the *Steele v. State*¹³⁴ decision in Wisconsin, although the state does not have similar statutory restraints, operates to deprive the defendant of his or her constitutional rights.

Mental state; restriction on expert testimony; determined by trier of fact.

In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact.

Id. Notice the similarities between this provision and the amendment to Rule 704. See *supra* note 86 for the text of the amendment.

127. *People v. Whitler*, 171 Cal. App. 3d 337, 214 Cal. Rptr. 610 (1985).

128. *Id.* at ___, 214 Cal. Rptr. at 613; see also *People v. Jackson*, 152 Cal. App. 3d 961, 199 Cal. Rptr. 848 (1984).

129. See *supra* note 125.

130. See *supra* note 126.

131. *Whitler*, 171 Cal. App. 3d at ___, 214 Cal. Rptr. at 613.

132. *Id.* at ___, 214 Cal. Rptr. at 614.

133. 171 Cal. App. 3d 337, 214 Cal. Rptr. 848 (1985).

134. 97 Wis. 2d 72, 294 N.W.2d 2 (1980).

IV. CONCERNS, COMMENTS AND PROPOSALS

The limited scope of the admissibility of psychiatric expert testimony on the issue of specific intent has become constitutionally unacceptable. Where specific intent is an element of the crime charged or of a defense thereto, the restriction upon psychiatric expert testimony turns the rebuttable presumption of sanity at the time of the occurrence of the alleged offense into a conclusive presumption. This conclusive presumption is not created expressly (except for California's Penal Code § 1026),¹³⁵ but is created in the mind of the juror through the lack of information provided on the issue of intent and the instruction to the jury concerning the presumption that the accused was sane and intended the natural consequence of his or her actions. This conclusive presumption also has the effect of relieving the government of an element of the crime which it must prove beyond a reasonable doubt. These court decisions and evidentiary rules are production-shifting devices that are subject to constitutional due process review. The shifting of the burden of production to the defense and then strictly limiting its ability to enter evidence, is tantamount to a conclusive presumption and, therefore, violative of the defendant's due process rights.

A. Presumptions Generally

A presumption¹³⁶ is a relationship between sets of facts: basic facts and presumed facts. A conclusive presumption exists if the presumed fact exists as a matter of law due to the establishment of the basic facts.¹³⁷ A rebuttable presumption is a rule of law which requires the presumed fact to be found once the basic fact is established, unless the judge rules that the evidence offered against the presumed fact is sufficient for such a showing.¹³⁸

135. See *supra* note 14 and accompanying text.

136. See generally C. McCORMICK, *supra* note 71, §§ 342-47.

137. A conclusive presumption is technically not a presumption at all because it does not shift a burden of production or persuasion. It is seen as a fiction that masks substantive law and the court will not entertain evidence as to its rebuttal.

138. Two theories exist as to the operation of rebuttable presumptions. The first is "Thayer's Bursting Bubble" theory, adopted by FED. R. EVID. 301 and by CAL. EVID. CODE § 604 (West 1986). Under this theory, when the basic fact is established, the presumed fact must be taken as established unless and until the opponent introduces

Recent United States Supreme Court decisions¹³⁹ have resurrected old terminology concerning presumptions in criminal cases.¹⁴⁰ A mandatory presumption "operates to shift at least the burden of production. It tells the trier of fact that it must find the presumed fact upon proof of the basic fact, 'at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts.'"¹⁴¹ A permissive presumption "allows, but does not require, the trier of fact to infer the presumed fact from proof of the basic facts."¹⁴² Both mandatory and permissive presumptions on the criminal level operate like a rebuttable presumption.

evidence sufficient to support a finding of the non-existence of the presumed fact by the trier of fact. Upon the introduction of such evidence, the presumption is overcome and disappears (the bubble bursts) without regard to whether it is believed or not. The second theory is the "Morgan Approach" which is adopted in Wisconsin by WIS. STAT. § 903.01 (1985-86). Under this theory, when the basic fact is established, the jury is instructed that it must find the presumed fact unless and until the opponent persuades the jury that the non-existence of the presumed fact is more probably true than not. For a more comprehensive discussion of these theories see M. GRAHAM, *supra* note 68, at § 301.6. See *infra* note 139 and accompanying text for a discussion of the operation of presumptions in criminal cases.

139. See *Sandstrom v. Montana*, 442 U.S. 510 (1979); *County Court of Ulster County v. Allen*, 442 U.S. 140 (1979).

140. For a discussion of presumptions in criminal cases in Wisconsin, see *Genova v. State*, 91 Wis. 2d 595, 283 N.W.2d 483 (Ct. App. 1979). In *Genova*, the court of appeals held:

[A] "criminal presumption" is not a presumption at all but simply a permissive inference, that is, a finding of fact that may be grounded upon circumstantial evidence. Thus, a permissive inference is judicially-approved logic that endorses evidence of a basic fact as circumstantially sufficient to permit, but not compel, an inferred fact which must be established if the finder of fact's affirmative ultimate conclusion is to be upheld.

Id. at 607, 283 N.W.2d at 488. Whether courts label this procedural tool a presumption or an inference, its operation still pivots upon some evidence that establishes the presumed or inferred fact. That evidence can be direct as to the presumed or inferred fact's existence or it can be circumstantially based upon the basic fact or the evidence taken as a whole. Evidence must exist for the "logical relationship which establishes the sufficiency of the circumstantial evidence of an inferred fact," or for a presumption to be "grounded upon logical relationship or policy, or both, of the basic fact to the presumed fact." *Id.* at 607-08, 283 N.W.2d at 489. A logical relationship must be formed with some evidence to support it. See also WIS. STAT. § 903.03 (1985-86).

For a more detailed discussion of burdens of proof and presumption in the criminal setting, see Allen & DeGrazia, *The Constitutional Requirement of Proof Beyond Reasonable Doubt in Criminal Cases: A Comment Upon Incipient Chaos in the Lower Courts*, 20 AM. CRIM. L. REV. 1 (1982-83); Graham, *Presumptions — More Than You Ever Wanted to Know and Yet Were Too Disinterested to Ask*, 17 CRIM. L. BULL. 431 (1981).

141. C. MCCORMICK, *supra* note 71, § 346, at 988 (quoting *Allen*, 442 U.S. at 157).

142. C. MCCORMICK, *supra* note 71, § 346, at 988.

As a result of *County Court of Ulster County v. Allen*¹⁴³ and *Sandstrom v. Montana*,¹⁴⁴ presumptions operating within a criminal case are subject to the test developed by those cases. This test is best stated in the Cleary edition of *McCormick on Evidence*:

Mandatory presumptions, at least those which operate to place a burden of persuasion on the defendant, will be rigidly scrutinized in accordance with a test which requires that a rational juror could find the presumed fact beyond a reasonable doubt from the basic facts. In making this assessment, the Court will not consider the other evidence in the case. . . . [P]ermissive presumptions will be constitutionally acceptable if there is a rational way, considering all of the evidence in the case, that the jury could draw the inference suggested by the presumption. Whether a presumption is mandatory or permissive is to be gleaned from an analysis of the instructions to the jury.¹⁴⁵

However, the presumption being mandatory or permissible is of little consequence because the ability to rebut the presumption of sanity is so extremely limited that the presumption's nature turns from rebuttable to conclusive. The presumption's classification theoretically may be rebuttable, but in its practical application it acts like a conclusive presumption. The jury is not given enough evidence or testimony to support a finding against the presumption. Therefore, the inference is created in the mind of the juror that the presumption of sanity, upon which the jurors were instructed at the outset, still exists. The presumption's existence insures a finding for sanity.

B. *Production-Shifting and the Effect on the Jury*

The Wisconsin Supreme Court addressed the issue of production-shifting devices in *Muller v. State*.¹⁴⁶ *Muller* was de-

143. 442 U.S. 140 (1979).

144. 442 U.S. 510 (1979).

145. C. MCCORMICK, *supra* note 71, § 347, at 997.

146. 94 Wis. 2d 450, 289 N.W.2d 570 (1980).

cided in light of *Ulster* and *Sandstrom*.¹⁴⁷ The court reviewed the instruction given to the jury on intent to kill.¹⁴⁸ The review consisted of the wording of the instruction and, more crucially, the effect upon a reasonable juror. The reasonable juror was seen as not being able to interpret the instruction as shifting the burden of persuasion to the defendant or establishing a conclusive presumption.¹⁴⁹

Taking this "reasonable juror" concept, in relation to the procedural devices of the psychiatric expert testimony exclusion provided for in Rule 704(b), an assumption can be drawn that the reasonable juror could misinterpret any instruction as shifting the burden of persuasion to the defendant or creating a conclusive presumption. The effect is a directed verdict on the element of intent due to production (or persuasion) in the mind of the juror. As a practical matter, the juror will be looking for some evidence to show him or her that the presumption no longer exists. The incompleteness of the evidence will suggest to the juror that there is not enough evidence to refute specific intent, regardless of the instruction that it is only a presumption.

The issue of intent remains an issue for litigation. Testimony is given and the jury is permitted to draw inferences from the circumstances surrounding the incident and from lay

147. See Note, *After Sandstrom: The Constitutionality of Presumptions that Shift the Burden of Production*, 1981 WIS. L. REV. 519. The above Note is a comprehensive look at this Wisconsin decision in light of the decisions in *Ulster* and *Sandstrom*.

The following articles are excellent works on the issues of presumptions and the role of psychiatry in the courtroom. See generally Allen, *More on Constitutional Process-of-Proof Problems in Criminal Cases*, 94 HARV. L. REV. 1795 (1980-81); Allen, *Rationality and Accuracy in the Criminal Process: A Discordant Note on the Harmonizing of the Justices' Views on Burdens of Persuasion in Criminal Cases*, 74 J. CRIM. L. & CRIMINOLOGY 1147 (1983); Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321 (1980-81); Dickey, Remington & Schultz, *Law, Trial Judges, and the Psychiatric Witness — Reflections on How a Change in Legal Doctrine Has Been Implemented in Wisconsin*, 3 INT'L J. L. & PSYCHIATRY 331 (1980) [hereinafter Dickey]; Nesson, *Rationality, Presumptions and Judicial Comment: A Response to Professor Allen*, 94 HARV. L. REV. 1574 (1980-81); Risinger, *Substance and Procedure Revisited With Some Afterthoughts on the Constitutional Problems of Irrebuttable Presumptions*, 30 UCLA L. REV. 189 (1982-83).

148. *Muller*, 94 Wis. 2d at 468-73, 289 N.W.2d at 579-81. The instruction has since been revised to prevent constitutional infirmities. See Wis. Jury Instructions-Criminal 1100 (1986).

149. *Muller*, 94 Wis. 2d at 477-78, 289 N.W.2d at 584.

testimony. Expert testimony is admissible but, as previously shown, on a very limited scale. The expert can speak to the facts surrounding her diagnosis and can explain the medical basis for the diagnosis and the characteristics of the diagnosed mental illness. However, the jury is left to draw its own inferences and conclusions as to the true meaning of the psychiatrist's testimony. The lay jurors are given raw data and are told to come to conclusions as to insanity, conclusions which the psychiatric expert has been highly educated to make. To permit the jury to draw an inference from incomplete and often confusing evidence is wrong.

Granted, the jury is permitted to draw any inference it sees fit. However, a better reasoned approach would be to have the expert bring all the facts, data and observations together to an ultimate conclusion that would be more helpful to the jury, creating more assistance to the trier of fact.¹⁵⁰ It is better to educate the jury with complete testimony than to leave the important issues of specific intent and insanity open to the unfettered discretion of the jurors in drawing their inferences. It is argued that expert opinions on ultimate issues invade the province of the jury. The justification to abolish the ultimate issue rule still remains today. The jury is free to disregard the opinions of experts.¹⁵¹ It is better to provide the jury with the opinion, permit it to resolve the differences in opinion,¹⁵² and properly instruct the jury of its rights concerning expert opinion, than it is to provide the jury with insufficient information to rebut a presumption.

C. Restricted Psychiatric Expert Testimony and the Bifurcated Trial

The effect of limited psychiatric expert testimony on the bifurcated trial system is much more profound than in the single phase trial. In California, the statutory conclusive presumption¹⁵³ operates as the device depriving the defendant of

150. "The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact." FED. R. EVID. 704 advisory committee's note.

151. See M. GRAHAM, *supra* note 68, § 704.1. "Wigmore dismissed the common law ultimate issue rule as 'a mere bit of empty rhetoric.'" *Id.* (quoting J. WIGMORE, EVIDENCE § 1920, at 18 (Chadbourn rev. ed. 1978)).

152. See *supra* text accompanying note 84.

153. See *supra* notes 14 and 25 and accompanying text.

the opportunity to enter a defense to the element of intent. In Wisconsin, the *Steele v. State* decision is that device.¹⁵⁴ Each system separates the issues of guilt and insanity. The guilt phase is conducted with knowledge of the separate insanity phase. This suggests to the jury that the mental state of the defendant is less critical in the guilt phase. With this illogical suggestion, in conjunction with the lack or insufficiency of testimony concerning intent, the juror is given little to use to rebut a presumption of intention on the part of the accused to commit the criminal act. A guilty verdict is then a determination by the jury that the act was committed without an assurance that the element of specific intent was proven beyond a reasonable doubt by the state. A specific intent crime, such as first-degree murder, requires proof of that element. The result is that the criminal justice system is finding defendants guilty of a crime when an element of that crime is missing.

In the insanity phase, the jury makes a determination of the issue of insanity without regard to the guilt phase or the guilty verdict. Therefore, the issue of intent, an issue properly reserved for the guilt phase, is never thoroughly or properly addressed. As Professor Wallace MacBain points out, "the sanity or responsibility of the defendant is an integral part of guilt determination. This must be so if the criminal justice system is to be minimally fair and just."¹⁵⁵ Professor MacBain's discussion of doctrinal confusion is also very enlightening on this point.¹⁵⁶ The concepts of "*mens rea*," "responsibility," and "guilt" work together to suggest that "*mens rea* should be used in its general sense which assumes that there may be no culpability or guilt without responsibility."¹⁵⁷

154. See *supra* text accompanying notes 36-38.

155. MacBain, *supra* note 8, at 14.

156. *Id.* at 10-16.

157. *Id.* at 16. Wisconsin views the accused guilty of the criminal act but not responsible for his or her criminal conduct. See WIS. STAT. § 971.15 (1985-86). When a state makes the mental state (specific intent) an element of the crime, that element must be proven beyond a reasonable doubt. If that mental element is not present, there is no guilt and likewise no responsibility. It is the better view to hold mental disease or defect as to that mental element to be crucial in guilt determination and ultimate responsibility, than it is to view mental disease or defect as encompassing only responsibility. The criminal act may still have occurred, but without that required mental element, that *mens rea*, there is no guilt. See MacBain, *supra* note 8, at 10-16. See generally Annotation, *Modern Status of Test of Criminal Responsibility - Federal Cases*, 56 A.L.R. Fed.

He ultimately concludes that sanity is a necessary element in guilt determination.

Since specific intent concerns a mental purpose or a mental state,¹⁵⁸ the improper treatment of the element of specific intent causes insanity to play little part in guilt determination. Not permitting the jury to properly address the issue of intent by limiting the defense's ability to rebut a presumption of sanity relieves the state of its burden as to that element. Such a sequence is in violation of due process.¹⁵⁹

D. Misplaced Fear and Misdirected Confusion

The major fear in the legal community surrounding psychiatric expert testimony is confusion itself. The fear that the testimony of these experts will confuse the jury has led to the exclusion of this evidence. Some of this confusion emanates from the nature of the testimony itself. If the issues surrounding mental state, intent and psyche in general were all crystal clear and easily answered, these issues would not pose a great problem and the need for expert testimony would be minimal. Unfortunately, this is not the case.¹⁶⁰ Some experts attempt to force medical concepts into legal molds and vice versa. This causes confusion. However, this can be controlled.

Much of the confusion-causing factors come not from the expert but from the attorneys, judges, and the system in general. Attorneys question their witness or the opposition's wit-

326 (1982); Annotation, *Modern Status of Test of Criminal Responsibility - State Cases*, 9 A.L.R.4th 526 (1981).

158. See *supra* note 58.

159. It should be noted that this restriction on the admissibility of psychiatric expert testimony also hinders the prosecution. The state wishes to enter evidence to prove specific intent and to disprove insanity. The restraints upon the submission of such testimony can make the state's burden difficult to meet. However, with the effect of the presumptions, the nature of the juror, and the nature of the bifurcated trial system, the defendant is the party more egregiously affected. When the liberty and societal stigma of the accused is at stake, the state must shoulder the heavier burden.

160. See generally Dickey, *supra* note 147. It is a given that there is controversy within the psychiatric profession and that psychiatric theories lend themselves to an inner sense of confusion. But this is why the evidence must be supported by explanations and opinions. One author has written extensively concerning this debate which centers around the confusion within the psychiatric profession. For a discussion of this dilemma, see generally T. SZASZ, *IDEOLOGY AND INSANITY* 98 (1970); T. SZASZ, *LAW, LIBERTY, AND PSYCHIATRY* (1963); T. SZASZ, *PRIMARY VALUES AND MAJOR CONTENTIONS* ch. 6 (1983); T. SZASZ, *THE THERAPEUTIC STATE: PSYCHIATRY IN THE MIRROR OF CURRENT EVENTS* chs. 1 & 3 (1984).

ness in a manner that fosters confusion.¹⁶¹ The questioning permits the witness to answer too freely and to interject, too often, testimony that causes confusion or raises unnecessary collateral issues. The attorney should conduct the direct or cross-examination of the witness with pointed questions that call for clear and concise answers. Testimony in this fashion will provide the trier of fact with the pertinent information without giving it useless and confusing statements.

The judge should monitor the admission of the testimony with strict scrutiny. Objections that arise from the questioning should be considered with an open mind as to the value of the testimony, keeping in mind the goals of expert testimony, *i.e.*, to assist the trier of fact. Any offer of proof as to a contested issue should be conducted out of the hearing range of the jury. Possibly a pretrial conference, a motion *in limine*, or a recess at the time the expert is to take the stand, for the purpose of setting parameters for the submission of the testimony, would eliminate some of the confusion and reinforce in the minds of both the attorneys and the judge that the testimony is valuable, but must be handled with care. An instruction to the jury, either at the start of the trial or prior to the submission of testimony, concerning the testimony and their rights as jurors in connection with that testimony, would be helpful. It may be more appropriate to phrase the instruction in general terms so as not to place in the minds of the jurors the impression that this testimony is more important than other testimony. Such an instruction may not be possible and may be too prejudicial, but if a suitable agreement can be reached between the state and the defense as to its wording, the instruction may have the benefit of eliminating some confusion.

The system itself can cause some degree of confusion. This confusion stems mainly from incomplete testimony that the evidentiary rules and case law advocate. The testimony is limited to facts, data and superficial diagnoses. Because the expert cannot express an opinion or inference that would bring some meaning to the admissible evidence, the jury is left to speculate as to the meaning of this evidence and draw its

161. Dickey, *supra* note 147, at 333-38 (examples of the line of questioning of an expert in leading Wisconsin cases).

own inferences. The better course to follow is to admit competent and relevant opinion testimony in each phase of the trial where the issue is raised. If the evidence is admitted under proper questioning and under a watchful, scrutinizing eye of the judge, the jury will be permitted to make more informed judgments, rather than battle with incomplete, confusion-causing evidence. Having the jury resolve the differences of opinion between experts is more judicially sound than letting the jury draw inferences from insufficient evidence. The other alternative would be to exclude all psychiatric expert testimony. However, this alternative is much too drastic in light of the immense value of this critically important testimony. Such unsupported inferences should not be permitted when they determine ultimate facts (which constitute an element of the crime charged or a defense thereto).

Psychiatric expert testimony should be admissible. The jury is free to reject expert opinion or give it any weight it sees fit. Therefore, testimony that is competent and relevant should be admitted even though it embraces an ultimate issue. The proposals below should assist in making the testimony competent and relevant. The justifications, although their merit is minimal, are not enough to keep the testimony out or to deprive the defendant of his due process right to properly enter his defense. The difficulties with the testimony and psychiatry in general should then go to the weight of the evidence, not admissibility.

E. Proposals

The following proposals address first the psychiatric expert and second the bifurcated trial system. If viewed as a starting point for a review of these aspects of Wisconsin's criminal justice system, they will hopefully ignite some productive debates.

1. The Expert and the Testimony

The major difficulty courts seem to have concerning psychiatric expert witnesses is assuring that they are properly qualified to testify and assuring that their testimony is reason-

ably based upon their qualifications. In *State v. Dalton*,¹⁶² the "psychiatrist's qualifications as an expert were conceded."¹⁶³ However, the court excluded his opinion testimony on whether Dalton had the intent to kill because the opinion was not based on scientific knowledge and the testimony would not assist the trier of fact.¹⁶⁴ Therefore, even though the expert was qualified, the testimony he was offering was not competent. If the expert had properly examined the defendant, formulated his opinion on the basis of scientific, technical or other specialized knowledge, and then presented his opinion supported by credible information, the testimony would have been admissible.

In *State v. Flattum*,¹⁶⁵ the court prohibited expert testimony which made a causal link between the defendant's mental health history and a lack of intent. A psychiatrist would be allowed to give his opinion on the defendant's capacity to form the requisite intent to kill if he was "properly qualified as an expert on the effects of intoxication . . . [but] he or she may do so only if that opinion is based solely on the defendant's voluntary intoxicated condition."¹⁶⁶ This suggests that a properly qualified expert who makes an examination and bases his or her opinion on his or her qualifications and the examination, will be permitted to offer that opinion to the trier of fact.

In *State v. Repp*,¹⁶⁷ the court followed its holding in *Flattum* by excluding causally linked testimony of mental health history and lack of capacity to form the requisite criminal intent, and permitting properly qualified and based expert testimony.¹⁶⁸ The court also held that the exclusion of testimony did not prevent the defendant from offering a permitted defense, but rather, was a "function of defense counsel's failure to adequately introduce either lay evidence or properly quali-

162. 98 Wis. 2d 725, 298 N.W.2d 398 (Ct. App. 1980).

163. *Id.* at 731, 298 N.W.2d at 400.

164. *Id.* at 730-31, 298 N.W.2d at 400.

165. 122 Wis. 2d 282, 361 N.W.2d 705 (1985).

166. *Id.* at 293, 361 N.W.2d at 711.

167. 122 Wis. 2d 246, 362 N.W.2d 415 (1985). Both *Repp* and *Flattum* were decided on the same day. They also were argued on the same day.

168. *Id.* at 254, 362 N.W.2d at 418.

fied psychiatric evidence in admissible form to raise" the permitted defense.¹⁶⁹

These three cases indicate that Wisconsin courts are willing to admit psychiatric expert testimony that is relevant and competent. The first step is to properly qualify the witness. For example, if the issue deals with intoxication, the witness must be educated and experienced in the area of intoxication. If there are multiple issues it is conceivable that an expert on each issue will be needed. With multiple issues, however, the risk of confusion is greater and the possibility of an objection under section 904.03¹⁷⁰ is more likely. It is then advisable to choose the argument with the strongest probability of success. The best criteria to use for assuring that the expert will meet the qualification is a strict adherence to the standard set out in section 907.02.¹⁷¹

The second step is to educate the witness. Educating the witness should take place before the defendant is examined. The witness should be informed as to what the present state of the law is concerning intent and insanity. If the prosecution and the defense can stipulate as to the definition given to these concepts, things will be much easier. If no agreement can be reached (which is more likely), then the witness should be given a broad definition and informed of the arguments for and against that definition. Remember that psychiatrists are highly educated people. It is not inconceivable that they have the ability to understand legal concepts. The idea is not to have medical and legal concepts joined together,¹⁷² but to have the psychiatrist, who is examining the defendant, conscious of what the law says these concepts mean. The ultimate determination of intent, guilt, responsibility and insanity are legally and not scientifically based. A forensic psychiatrist would be

169. *Id.* at 259, 362 N.W.2d at 420.

170. WIS. STAT. § 904.03 (1985-86). See *supra* note 75 for the text of the statute. The probative value of the evidence weighed against the propensity for confusion is the basic review criterion.

171. WIS. STAT. § 907.02 (1985-86). See *supra* note 71 for the text of the statute.

172. See generally M. MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP (1984); Comment, *Legal and Psychiatric Concepts and the Use of Psychiatric Evidence in Criminal Trials*, 73 CAL. L. REV. 411 (1985); Poythress, Book Review, 1985 WIS. L. REV. 67 (reviewing M. MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP (1984)).

an ideal candidate for an expert witness.¹⁷³ The expert's insight and experience as to both the legal and scientific aspects of the issues involved may lend more credibility and competency to the testimony. If the expert is required to address the legal aspect of the examination, an offer of proof can be made to show that the expert has been "educated" in the legal definitions of the issues, and the examination and determination have been made with these in mind. The forensic psychiatrist should therefore be able to offer relevant and competent opinion testimony concerning the legal aspects, as well as the scientific aspects, of intent and insanity.

It should be remembered that the attorney offering the testimony as evidence should not tell the expert what should be found. Otherwise, the expert's credibility will be destroyed by a good cross-examination. It is rather an educational process which makes the witness more competent and useful.

The third step is to perform the examination of the witness with great care. Instruct the witness to answer only the questions asked with pointed, concise answers in terminology that will not confuse the jury. Fashion the questions around the qualifications of the expert to prevent the submission of testimony which is beyond the scope of the expert's examination and expertise. Such testimony, which is beyond the scope limitations, will be subject to exclusion under *Flatsum* and *Repp*.

These steps are of a practical nature. Although not revolutionary, they need to be stressed due to the increased difficulties in dealing with psychiatric expert witnesses. If followed, these steps should lead to more competent and useful testimony that does not cause great confusion. Much of the confusion has stemmed from the system itself. Much of this confusion can be eliminated by adhering to the above proposals.

2. The Bifurcated System

The basic ideals associated with a bifurcated trial system are commendable. The difficulty concerns its operation. The

173. See generally Smith, *The Art of Forensic Psychiatry: A Montage of Murder Cases*, 29 J. FORENSIC SCI. 209 (1984); Tanay, *Forensic Psychiatry and Justice*, 62 MICH. B.J. 206 (1983); Tuchler, *Psychiatry and Criminalistics*, 4 J. FORENSIC SCI. 242 (1959).

defendant is being found guilty in the first phase of the trial when all the elements are not being properly addressed. The right of the defendant to have the state prove each element of the crime charged beyond a reasonable doubt is viciated when specific intent is given such presumptive treatment. The theory of presumption of innocence, being not really a presumption but merely another way of stating the government's burden of proof,¹⁷⁴ no longer has any validity. The element of specific intent is, in effect, conclusively presumed to be present when the act is yet to be proven. The second stage then addresses insanity. Under the present system, the purpose of this stage is basically to determine the guilty party's disposition; if sane, the defendant is imprisoned and if insane, institutionalized.

The two alternatives suggested in the discussion which follows operate under the conclusion reached by Professor MacBain and assumed here, namely that sanity is a necessary element in guilt determination.¹⁷⁵ Therefore, the defendant should not be found guilty in the first phase if found to be insane in the second phase.

The guilt phase could be better termed and described as an "act determination" phase. In this phase each element of the crime, except specific intent, will be addressed by a special verdict. The jury will return a verdict of "proven" or "not proven" as to each element. If an element is adjudged to be "not proven," then the defendant is not guilty unless the elements "proven" amount to a lesser included offense.

All the elements being "proven," the second phase becomes necessary. In this, the guilt phase, the element of specific intent would be addressed along with the issue of insanity. This would focus the attention on mental state and eliminate confusion of the issues. Again, special verdicts as to each possibility would be appropriate. The instruction should include statements on the meaning of each outcome in terms of guilt. By finding in such a way, the outcome will be guilty or not guilty. If intent is found and insanity is proven, then the defendant is not guilty by reason of insanity (mental dis-

174. See C. McCORMICK, *supra* note 71, § 342, at 967-68; see also *supra* note 24.

175. See MacBain, *supra* note 8, at 16; see also C. McCORMICK, *supra* note 71, § 346, at 988 (quoting *Allen*, 442 U.S. at 157).

ease or defect). If intent is found and insanity is *not* proven, then the defendant is guilty of the crime charged. If intent is not found, insanity is proven, and the remaining elements amount to a lesser included offense, then the defendant is not guilty by reason of insanity. Finally, if specific intent is not found and insanity is *not* proven, then the defendant may be guilty of a lesser included offense if the "proven" elements amount to that.¹⁷⁶

By associating specific intent and insanity so closely, the jury will be able to review the state's burden of proving beyond a reasonable doubt as to intent with the defense's burden of proving insanity as an affirmative defense by a lesser quantum of proof. Less confusion may arise from this close association than by splitting the issue up in the present scheme of a sequential order of proof. Granted, intent and insanity are two distinct issues, but the general relationship of state of mind or mental purpose calls for a review under one umbrella of proof rather than split into two proofs.

The second alternative would be to have the first phase become the insanity phase. If the defendant is adjudicated to be sane, then the second phase would become a basic guilt phase that operates like a regular single-phase trial. In the guilt phase the issue of specific intent must be fully addressed as discussed in this Comment. If the defendant is adjudicated insane in the first phase, the second phase would be an "act determination" phase where it is assured that the accused is the person who committed the acts of the crime charged and therefore not responsible because of the defendant's insanity.

It is crucial to all of these suggestions that the instructions to the jury concerning experts, intent, phases, elements of the crime and the burden of proof be as clear and as helpful as possible. The better the instructions the more effective these proposals will be.

V. CONCLUSION

If the government is going to make the mental state of the accused an essential element of the crime charged or of a de-

176. This second phase may be termed the "guilt determination" phase. The findings by the jury in this phase will determine the guilt of the defendant of the crime charged or possibly a lesser included offense.

fense thereto, then fundamental fairness requires that the defendant be permitted to fully address these issues. Evidentiary rules, procedural rules and court decisions have eroded this fairness which is basic to our system of jurisprudence. The attempts to rationalize and crystalize legal issues by these rules and decisions have failed. The endeavors to alleviate confusion-causing factors have been misdirected. More confusion is caused by the system and its operatives than by the expert witness.

Psychiatrists, as expert witnesses in a criminal trial, should be given the opportunity to fully express their findings and their opinions regarding their findings.¹⁷⁷ Where presumptions exist as to elements that the psychiatrists are qualified to address, they should address those elements in their entirety rather than providing bare, incomplete testimony. The expert witness is there to assist the trier of fact.

The bifurcated trial system, although enacted with the intention to eliminate confusion, has created confusion and injustice when it operates in conjunction with the restriction on expert opinion testimony speaking to ultimate issues. This confusion and injustice has been elevated to the point of being unconstitutional.

Criminal intent and insanity are very controversial areas of the law. The bifurcated trial system and expert opinion testimony on ultimate issues add to this controversy by being constitutionally incompatible. If our criminal justice system is to operate under the notion that with guilt there must be sanity and responsibility, the present system must be reevaluated. The bifurcated trial system can work if the submission of evidence is permitted but properly controlled. The possible deprivations of liberty and stigma attachments are too great to permit the system to continue along the present course.

KEVIN T. SMITH

177. See Tuchler, *supra* note 173, at 248.