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THE INSANITY DEFENSE: CONCEPTUAL CONFUSION AND THE EROSION OF FAIRNESS

Wallace A. MacBain*

I. INTRODUCTION

The insanity defense is in serious trouble.1 This article will examine one of the main causes of its peril: a habitual failure to come to terms with the meaning and implications of “mens rea” and its relation to “guilt” and “responsibility.” While reviewers have given ample consideration to the insanity defense,2 there has not been sufficient concern for the link between doctrinal confusion and the threats to which the defense is now exposed.

This article does not seek to comprehensively analyze the insanity defense. Expressly excluded from discussion are (1) the proper standard for exculpation on the ground of mental

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1. See, e.g., Note, Rules for an Exceptional Class: The Commitment and Release of Persons Acquitted of Violent Offenses By Reason of Insanity, 57 N.Y.U. L. Rev. 281, 283 n.12 (1982) (capsulizing the threat in light of recent events: two states enacting legislation abolishing the defense, seven others adopting the “guilty but mentally ill” verdict and the outcry over the acquittal and possible release of John W. Hinckley, Jr., who attempted to assassinate President Reagan).

abnormality; placement of burdens of proof; mitigating pleas such as "diminished capacity"; evidentiary questions regarding the scope of expert testimony by mental health professionals; the esoteric distinction between crimes requiring only "general intent" and those necessitating "specific intent"; the problems of disposition of those acquitted by reason of insanity; the various proposals to abolish or modify the insanity defense; and the constitutional problems presented by the defense. These issues have been extensively analyzed in other articles.

The focus of this article is the confusion, or lack of agreement, as to the meaning of key terms and concepts in the criminal law and their interrelationships in the context of the insanity defense.

3. See infra text accompanying notes 81-124 for a discussion of the development of the insanity standard in Wisconsin.


5. See infra text accompanying notes 125-35 for a discussion of diminished capacity in Wisconsin. The insanity defense deals with diminished responsibility rather than nonresponsibility but remains an all or nothing categorical classification. Arguably, so-called "diminished capacity" is an attempt to take into account degrees of diminution of responsibility. For a general discussion of diminished capacity, see Arenella, The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage, 77 COLUM. L. REV. 827 (1977); Diamond, Criminal Responsibility of the Mentally Ill, 14 STAN. L. REV. 59 (1961); Lewin, Psychiatric Evidence in Criminal Cases for Purposes Other than the Defense of Insanity, 26 SYRACUSE L. REV. 1051 (1975); Note, Criminal Law — First Degree Murder — Evidence of Diminished Capacity Inadmissible to Show Lack of Intent, 1976 Wis. L. REV. 623.


7. For analysis of this distinction, see Comment, Rethinking the Specific-General Intent Doctrine in California Criminal Law, 63 CALIF. L. REV. 1352 (1975).


9. For an analysis of these problems, see Note, supra note 1, at 284.
II. THE INSANITY DEFENSE: ITS SIGNIFICANCE IN ANGLO AMERICAN LAW

The basic principle of criminal law has been aptly generalized: "[T]he harm forbidden in a penal law must be imputed to any normal adult who voluntarily commits it with criminal intent, and such a person must be subjected to the legally prescribed punishment." This principle is anchored in the concept of "individual responsibility," which subsumes the modifiers "normal," "voluntary" and "criminal." The notion of criminal responsibility proceeds from the assumption that normal adults freely exercise choices over courses of action. It is assumed that they have the capacity to purposefully select their conduct and therefore should be held accountable for it. Thus, the rule of responsibility is a necessary condition to criminal liability. It follows from this that there is a "single, universal defense of non-responsibility." The defense of insanity is but one evidentiary means of raising it. If an individual lacks the capacity to recognize, to appreciate or to control the nature of the choices made, the assumption of "free exercise" of will is inoperative and he cannot be legally accountable for his acts. To punish one who, by hypothesis, could not have done otherwise would be unjust, inhumane, and ineffective. In sum, this is the insanity defense.

However, it is said that "the insanity defense is raised so rarely as to make questionable assigning it an important role in the criminal law." Unfortunately, the frequency of its use, or of its success, misses the point. As Herbert Packer

12. Free exercise of will refers to the assumption that normal adults act freely and that whenever the will operates at all, it is possible for a person to will otherwise. H. Fingarette, The Meaning of Criminal Insanity 69-84 (1972).
14. A. Goldstein, supra note 13, at 167.
15. See, e.g., Fullin, The Insanity Defense: Ready for Reform, Wis. B. Bull., Dec. 1982, at 13 ("A 1978 study showed that of more than 2 million criminal prosecu-
has said:

We must put up with the bother of the insanity defense because to exclude it is to deprive the criminal law of its chief paradigm of free will . . . . [It] operates as if human beings have free choice. This contingent and instrumental posit of freedom is what is crucially at stake in the insanity defense.\textsuperscript{16}

If the defense were abolished or substantially modified, a primary symbol of personal responsibility, perhaps imperative in creating law-abiding behavior, would also be diminished. Also, the basic assumptions regarding responsibility and freedom, upon which the whole of the criminal law is constructed,\textsuperscript{17} would necessarily be altered. An evolutionary process begun before the thirteenth century\textsuperscript{18} which developed as a doctrine of personal culpability or blameworthiness,\textsuperscript{19} would be halted. Seven centuries of adherence to this

\textsuperscript{16} H. Packer, \textit{The Limits of the Criminal Sanction} 132 (1968).

\textsuperscript{17} See Monahan, \textit{Abolish the Insanity Defense?—Not Yet}, 26 Rutgers L. Rev. 719, 720-25 (1973).


\textsuperscript{19} For an excellent summation of the central role which culpability plays in our criminal justice system, see Bonnie & Slobogin, \textit{supra} note 6, at 448-49, in which those commentators stated:

\begin{quote}
[T]he ethical foundations of the criminal law are rooted in beliefs about human rationality, deterrability and free will. These are articles of moral faith rather than scientific fact. Many commentators believe that the integrity of this system of beliefs requires symbolic affirmation of the pervasively held, but also unvalidated, intuition that mental abnormalities exist and can subvert a person's ability to comprehend the consequences of his acts or to control behavior. According to this view, perpetuation of the insanity defense is essential to the community's moral perceptions of the legitimacy of punishment. However uncertain the inquiry, a respect for the moral integrity of the criminal law may require us to make it.
\end{quote}
principle should not be lightly cast aside.

The culmination of this historical process is the belief that, "the collective conscience does not allow punishment where it cannot impose blame." This statement represents two complementary concerns: acceptance of both the autonomy and accountability of the sane, as well as a sympathetic understanding of the insane. It also acknowledges a significant differentiation between the two classifications — they merit different treatment. The conclusion that the acquittee (through the insanity defense) is not punishable is supported by both common law and moral concerns recognized for over five hundred years.

Aside from the point that punishing those assumed blameless serves no accepted purpose in the criminal law, a further function is served by the insanity defense. If there were no defense of nonresponsibility, those who could not satisfy the mental requirement defined in the crime would be entitled to an unconditional acquittal. Currently, the acquittal is on a special ground; the acquittee is controlled by being channeled into the mental health system. The insanity defense relates, then, to the substantive premises underlying

See also Spring, supra note 8, at 606, in which the author states: "[T]he controversy is of importance, for it pits the concept of a system of criminal law based upon individual responsibility [blameworthiness based on mens rea] against the public perception of the adequacy of such a system in serving public needs." (Emphasis in original.)


21. The reason for this different treatment is best stated in 6 G. Fletcher, Re-Thinking Criminal Law 846 (1978):

The inescapable question is whether convicting the blameless is acceptable in a society committed to respect for individual autonomy.

My view is that it is not acceptable. The criminal law expresses respect for the autonomy of the sane as much as it shows compassion for the insane. The line between the two may shift over time. Our theories of sanity may change. But the line remains. If the criminal law is to be an institution expressing respect as well as compassion, its institutions must be able both to punish the guilty and excuse the weak. These two sentiments depend on each other. Compassion is possible only so far as punishment is the norm. Punishing wrongdoing is possible only so far as we have a concept of accountability for wrongdoing. Respect for autonomy and compassion for the weak are too important to our culture to be easily shaken by the skeptics.


24. See Monahan, supra note 17, at 725-29.
criminal law. But of more practical significance, the defense determines the disposition of the insanity acquittee.25

III. THE INSANITY DEFENSE IN JEOPARDY

If the insanity defense is legitimate and necessary, why is its continued existence threatened?26 The assault on this citadel continues apace. The threats are both real and imagined, recent and longstanding, opportunistic and deeply felt, broad-based and narrowly philosophical. No one author can hope to adequately survey these concerns. What follows is presented as a representative sample; a demonstration that concern for the survival of the insanity defense, as now constituted, is justified.

Certainly, the vagueness of the mental health concept and its imprecise relationship to criminal behavior have troubled countless courts, commentators and citizens.27 Undoubtedly, uneasiness regarding the insanity defense will persist regardless of the outcome of the present assaults. But there are many aspects of the criminal justice system which are similarly troublesome; yet we continue to attempt to improve them rather than discard them.28

The causes of contemporary demands for the revision of the insanity defense may, for survey purposes, be catego-
A. Public Opinion

The public believes that the insanity defense is commonly relied upon and frequently successful. However, in-

29. See, e.g., Myths and Realities, supra note 15.

#1 Myth: Many criminal defendants plead insanity and most are acquitted.
Reality: The insanity plea is rarely used; acquittals are extremely rare.

#2 Myth: The insanity defense causes major problems for the criminal justice system.
Reality: The insanity defense has a minor practical role in the criminal justice system but a very important moral role.

#3 Myth: Mentally ill people are dangerous and are capable of violent behavior at any time.
Reality: The overwhelming majority of the 35 million mentally ill people in this country are neither dangerous nor unpredictable; they are victims of stigma.

#4 Myth: Most insanity defendants are murderers who commit random acts of violence.
Reality: Most of the crimes committed by insanity defendants are non-violent crimes. Only 14 percent of insanity defendants are charged with homicide or other violent crimes, Most of which are directed, not at strangers, but at family members and authority figures.

#5 Myth: The insanity defense allows defendants to fool juries and escape punishment.
Reality: The overwhelming majority of acquittees suffer from the most serious forms of mental illness.

#6 Myth: The insanity defense is a rich man’s defense.
Reality: Most insanity defendants are likely to be poor, just as are most other criminal defendants.

#7 Myth: Insanity trials are a “circus” of conflicting expert testimony that confuses the jury.
Reality: Most insanity cases reflect agreement among the experts, the defense, and the prosecution. Few go to trial and even fewer go to a jury. The celebrated cases are the exception rather than the rule.

#8 Myth: Most insanity acquittees go free immediately or within a short period of time following their trial.
Reality: The majority of acquittees are confined for significant periods of time.

#9 Myth: Insanity acquittees repeat the same crime when they are released.
sanity is rarely claimed and even more rarely successful. Improved public awareness of the actual statistics may eventually reduce this factor.

More troubling, however, are the causes of public apprehension which have a substantial basis in fact, although perhaps lacking in proportion. Heading the list, on the basis of notoriety, is John W. Hinckley, Jr.'s assassination attempt on President Ronald Reagan. The assassinations and attempted assassinations which have unfortunately occupied a prominent place in our political life have no doubt increased the outrage which greeted the Hinckley verdict of not guilty by reason of mental defect. The seeds of discontent over the insanity defense were previously sown in fertile soil. Preparing the way for the adverse groundswell reaction to the Hinckley verdict were a number of instances of insanity acquittals, followed by quick institutional releases and violent offenses by those released. Such occurrences have led to a distrust of both the legal and psychiatric professions and a

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Reality: Crimes committed by insanity acquittees upon release tend to be less violent in nature. Recidivism rates are no higher than for convicted felons.

. . . .

#10 Myth: The "guilty but mentally ill" verdict means that the defendant will receive mental health treatment.

Reality: A "guilty but mentally ill" verdict does not guarantee treatment beyond what a convicted felon would receive.

Id. at 14-26.


31. On March 30, 1981, John W. Hinckley, Jr. attempted to assassinate President Reagan. His attempt wounded the President and several bystanders. On June 21, 1982, after an eight week trial, a Washington, D.C. jury found Hinckley not guilty by reason of insanity on all counts. Hinckley was committed for an indefinite period to a mental hospital. There he may petition the court every six months for a hearing at which he may show that he is sane and not dangerous. If he succeeds in doing so, he will be released.

As described by Irving R. Kaufman:

Outrage over the verdict was immediate and intense. Numerous Government officials called for changes in the laws concerning the insanity defense. A United States Senate subcommittee conducted hearings to consider amending the relevant Federal statutes, summoning five of the jurors in the Hinckley case to testify. Countless commentators attacked the verdict and suggested their own reforms. And among the general populace there was widespread anger and resentment.

Kaufman, The Insanity Plea on Trial, N.Y. Times, Aug. 8, 1982, § 6 (Magazine) at 16.

32. See Spring, supra note 8, at 603-04.
nagging feeling that the defense just does not work. Thus, the foundation was built for generalized public frustration, revulsion and rage toward insanity acquittals.

These perceptions are real causes of concern for those defending the traditional role the insanity defense plays. However, the major impetus for the objections which threaten to overthrow the defense comes from the erosion of the longstanding rule of automatic and indefinite commitment. As long as defendants who successfully claimed insanity were automatically and indefinitely committed, the public was reassured. The difference between a state prison and a state hospital for the criminally insane, both presumed to be maximum security institutions, was not of great concern. Additionally, indefinite commitment minimized the use of the plea.

However, the decline of automatic commitment following Bolton v. Harris, which required that those found not guilty by reason of insanity be dealt with in essentially the same way as persons civilly committed, raised public sensitivity to such acquittal to epic proportions. This concern was shared by legislators, the bench, the bar and commentators who also perceived hospitalization following a successful plea as potentially meaningless due to the threat of early release. Persuasive suggestions have been made that, contrary to the Bolton position, insanity acquitteds can be distinguished from those civilly committed and thus treated.

33. See Spring, supra note 8, at 610; Note, supra note 1, at 281-83.
37. See, e.g., supra note 1. The sampling there presented may be safely assumed to be only the tip of the iceberg.
38. See Spring, supra note 8, at 610.
differently.  

B. Philosophical Differences

Some argue for abolition of the insanity defense on philosophical or practical grounds. They "doubt whether there is a coherent difference between the wicked and the sick."  

By positing that all tests for insanity are useless, several critics deny that an adversary system can provide a viable means for dealing with mental abnormality, let alone its relationship to unlawful conduct. These skeptics, however, have been successfully refuted elsewhere.

IV. DOCTRINAL CONFUSION

The underlying cause for doubts concerning the insanity defense is the confusion and uncertainty surrounding both the doctrine and its rationale. The failure to agree on the meaning and proper use of key terms and concepts, or the relation of these terms and concepts to each other, has been a significant source of confusion and frustration. One symptom of this confusion is the profusion of books and articles

39. Id. See also State v. Gebarski, 90 Wis. 2d 754, 280 N.W.2d 672 (1979). A proposal submitted to the Wisconsin legislature would reinstate automatic commitment. See infra note 155. The United States Supreme Court recently held: [W]hen a criminal defendant establishes by a preponderance of the evidence that he is not guilty of a crime by reason of insanity, the Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society. This holding accords with the widely and reasonably held view that insanity acquittees constitute a special class that should be treated differently from other candidates for commitment. Jones v. United States, 103 S. Ct. 3043, 3052-53 (1983) (footnote omitted).

40. 6 G. FLETCHER, supra note 21, at 844. Substantive skeptics doubt whether there is coherent difference between the wicked and the sick. The irony is that this camp consists of some people, like Lady Wooton, who regard wickedness as irrelevant or impossible and therefore wish to treat us all as though we were sick — incapable of evil. At the other extreme, there are skeptics, like Thomas Szasz, who take the issue of personal accountability so seriously that they wish to regard everyone as sane. Id. (footnotes omitted).

41. See, e.g., Brady, Abolish the Insanity Defense? — No!, 8 HOUS. L. REV. 629 (1971); Monahan, supra note 17, at 719.

This profusion of "insanity defense literature" makes it difficult for the reader to grasp the issues. The greatest difficulty surrounds the definitions of "mens rea," "guilt," and "responsibility," and there is considerable discord as to the relationship between these terms.

A. "Mens Rea"

"The term 'mens rea,'" Sanford Kadish complains, "is rivalled only by the term 'jurisdiction' for the varieties of senses in which it has been used and for the quantity of obfuscation it has created." An attempt to account for all these uses would be futile and fruitless. However, a general classification will be attempted.

In one sense mens rea is conceived as the "vicious will" of Blackstone's usage. This may be considered as a shorthand expression for "blameworthiness." "It postulates a free

43. See supra note 2.
44. See, e.g., Fingarette, supra note 2, at 132 ("Plainly this whole range of terms — 'responsible,' 'innocent,' 'absence of mens rea,' 'not guilty' — has a systematic ambiguity related to two quite different contexts of use, a moral and a nonmoral context. And this ambiguity pervades the legal discourse in which such terminology is used.").
45. Kadish, supra note 13, at 273.
46. See generally Sayre, supra note 22, at 1016-17 in which the author states:

A study of the historical development of the mental requisites of crime leads to certain inescapable conclusions. In the first place, it seems clear that mens rea, the mental factor necessary to prove criminality, has no fixed continuing meaning. The conception of mens rea has varied with the changing and underlying conceptions and objectives of criminal justice. At the beginning when the object of criminal administration was to restrict and supplant the blood feud, the mental factor was of importance insofar as it determined the provocative nature of the offense.... Under the dominating influence of the canon law and the penitential books the underlying objective of criminal justice gradually came to be the punishment of evil-doing; as a result the mental factors necessary for criminality were based upon a mind bent on evil-doing in the sense of moral wrong.... As the underlying objective of criminal administration has almost unconsciously shifted, and is shifting, the basis of the requisite mens rea has imperceptibly shifted, lending a change to the flavor, if not to the actual content, of the criminal state of mind which must be proved to convict.

See also Black's Law Dictionary 889 (rev. 5th ed. 1979) ("Mens rea—a guilty mind, a guilty or wrongful purpose; a criminal intent. Guilty knowledge and wilfullness.").
47. See, e.g., H.L.A. Hart, Punishment and Responsibility 28 (1968); W. LaFave & A. Scott, supra note 23, at 191-95; Sayre, supra note 22, at 983.
agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong." The Supreme Court has adopted this sense of the term, attaching to mens rea the concept of evil purpose. Central to this view is the idea of a free agent freely choosing a blameworthy course for which he should be held accountable.

An alternate view is that mens rea is simply the collection of mental states that have come to be recognized as requisite to the definition of various crimes and might more appropriately be designated "mentes reae." This view may assume the presence of a responsible agent, perhaps by treating sanity as a separate element of criminal liability. It is commendable from the standpoint of its coherence and conceptual simplicity.

In the Model Penal Code, the American Law Institute defines mens rea as "the culpable states of mind." By labelling the states of mind as "culpable" and electing to admit evidence of mental abnormality to rebut their presence, the Institute also appears to assume a responsible agent.

Finally, there is the argument that mens rea means merely the intention to do the forbidden act; accepting either "sane" or "insane" mens rea as sufficient for guilt. If one intentionally shoots another without justification or excuse,

50. See Lyons, supra note 42, at 391, in which the author states:

Insanity negates moral accountability for an act otherwise offensive under the criminal laws. Technically, insanity negates mens rea—the mental element of crime. But mens rea is really legal shorthand for moral accountability; otherwise how can one explain that mens rea refers to a comprehensive mental condition which includes not only (1) the intention to commit a particular criminal act, but also (2) the absence of certain excusing conditions such as infancy, insanity, self-defense and duress?

51. Sayre, supra note 22, at 1026.
54. Id. at § 4.02 ("Evidence of Mental Disease or Defect Admissible When Relevant to Element of the Offense.").
other than mental abnormality, guilt is complete.\textsuperscript{56}

These categories account for most of the ways in which the traditional term "mens rea" is used. Too often writers and judges fail to inform the reader as to the meaning being used. They ignore other usages, while insisting that proof of mens rea is necessary to criminal liability. Consequently, the result is confusion.

Professor Kadish has aptly summarized these positions, declaring that the two principle categories of mens rea are "mens rea in its special sense"\textsuperscript{57} and "mens rea in its general sense."\textsuperscript{58} The former category refers only to the "mental state which is required by the definition of the offense to accompany the act which produces or threatens the harm."\textsuperscript{59} The latter refers to "legal responsibility," wherein the "law absolves a person precisely because his deficiencies of temperament, personality, or maturity distinguish him so utterly from the rest of us to whom the law's threats are addressed that we do not expect him to comply."\textsuperscript{60} In other words, the absence of responsible agency prevents blameworthiness and thus guilt. One would assume from this dichotomous treatment that the insanity defense would accordingly perform a dual role: to obviate either responsibility — mens rea in the general sense, or to erase the mental state requisite to the crime — mens rea in the special sense. Kadish deals with this point, however, by describing the special preemptive defense of legal insanity as "depriving a defendant of his normal mens rea defense . . . ."\textsuperscript{61} The Kadish position, then, is that when one speaks of mens rea, it is in the special sense. However, where the issue is the responsibility of the actor as in the insanity defense, the older "general sense" mens rea is

\textsuperscript{56} See State v. Hebard, 50 Wis. 2d 408, 419, 184 N.W.2d 156, 162 (1971).
\textsuperscript{57} Kadish, supra note 13, at 274; see also H. FINGARETTE, supra note 12, at 131.
\textsuperscript{58} Kadish, supra note 13, at 275.
\textsuperscript{59} Id. at 274. Kadish further notes:

[T]hat the absence of mens rea, in this special sense of the required mental state, precludes liability in all of these cases is of course the merest tautology. This is the way these crimes are defined. But it is important to see that they are so defined because the special mens rea element is crucial to the description of the conduct we want to make criminal . . . .

\textsuperscript{60} Id. at 275.
\textsuperscript{61} Id. at 280.
necessary and appropriate. A conclusion which can be drawn from this is that 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.

B. "Responsibility"

The term "responsibility," used above as interchangeable with sanity, may be viewed in its ordinary sense as simply liable to punishment and thus essentially tautological. But liability to punishment demands moral culpability. Moral culpability requires a capacity to appreciate the nature and consequences of the act combined with the capacity to choose. In other words, it requires a rational, free agent. The "rule of responsibility" is an underlying premise of a "just" criminal justice system. Implicit in and necessary to "responsibility," then, is moral blameworthiness or culpability.

62. See H. Fingarette, supra note 12, at 131. Whether mens rea should be taken as implicating all factors touching on culpability (mens rea in the general sense) or as only referring to the mental element required by the definition of a particular crime (special sense) has been subject to dispute. See also H. Packer, supra note 16, at 103-08; Fletcher, The Theory of Criminal Negligence: A Comparative Analysis, 119 U. Pa. L. Rev. 401 (1971).


64. Any definition of insanity involves locating a somewhat arbitrary point on the continuum of responsibility beyond which we have decided not to attribute blame. The Model Penal Code § 4.01, comment 1, at 156 (Proposed Official Draft 1962) explains that, "the problem is to discriminate between the cases where a punitive-corrective disposition is appropriate and those in which a medical-custodial disposition is the only kind that the law should allow." See also Moore, Legal Conceptions of Mental Illness, in Mental Illness: Law and Public Policy 25-69 (1980).


66. See J. HALL, supra note 10, at 146. "Crime does and should mean condemnation and no court should have to pass that judgment unless it can declare that the defendant's act was wrong. This is too fundamental to be compromised." Model Penal Code § 2.05, comment 1, at 140 (Proposed Official Draft 1962).

67. See supra text accompanying notes 47-50. See also H.L.A. HART, supra note 47, at 46-50; Brady, supra note 41; Gardner, supra note 42; White, Making Sense of the Criminal Law, 50 U. Colo. L. Rev. 1 (1978).

68. Bleechmore, supra note 11, at 242-47.

69. H. Fingarette, supra note 12, at 236; White, supra note 67.
C. "Guilt"

The relationship of "guilt" to all this would seem elementary—without responsibility there can be no guilt. The traditional verdict form of "not guilty by reason of mental disease or defect" recognizes this. 70 If "guilt" means "culpability" and "blameworthiness," which it presumably does, then an absence of responsibility due to legal insanity must mean an absence of guilt. 71

The difficulty in terms of public confidence in the rationality of the criminal justice system is that "guilty" is more commonly understood as, "he did the act." 72 To say that, "he did it but he's not 'guilty'" presents an unpalatable anomaly. 73 To surrender on this point might seem to be an abandonment of the principle that moral culpability is the basis for liability in crime—"guilt." The choice is between semantic precision and expediency. Although one may feel

70. Wis. Stat. § 971.17 (1981-82). See also Gardner, supra note 42, at 90.
71. "Guilty but not responsible," would clearly be a contradiction in terms.
72. See A. Goldstein, supra note 13, at 144. This sentiment was recently expressed by President Reagan:

In the interview Reagan discussed legislation he had sent to Congress last year that would abolish the plea of not guilty by reason of insanity. He said he favored changing the law so that a defendant could be found "guilty but insane." "There seems to be something wrong with 'not guilty by reason of insanity' when the person has performed the deed," Reagan said. Reagan and Brady Discuss Hinckley, Milwaukee J., Mar. 30, 1983, § 1, at 10, col. 3.

73. Myths and Realities, supra note 15, at 34-35, in which the Commission (appointed by the National Mental Health Association) advocates a change in the use of descriptive terms to alleviate public misconceptions.

The Commission finds the term "not guilty" confusing to the general public. In the public meaning the term "not guilty" implies that a person accused of a crime did not commit the act. The confusion arises when the public can actually see a crime reenacted or receive incontrovertible testimony that the person "physically" pulled the trigger, stabbed the knife, or whatever "physical" characteristics describe the crime. . . .

The legal definition of "guilty" implies more than the physical commission of an act; under the A.L.I. it includes the ability of the accused to understand the nature of the act and the ability to conform his conduct to the requirements of the law.

Legally, the terms "responsible" and "guilty" are interchangeable; they mean the same thing. However, to the public, the word "responsible" better communicates the legal definition as well as the intent.

The Commission believes that "not responsible" in its public usage would help alleviate the public's confusion and misunderstanding surrounding the finding of not guilty.

Id.
strongly that nonculpability or nonblameworthiness attributable to legal insanity can only be fairly and properly designated "non-guilt," one may also feel that the threat to the insanity defense requires that the label "not responsible" be accepted if it serves to diminish the apparent anomaly.74

V. A Pause for Reflection

One of the major reasons for distrust of the insanity defense is a failure to agree on, or perhaps to explicate, the meaning of the slippery but essential term "mens rea" and its relationship to the pivotal concepts of "guilt" and "responsibility." Acceptance of the Kadish analysis of mens rea75 is in order since it is based upon the proper foundation of criminal law—culpability and responsibility. In defining and establishing the commission of a crime, use of the special sense of mens rea is essential. However, in dealing with the defense of insanity, mens rea should be used in its general sense which assumes that there may be no culpability or guilt without responsibility.

This discussion has proceeded on the basis of several implicit and explicit assumptions: (1) man possesses a free will, a capacity to make rational choices for which he should be held accountable;76 (2) mental illness is a reality and may be professionally diagnosed;77 (3) mental illness may so affect

74. The proposed change to the Wisconsin statutory scheme, infra note 155 and accompanying text, includes a provision for "not responsible" when the defendant successfully asserts the insanity defense.

75. See Kadish, supra note 13, at 274-75; see also H. Fingarette, supra note 12, at 131.

76. See H. Packer, supra note 16, at 132-34; Monahan, supra note 17, at 721; White, supra note 67.

77. But see T. Szasz, The Myths of Mental Illness 262 (1974), in which the author states:

Mental illness is a myth. Psychiatrists are not concerned with mental illnesses and their treatments. In actual practice they deal with personal, social and ethical problems in living.

I have argued that, today, the notion of a person "having a mental illness" is scientifically crippling. It provides professional assent to a popular rationalization—namely, that problems in living experienced and expressed in terms of so-called psychiatric symptoms are basically similar to bodily diseases. Moreover, the concept of mental illness also undermines the principle of personal responsibility, the ground on which all free political institutions rest. For the individual, the notion of mental illness precludes an inquiring attitude toward his conflicts which his "symptoms" at once conceal and reveal. For a society it
free will as to justify a determination of nonresponsibility; (4) mentally abnormal offenders, determined to be nonresponsible and thus beyond the reach of criminal law, will be subjected to alternative rehabilitation and preventative mechanisms to assure adequate social control; 78 (5) the insanity defense involves a categorical, "all or nothing," determination of responsibility or blameworthiness; 79 and (6) one appropriate function of the insanity defense is the identification and exculpation of one whose capacity for free choice has been so diminished as to warrant a characterization of nonresponsibility with the consequent invocation of alternative social control mechanisms.

In light of these premises, it may be concluded that the insanity defense recognizes man's autonomy and dignity. When man's autonomy is so substantially impaired by mental abnormality that blame should no longer attach, then the requisite mens rea is negated along with the guilt of the actor. 80 In brief, sanity is a necessary condition to a determination of guilt.

VI. THE LAW OF INSANITY IN WISCONSIN

A. Its Evolution

The Wisconsin Supreme Court has been considering formulations of the legal standard of insanity since before the turn of this century. 81 Until 1966, these decisions generally adhered to the M'Naghten's Case 82 formulation. Under

precludes regarding individuals as responsible persons and invites, instead, treating them as irresponsible patients.


78. See supra text accompanying notes 35-39.

79. See Brady, supra note 41, at 650-51.

80. See supra notes 73-74 and accompanying text.

81. See, e.g., Butler v. State, 102 Wis. 364, 78 N.W. 590 (1899); State v. Wilner, 40 Wis. 304 (1876).

82. 8 Eng. Rep. 718, 722 (1843) in which the court stated:
[It must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong . . . . [That is,] whether the accused at the time of doing the act knew the difference between right and wrong.
M'Naghten, a defendant was relieved of liability if he did not understand the nature and quality of his act at the time he committed it, or was unable to distinguish right from wrong with respect to that act.\textsuperscript{83}

In 1966, the court announced a new standard in \textit{State v. Shoffner}.\textsuperscript{84} Under \textit{Shoffner}, a defendant who assumed the burden of proving his insanity by the greater weight of the evidence, a burden which otherwise rested on the prosecution, was entitled to a jury instruction based on the more liberal Model Penal Code formulation.\textsuperscript{85} However, a survey of cases demonstrates that the definition of insanity, which had been a complex and controversial dilemma since the earliest formulations, remained a problem in \textit{Shoffner}.

In 1899 the Wisconsin Supreme Court defined insanity in terms of both cognition and loss of will.\textsuperscript{86} In \textit{Butler v. State},\textsuperscript{87} the court approved an instruction requiring a finding of insanity if the defendant was incapable of distinguishing between right and wrong or was not conscious of the nature of his act.\textsuperscript{88} It was also applicable, “where, though conscious of it, and able to distinguish between right and wrong, and knowing that the act is wrong, [the defendant’s] will . . . has been otherwise than voluntarily so completely destroyed that his actions are not subject to it, but are be-

\begin{flushright}
\textsuperscript{83} Id.
\textsuperscript{84} 31 Wis. 2d 412, 143 N.W.2d 458 (1966).
\textsuperscript{85} Id. at 427, 143 N.W.2d at 465. The \textbf{MODEL PENAL CODE} § 4.01(1) (Proposed Official Draft 1962) provides: “A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law.”
\textsuperscript{86} See Butler v. State, 102 Wis. 364, 78 N.W. 590 (1899).
\textsuperscript{87} 102 Wis. 364, 78 N.W. 590 (1899).
\textsuperscript{88} Id. at 367, 78 N.W. at 591.
\end{flushright}
yond his control." This instruction was subsequently adopted in *Eckert v. State* and *Lowe v. State.*

In 1910, however, the court rejected the contention that legal insanity may exist when the defendant, although suffering a loss of will, remained capable of distinguishing between right and wrong. In *Oborn v. State,* the court explained that a definition which included the term "loss of will" had been allowed in *Butler* because it was not prejudicial to the defendant. In *Oborn* the court held that the correct rule was that a defendant was not relieved of liability if he had the ability to distinguish between right and wrong, and was conscious of the wrongfulness of the particular act. Thus, a refusal to instruct the jury on irresistible impulse was not error. After *Oborn,* the only condition relieving a defendant of criminal responsibility was the inability to distinguish right from wrong.

In *Jessner v. State* the "right-wrong" standard was strictly applied. Although the *Jessner* trial court instructed the jury that the defendant was legally insane if unable to understand the nature and quality of his act, the supreme court held that the "right-wrong" and "nature and quality" phrases must be interpreted as having the same meaning with a distinction resulting only in emphasis.

The first suggestion for change in the standard came in *State v. Carlson.* Some members of the court believed that the test should also include the inability to conform one’s

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89. *Id.*
90. 114 Wis. 160, 89 N.W. 826 (1902).
91. 118 Wis. 641, 96 N.W. 417 (1903).
93. 143 Wis. 249, 126 N.W. 737 (1910).
94. *Id.* at 269, 126 N.W. at 745.
95. *Id.* at 270, 126 N.W. at 746.
96. 202 Wis. 184, 231 N.W. at 634 (1930).
97. *Id.* at 196, 231 N.W. at 639. The *Oborn* rule was construed in a similar manner in *Simecek v. State,* 234 Wis. 439, 10 N.W.2d 161 (1943); *State v. Johnson,* 233 Wis. 668, 290 N.W. 159 (1940); *Oehler v. State,* 202 Wis. 530, 232 N.W. 866 (1930). In *Wilson v. State,* 273 Wis. 522, 528, 78 N.W.2d 917, 920 (1956), the court stated that since the legislature had not acted in the area, it would follow the same test. It should also be noted that a "product of mental disease" formulation was rejected as early as 1902 in *Eckert v. State,* 114 Wis. 160, 163, 89 N.W. 826, 827 (1902).
98. 5 Wis. 2d 595, 93 N.W.2d 354 (1958).
conduct to what one believes is right.\textsuperscript{99} However, since the question was not raised by the defendant, all justices agreed that it should not be decided in that case.\textsuperscript{100} Although the strict "right-wrong" test was upheld, the court held that its terms should not limit the admissibility of testimony.\textsuperscript{101} The court said that "[e]ven under the right-wrong test, no evidence should be excluded which reasonably tends to show the mental condition of the defendant at the time of the offense."\textsuperscript{102} Under the limited Carlson rule, M'Naghten no longer limited the admissibility of evidence on the issue of insanity.

Although the M'Naghten test was reaffirmed in 1960 in \textit{Kwosek v. State},\textsuperscript{103} its continued viability was questionable since three members of that court expressed a willingness to adopt the more liberal American Law Institute test.\textsuperscript{104} In a concurring opinion, Justice Hallows reasoned that since the criminal law rests upon the assumption that man has powers of free choice and self-control, the legal test of insanity must include a volitional element.\textsuperscript{105} Justice Currie later explained that since the Carlson rule allowed evidence relating to volitional capacity, a jury might nevertheless acquit a defendant on the basis of volitional impairment despite the M'Naghten instruction.\textsuperscript{106}

A change in Wisconsin's insanity definition became imminent after \textit{State v. Esser}.\textsuperscript{107} In Esser, the court concluded that it had the power to adopt new definitions of insanity in order to keep abreast of scientific developments.\textsuperscript{108} Upon reviewing existing definitions, the court decided to retain the M'Naghten definition, expressly restoring to it the "nature and quality" element eliminated in \textit{Oborn}.\textsuperscript{109} The decision rested on the premise that (1) the state still had the burden of

\textsuperscript{99. Id. at 607, 93 N.W.2d at 361.}
\textsuperscript{100. Id.}
\textsuperscript{101. Id.}
\textsuperscript{102. Id.}
\textsuperscript{103. 8 Wis. 2d 640, 100 N.W.2d 339 (1960).}
\textsuperscript{104. Currie, M'Naghten: Yes or No?, 1961 Wis. B. Bull. 36, Apr. 1961, at 41.}
\textsuperscript{105. Kwosek, 8 Wis. 2d at 654, 100 N.W.2d at 345-46 (Hallows, J., concurring).}
\textsuperscript{106. Currie, \textit{supra} note 104, at 40.}
\textsuperscript{107. 16 Wis. 2d 567, 115 N.W.2d 505 (1962).}
\textsuperscript{108. Id. at 583-84, 115 N.W.2d at 515.}
\textsuperscript{109. Id. at 597, 115 N.W.2d at 521.}
proving responsibility beyond a reasonable doubt; (2) Wisconsin has no death penalty; and (3) there is a need for treatment of the mentally ill.116

The Carlson rule was reaffirmed in Esser because the court believed that a jury could best perform its function when it had heard all qualified expert testimony, even if that information did not conform to the legal definition of insanity.111 The court recognized that it was probable that, "no general standard can be devised that will satisfactorily fit all cases."112 Dissenting in part, Justice Dieterich agreed that all probative evidence of the offender's mental condition at the time of the offense should be admitted.113 However, he criticized the majority for its failure to liberalize the M'Naghten standard to enable a jury to properly consider all of the evidence.114 Justice Dieterich thus advocated the addition of an "irresistible impulse" element.115

Two other justices, in separate partial dissents, favored adoption of a more comprehensive test. Justice Currie objected to M'Naghten's failure to recognize volitional incapacity as a form of legal insanity,116 a factor which Justice Hallows considered the most basic excuse from criminal liability.117

Between the Esser and Shoffner decisions, the court adhered to the Esser test on the grounds that it best served society's interest in deterrence.118 Circumstances warranting more drastic change had not yet been demonstrated to the court.119 However, in Shoffner, the court once again addressed the complex problem of the proper definition of the

110. Id. at 588-91, 115 N.W.2d at 516-18.
111. Id. at 593, 115 N.W.2d at 519.
112. Id.
113. Id. at 620, 115 N.W.2d at 533 (Dieterich, J., dissenting).
114. Id.
115. Id.
116. 16 Wis. 2d at 607-08, 115 N.W.2d at 526-27 (Currie, J., dissenting).
117. Justice Hallows wrote: "I believe that a test of criminal responsibility should include or be stated in terms of the free will of man because it is that concept of the nature of man upon which we have traditionally and morally placed responsibility and is in accord with current day medical science." 16 Wis. 2d at 612, 115 N.W.2d at 529 (Hallows, J., dissenting) (footnote omitted).
119. See State v. Kanzelberger, 28 Wis. 2d 652, 137 N.W.2d 419 (1965).
insanity defense,120 noting that "no solution is perfect, and each alternative can be legitimately subject to . . . criticism."121 The difficulty of solution was further exacerbated by the diversity of opinion among the members of the court.122 The result was the adoption of a new rule allowing the defendant to be tried under the more liberal American Law Institute test if he was willing to carry the burden of proof on the issue of insanity. This rule is now codified in Wisconsin Statutes section 971.15.123 This statute broadens the concept of criminal responsibility to include a volitional element; it requires the substantial capacity to conform conduct to the requirements of the law.124

B. Diminished Capacity in Wisconsin

"Who in the rainbow can draw the line where the violet tint ends and the orange tint begins? Distinctly, we see the difference of the colors, but where exactly does the one first blindingly enter into the other? So with sanity and insanity."125

The Wisconsin Supreme Court has consistently rejected the notion that mental conditions short of legal insanity have a bearing on the defendant's responsibility for his actions.126

120. See supra notes 84-85 and accompanying text.
121. Shoifner, 31 Wis. 2d at 419-20, 143 N.W.2d at 461.
122. In his majority opinion, Justice Fairchild, along with Justices Beilfuss, Hef fernand and Gordon, was of the opinion that the Esser test, with the burden of proof of sanity beyond a reasonable doubt upon the state, had not produced unjust results and is the only definition which the defendant is entitled to as a matter of right. Id. at 424-25, 143 N.W.2d at 463-64. He noted that Chief Justice Currie and Justices Hallows and Wilkie advocated overruling Esser and adopting the A.L.I. test, with no change in the burden of proof rule. Id. at 425, 143 N.W.2d at 464. Given this division in the court, Justice Fairchild was of the opinion that, as an experiment, a defendant should be given the option of assuming the burden of proof of insanity under a more liberal definition. Id.
123. See supra note 85 for text of statute.
124. See Note, supra note 5, at 633.
125. Robitscher & Haynes, supra note 27, at 27 (quoting H. MELVILLE BILLY BUDD (1948)).
126. Note, supra note 5, at 630. In Curl v. State, 40 Wis. 2d 474, 485-86, 162 N.W.2d 77, 83 (1968), one of the earlier cases in which a diminished capacity defense was attempted, the court stated:

It may well be that all criminal behavior connotes some degree of personality disorganization. It may well be that, far short of actual psychosis, the personality with a paranoid flavoring may have less room to maneuver in forming
Thus, Wisconsin has refused to recognize the broader "diminished capacity" or "diminished responsibility" defenses. Under these defenses all evidence regarding a defendant's mental state is admissible if relevant to his capacity to form the requisite intent. Additionally, underlying these defenses is a belief that in some cases evidence of mental impairment, short of legal insanity should, in the interest of fairness, be considered in order to reduce the defendant's penalty although not sufficient to justify complete acquittal.

Commentators who favor this doctrine argue that the law should consider mental impairments inconsistent with the intent or resisting impulses to engage in criminal or anti-social acts. Personality disturbances or emotional disorders that fall short of insanity are not required areas of court inquiry.

See also Muench v. State, 60 Wis. 2d 386, 210 N.W.2d 716 (1973) (a defense of incapacity to form the necessary intent as a result of mental disease or deficiency must be pursued in a bifurcated trial through a plea of not guilty by reason of insanity); Sprague v. State, 52 Wis. 2d 89, 187 N.W.2d 784 (1971) (evidence of an epileptic seizure at the time of commission of the offense is inadmissible in guilt portion of a bifurcated trial); State v. Anderson, 51 Wis. 2d 557, 187 N.W.2d 335 (1971) (testimony regarding the defendant's mental condition is inadmissible on the question of intent); State v. Hebard, 50 Wis. 2d 408, 184 N.W.2d 156 (1971) (a defendant can escape liability through a successful plea of insanity, but not by pleading impairment of capacity to intend).

Arenella, supra note 5, at 828-29, describes two models of the defense:

In the mens rea model, the jury is asked to consider whether a sane defendant's mental abnormality at the time of the crime prevented him from ente

(2) The second model [the formal litigation model] permits the jury to mitigate the punishment of a mentally disabled but sane offender in any case where the jury believes that the defendant is less culpable than his normal counterpart who commits the same criminal act.

See Note, supra note 5, at 627. See also Arenella, supra note 5, at 828. The causes of such mental impairment could include "drug and alcohol intoxication, 'heat of passion', frenzy, anger, rage, old age infirmity, young age and immaturity, fatigue, premenstrual tension, personality disorders, intellectual limitations, mental retardation, neurosis, and psychosis." Fosdal, Diminished Capacity, Intent and Psychiatric Testimony, 52 Wis. B. Bull., Apr. 1979, at 20. In Dr. Fosdal's opinion a larger number of defendants could avail themselves of this defense since only a minority are mentally ill while a larger number evidence some degree of diminished capacity.
particular states of mind required for a finding of guilt.129 In Wisconsin, however, a distinction is maintained between the inability to form a specific intent and legal insanity.130 In State v. Hebard,131 the court held that "a finding of inability to intend . . . is rather a finding that under the applicable standard or test, the defendant is to be excused from criminal responsibility for his acts."132 Thus, in Wisconsin evidence of mental impairment is inadmissible on the issue of intent.133 The Wisconsin court has declared that psychiatric testimony is neither relevant nor competent on that issue.134 In addition, the court has excluded such evidence from the guilt phase of an insanity trial in order to preserve Wisconsin's bifurcated procedure since such evidence would have to be repeated in the second stage in order to determine the insanity issue.135


The recognized advantages of the diminished capacity defense are that it provides (1) a more consistent approach to the relationship between insanity and criminal responsibility; and (2) a means of avoiding unfair treatment of offenders falling on different points on the continuum. The obvious disadvantage is the resultant need to make fine distinctions between mental conditions in pinpointing a particular defendant's level of responsibility. Nonetheless, many argue that the doctrine may be useful if understood and used correctly.

130. See Note, supra note 5, at 630.
131. 50 Wis. 2d 408, 184 N.W.2d 156 (1971).
132. Id. at 420, 184 N.W.2d at 163 (footnote omitted).
133. Steele v. State, 97 Wis. 2d 72, 294 N.W.2d 2 (1980).
134. See id. at 97, 294 N.W.2d at 13.

For Wisconsin cases holding that psychiatric testimony regarding the defendant's mental condition is admissible only in the guilt phase of a bifurcated trial, see supra note 126. Wisconsin's exclusionary rule was challenged in Hughes v. Matthews, 576 F.2d 1250 (7th Cir.), cert. dismissed, 439 U.S. 801 (1978), and the Seventh Circuit held that exclusion of evidence relating to incapacity to intend in a single stage trial is constitutionally impermissible. In Schimmel v. State, 84 Wis. 2d 287, 302, 267 N.W.2d 271, 278 (1978), the Wisconsin Supreme Court extended Hughes to allow admission of such evidence in the guilt stage of a bifurcated trial. In Steele v. State, 97 Wis. 2d 72, 85, 294 N.W.2d 2, 7-8 (1980), however, the court reversed this holding and concluded that there is a sufficient state justification for exclusion of such evidence in the guilt phase of a bifurcated trial.

135. See Hebard, 50 Wis. 2d at 421-22, 184 N.W.2d at 163-64; Note, supra note 5, at 633-34. See also Note, supra note 127, at 781-83.
C. Bifurcation

Wisconsin's present bifurcation statute was adopted in 1970 in response to *State ex rel. LaFollette v. Raskin*. Raskin reestablished bifurcation in Wisconsin. In 1878, a statute was enacted which provided for a trial on the insanity issue prior to the trial on the issue of guilt. In *Bennett v. State* the Wisconsin Supreme Court upheld the constitutionality of this statute. Additionally, the court commended the procedure as "the most practical and convenient method of disposing of the whole case," because when insanity was found, guilt was no longer an issue.

In 1911, however, the legislature amended the statute to repeal bifurcation. Thus, until 1967 the issues of guilt and insanity were tried together. Raskin changed this. In Raskin, a defendant subjected to a compulsory mental examination made inculpatory remarks to the examiner. The court held that he was entitled to "ask for a sequential order of proof on the issues of guilt and insanity in order to assure himself of his constitutional rights of a fair trial." Raskin was codified in section 971.175 of the Wisconsin Statutes.

D. The Present Statutory Scheme

As indicated, the Wisconsin Statutes require that the

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136. 34 Wis. 2d 607, 150 N.W.2d 318 (1967). *Wis. Stat.* § 971.175 (1981-82) 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.


138. 57 Wis. 69, 14 N.W. 912 (1883).

139. *Id.* at 78, 14 N.W. at 916.


141. *Raskin*, 34 Wis. 2d at 627, 150 N.W.2d 318, 328 (1967). The court wished to preserve Wisconsin's compulsory mental examination statute without depriving the defendant of his constitutional protection against self-incrimination. *See Note, supra* note 5, at 635. *See also* *Wis. Stat.* § 971.16 (1981-82).

142. *See supra* text accompanying notes 136-41; *see also* *State ex rel. LaFollette v. Raskin*, 34 Wis. 2d 607, 626, 150 N.W.2d 318, 328 (1967); *Bennett v. State*, 57 Wis. 69, 14 N.W. 912 (1883).
issues of "guilt" and "responsibility" be heard separately when a plea of "not guilty" is joined with one of "not guilty by reason of mental disease or defect."143 This is done through a sequential order of proof before the same jury in a continuous trial.144 In the first stage, the issue is "guilt."145 The question is whether the defendant committed all of the elements as charged. The presence of mental abnormality is irrelevant and such evidence is inadmissible in this phase.146 The burden of proof is on the state to prove all elements of the offense beyond a reasonable doubt.147

If the jury finds against the defendant in the first stage, the second stage determines whether the defendant should be relieved of responsibility for the criminal act because he suffered from a mental disease or defect at the time of the offense.148 Here, the defendant carries the burden of proof. He must establish the absence of responsibility (insanity) to a reasonable certainty by the greater weight of the credible evidence.149 If the defendant successfully asserts the mental disease or defect defense, a judgment of acquittal is entered and a third stage is necessary.150

In State ex rel. Kovach v. Schubert,151 the Wisconsin Supreme Court mandated the third phase in order to determine whether a defendant found not guilty by reason of insanity is "presently suffering from mental disease and is in need of institutionalized treatment."152 Under Schubert the standard for institutionalization is whether the defendant is "a danger to himself or to others."153 The state bears the burden of proving the need for institutionalized care.154

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144. Id.
145. Id.
146. See Steele v. State, 97 Wis. 2d 72, 294 N.W.2d 2 (1980).
149. Id. § 971.15(3).
150. Id. § 971.175.
151. 64 Wis. 2d 612, 219 N.W.2d 341 (1974).
152. Id. at 622, 219 N.W.2d at 351.
153. Id. at 620, 219 N.W.2d at 346; see also State v. Gebarski, 90 Wis. 2d 754, 762, 280 N.W.2d 672, 675 (1979). Wis. Stat. § 971.17(2) (1981-82).
154. Schubert, 64 Wis. 2d at 622, 219 N.W.2d at 346. A jury which found that an accused has committed the offense would hardly be likely to find that there was no
E. Proposed Changes in Wisconsin

Revision of this scheme is under consideration in the Wisconsin Legislature.155 A bill currently pending would retain the bifurcation procedure.156 It would, however, replace the "guilt" stage with an "all elements proven" verdict157 and change the second stage "not guilty by reason of mental disease or defect" to "not responsible by reason of mental disease or defect."158

Consider though, the issues raised by this proposed change. It would retain the bifurcated trial159 in which the defendant combines a plea of "not guilty" with a plea of "not guilty by reason of insanity,"160 despite the fact that that procedure has been discredited if not abandoned in other jurisdictions.161 It ignores the rejection of bifurcation need for institutionalization. It is probable that the "not guilty by reason of mental disease or defect" verdict was arrived at with institutionalization specifically in mind.

155. In September 1979, the Wisconsin Judicial Council established the Insanity Defense Committee to study the problems associated with the criminal trials of mentally ill persons and recommend such changes in the statutes as might be deemed necessary. The committee's recommendations, contained in Wis. A.B. 765 (1981), were approved by the Judicial Council.


157. "All elements proven" is a euphemism for "guilty" and is subject to the same criticisms. There can be no "guilty without responsibility" and, the two issues are in fact inseparable. By the same token, the "elements" which are said to be "proven" in the proposed first stage necessarily and properly should embrace the question of the "substantial capacity of the defendant either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." See supra text accompanying notes 63-74. It should be remembered that the use of the term "delinquency" was intended to avoid the harmful implication of criminality. It has not worked out that way.

158. See supra text accompanying notes 72-74 (reasons for reluctantly accepting this formulation).


160. See supra text accompanying notes 142-50.

161. See Gallivan, supra note 4, for an excellent review of bifurcation schemes in other jurisdictions.
by Task Force Three of The Criminal Justice Mental Health Standards Project. Why would bifurcation be retained in Wisconsin when it is being rejected elsewhere?

Essentially, the fifth amendment privilege against self-incrimination is central to Wisconsin's attachment to bifurcation. The Wisconsin Supreme Court has indicated that, in light of the compulsory mental examination, the admission of inculpatory statements the defendant made at such examinations when guilt was still at issue would violate the self-incrimination ban. Thus the bifurcation procedure which separates the "guilt" and the "responsibility" determinations, apparently resolves the dilemma to the satisfaction of the court and the legislature. At the guilt stage the product of the compulsory examination is inadmissible while at the responsibility phase an inculpatory statement is admissible because it is free from constitutional taint. Banning the use, directly or indirectly, of any inculpatory product of a defendant's examination in a unitary trial would appear to be a better solution.

Additionally, it is argued that bifurcation reduces prejudice, minimizes juror confusion and results in an orderly presentation of the case. However, despite the benefits claimed, bifurcation is conceptually unsound and inherently unfair. It improperly assumes that the responsi-
bility and mens rea issues can be determined separately. Further, excluding all evidence of mental abnormality from the first stage of the trial has the effect of creating an irrebuttable presumption of intent.

As to the former, bifurcation must stand or fall conceptually on the question of whether responsibility and guilt or its functional equivalent, "all elements proven," are separable and may be independently resolved. This question turns on the meaning of mens rea. If mens rea, an essential element of crime, contains even a trace of "blameworthiness" or "culpability," then the question of responsibility cannot be divorced from its determination. Bifurcation proponents then must intend mens rea to be used in its special sense, similar to the way in which the Model Penal Code deals with the mental element of crime. Note, however, that the states of mind identified by the American Law Institute are characterized as "culpable" states of mind and the Code provides for admission of evidence of mental abnormality to rebut the existence of the states of mind and the responsibility element inherent therein. It would appear that even limiting mens rea to its special sense would not

169. See supra text accompanying notes 60-74. See also G. Morris, THE INSANITY DEFENSE: A BLUEPRINT FOR REFORM 45 (1975) ("The American Bar Foundation charges that by separating the issues of guilt and sanity the [California] Commission assumed it was possible to separate criminal intent from sanity and to determine whether the defendant committed a criminal act without examining his intent. Both assumptions are suspect." (Footnotes omitted.)). In Louisell & Hazard, Insanity as a Defense: The Bifurcated Trial, 49 CALIF. L. REV. 805, 829-30 (1961), the authors state:

The separate trial procedure was based on an inaccurate premise of law. It assumed that the issue of guilt and the issue of mental condition are separable.

We submit that reason shows they are not separable, and that experience confirms this conclusion. We therefore believe that the separate trial procedure should be abolished.

(footnotes omitted.)

170. See infra text accompanying notes 181-84.

171. See supra text accompanying notes 45-64.

172. See Comment, supra note 2. The author proposes the following syllogism: "[S]ince blameworthiness is essential for crime and expressed in the concept of mens rea, and since the insanity tests define those who cannot be blameworthy, then the legally insane cannot entertain mens rea and cannot commit crimes." Id. at 507 (footnote omitted). The author then wrongly rejects the syllogism.

173. See supra text accompanying notes 45-64.

174. See supra notes 53-54 and accompanying text.

175. See supra note 54.
permit elimination of the question of responsibility from the first or "element" stage.\textsuperscript{176}

The only possible definition of the mental element which is compatible with bifurcation is what Professor Morris has labelled "insane intent."\textsuperscript{177} Professor Monahan responds:

Morris speaks of "insane mens rea." The connotations of this hybrid term, however, are internally contradictory: mens rea is part of a nomological net including the concepts "free will," "choice," and "responsibility," while "insanity" connotes "lack of free will," "inability to choose," and "irresponsibility." The term "insane mens rea" is born of a paradigm clash; it simply cannot withstand judicial scrutiny.\textsuperscript{178}

One can only "intend," in the mens rea sense, if one possesses the capacity to choose a course of action and to substantially understand the nature of this choice.\textsuperscript{179} Necessarily, the question of responsibility is inherent in whether or not there was intent. Bifurcation is conceptually incompatible with this position. In short, an "insane intent" is not a properly cognizable element of crime.\textsuperscript{180}

\textsuperscript{176} This article has previously characterized an "all elements proven" verdict as a euphemism for "guilty." \textit{See supra} note 157.

\textsuperscript{177} Morris, \textit{supra} note 55, at 520-21. Morris states:

\begin{quote}
In a few cases moral non-responsibility is so clear that it would be purposeless to invoke the criminal process. Accident, in its purest and least subconscious, accident-prone form, is a situation where there is little utility in invoking the criminal process. The same is true where a person did not know what he was doing at the time of the alleged crime. But in these situations there is no need for the \textit{M'Naghten} or \textit{Durham} rules, because they clearly fall within general criminal law exculpatory rules. The actor simply lacks the mens rea of the crime. It thus seems to me that, within the area of criminal responsibility and psychological disturbance, all that we need is already achieved with existing, long-established rules of intent and crime; I would allow either sane or insane mens rea to suffice for guilt.
\end{quote}

\textit{See also} State v. Hebard, 50 Wis. 2d 408, 184 N.W.2d 156 (1971).

\textsuperscript{178} Monahan, \textit{supra} note 17, at 728-29.

\textsuperscript{179} Only a "responsible" agent can possess the requisite "intent" for his actions to fall within the definition of a crime.

\textsuperscript{180} In the first stage of the bifurcated trial, will the finder of fact, having once found the existence of "intent" in the G. Morris sense, \textit{supra} note 177 and accompanying text, be willing or be able to dispassionately examine the question of the defendant's responsibility in the second stage? Or is the defendant, who must bear the burden of persuasion on the responsibility issue in the Wisconsin scheme, playing into a stacked deck?
Bifurcation is also objectionable because it is unfair to the defendant. When defining a crime, the mental element is invariably a subjective one. The prosecutor must rely on objective evidence to create a common sense inference as to what an ordinary person in the defendant's circumstance would have "intended." The practical effect is to shift the burden to the defendant. It forces him to show that he did not in fact possess the state of mind an ordinary person would have possessed. By denying the defendant the opportunity to make such a showing through presentation of relevant expert testimony, the common-sense inference becomes almost irrebuttable. The disadvantage thus imposed upon the defendant may explain the holding of the Seventh Circuit Court of Appeals in Hughes v. Matthews, as well as the reaction of the California Supreme Court in opening the first stage of the bifurcated trial to such testimony.

It seems anomalous that in Wisconsin a defendant may introduce evidence of voluntary intoxication to disprove a requisite mental element, but is forbidden the use of expert testimony to show mental abnormality for a similar purpose. The first stage of the bifurcated trial which considers "guilt" is, by its own definition, deficient because there can be no "guilt" without considering the responsibility or blameworthiness of the defendant, an issue only considered in the second stage of the bifurcation scheme. Bifurcation lacks fairness and is conceptually untenable. In Wisconsin there seems to be an overriding concern with the difficult problem of self-incrimination, to the point of arbitrarily, illogically and unfairly disregarding the nature and meaning of "guilt" and "responsibility."

Finally, the unfairness of submitting the question of the defendant's responsibility in the second stage of the trial to


the same jury which has just found that the defendant committed the crime is self-evident. A jury which has been exposed in the first stage to evidence of the defendant’s involvement in criminal activity and has determined that the accused committed the offense, without hearing the defendant’s evidence of lack of cognitive or volitional capacity, cannot even-handedly consider the defendant’s claim of nonresponsibility in the second stage. The jury has already passed judgment and a strong predisposition to punish would already exist which, when combined with the burden of persuasion placed upon the defendant in the second stage, egregiously stacks the deck against the defendant on the claim of nonresponsibility.

VI. Conclusion

Two themes emerge from what has been considered: the need to reduce the confusion which plagues discussion of insanity defenses, and the deficiencies in the effort to deal narrowly, perhaps myopically, with insanity defense and self-incrimination problems through bifurcation.

To reduce the confusion it is necessary to determine what is meant when the term “mens rea” is used. Sanford Kadish has advanced a workable resolution. Mens rea in its general sense pertains to insanity and responsibility, and in its special sense pertains to the mental states requisite to defining crime. Also, it is necessary to cling to the bedrock principle that there is no guilt without responsibility. Efforts to separate the two, as bifurcation attempts to do, inevitably must fail.

The Criminal Justice Mental Health Standards Task Force has recommended that “the defense of mental disability and all other evidence pertaining to defendant’s responsibility should be heard in a single trial by a single jury.” Bifurcation is flatly rejected. Considering this recommendation, the rejection elsewhere, and the arguments presented above, a unitary trial, despite its shortcomings, is the only fair and conceptually sound method of dealing with the assertion of the insanity defense.

185. See supra notes 57-63 and accompanying text.
186. See supra note 162 and accompanying text.