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Robinson-Patman Act: Interpretation of "Like Grade and Quality"

Joan Kessler

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RECENT DECISIONS

Robinson-Patman Act: Interpretation of "Like Grade and Quality"—In *Federal Trade Commission v. The Borden Company*,[1] the United States Supreme Court held that physically and chemically identical goods packaged and sold by the same manufacturer are within the scope of Section 2(a) of the Robinson-Patman Act,[2] which prohibits discriminatory price differentials between purchases of commodities of "like grade and quality," even though the goods bear different brand names.

The respondent packaged and sold evaporated milk under its Borden label and under various private labels owned by its customers.[3] Both the Borden brand and the private brand milks were physically and chemically identical, but the private brand milk was sold on both wholesale and retail levels at prices substantially below those commanded by the nationally advertised Borden label.[4] The Federal Trade Commission found both the Borden and private label milks to be of "like grade and quality" and the price differential to be discriminatory within the provisions of Section 2 (a).[5]

The respondent's contention, adopted by the Court of Appeals[6] in setting aside the Commission's order, was that a demonstrated consumer preference for one brand over another was as critical in a determination of "like grade and quality" as are the physical properties of goods. "Consideration should be given to all commercially significant distinctions which affect market value, whether they be physical or promotional."[7] The respondent was careful to interject that brand differences

[1] 383 U.S. 637 (1966).
[2] 49 Stat. 1526 (1936), 15 U.S.C. §13(a) (1964).
[3] Some economists refer to this marketing practice as "dual branding." Mueller, *Processor v. Distributor in Food Distribution*, reprinted in BAUM, THE ROBINSON-PATMAN ACT, SUMMARY AND COMMENT (1964).
[4] Borden Company, FTC Drt. 7129, Trade Reg. Rep. 16, 191 (1962). In some cases, preferred customers enjoyed a price differential of as high as 20 to 25 per cent.
[5] Section 2(a) provides in part:

> It shall be unlawful for any person engaged in commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which said commodities are to such purchasers sold or delivered.

[6] Borden Co. v. FTC, 339 F.2d 133 (5th Cir. 1964).
[7] *Id.* at 137.

alone do not cause identical commodities to be of unlike grade. A decided consumer preference for one of the brands must also exist, manifested by a willingness to pay more for the premium brand.[8] The United States Supreme Court's rejection of this argument, although doing little to clarify the precise meaning of the "like grade and quality" phrase, has vindicated the established view of the Commission that only physical properties are to be considered in a determination of the grade and quality of identical products, and that labels alone do not differentiate products for the purpose of this determination. This is true even though one label has been accepted by a vast segment of the buying public so as to be capable of commanding a higher price in the marketplace.[9] In every case, a determination of whether the commodities are of "like grade and quality" is a threshold finding essential to the applicability of Section 2(a).[10] It should be noted, however, that the test of "like grade and quality" within the meaning of the section is relevant only to compare two or more products sold by one seller to several buyers, and not to compare the products of competitors.[11] The prohibited practice is that of granting price differentials to only a few select customers, which in turn would permit them to drive prices down without a loss of profit. An interpretation of the proper *test* of "like grade and quality" formed the heart of the present decision. The test advanced by the respondent is the "market acceptability" or economic test, and that advanced by the Commission is the physical test, which represents the majority position among the commentators.[12] The tests are similar in that each requires an initial comparison of the physical characteristics of the goods, since a finding of dissimilarity would immediately terminate further inquiry into the question of an alleged price discrimination. The significant difference between the tests is in their determination of the basis by which the goods of one seller are to be distinguished from those of another in the light of their theoretical impact upon commerce.

According to the Commission and other advocates of the physical test, the statutory requirements have been met wherever the goods in

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[8] The situation referred to has been termed "product differentiation" and has been defined as "any situation which induces a buyer to be willing to pay more for a product bought from one seller rather than from another, or as any consideration that causes one dealer to be preferred to another as a seller of goods even though the price is the same with both sellers." MYERS, ELEMENTS OF MODERN ECONOMICS. 57, 59 (4th ed. 1956).

[9] See WHITAKER CABLE CORP., 51 F.T.C. 958 (1955); Page Dairy Co., 50 F.T.C. 395 (1953); United States Rubber Co., 46 F.T.C. 998 (1950); United States Rubber Co., 28 F.T.C. 1489 (1939); Hausen Inoculator Co., 26 F.T.C. 303 (1938); Goodyear Tire and Rubber Co., 22 F.T.C. 232 (1936).

[10] 383 U.S. 637, 639 (1966).

[11] *E.g.*, E. B. Muller & Co. v. Federal Trade Commission, 142 F.2d 511, (6th Cir. 1944); *cf.*, McWhiter v. Monroe Calculating Machine Co., 767 F.Supp. 456 (W.D. Mo. 1948).

[12] A list of the Commentators is compiled by the Court in the subject case.

question have been found to be physically identical. Thereafter the onus is upon the manufacturer to prove that any differences in price between the brand names are cost justified, or defensible as a good faith effort to meet the price of a competitor.

The proponents of the market acceptability test urge, on the other hand, that the Commission's myopic resolution not only ignores a fundamental reality of the marketplace, but actually endangers effective competition. The argument is that intangible factors such as advertising effectiveness, promotional gimmicks, reputation and even color or design of the package play a substantial role in determining consumer buying patterns, and that they are an actual part of the consumer's purchase. The unknown brand, which through its very obscurity lacks favorable consumer recognition, must necessarily be sold at prices which are sufficiently low so as to overcome, in some measure, the advantages enjoyed by the nationally advertised brands. But the Robinson-Patman Act, coupled with an interpretation of product identity based solely on physical differences, would bar a manufacturer or a distributor from selling his secondary brands for less than is strictly justified from "differences in the cost of manufacture, sale, or delivery" of the goods.[13]

Since the manufacturer may be doing little more than pasting a new label on his familiar product, he has hardly any cost differential to look to, and certainly not one large enough to allow him to list the goods at prices to attract prospective buyers.[14] Thus, the argument continues, a new commodity has been prevented from entry into the competitive marketplace, and the public denied access to an inexpensive, yet high grade, product. The solution to the dilemma would be to permit an inquiry into the consumer's preferences. If the consumer is unwilling to buy an unfamiliar product at prices similar to that of the premium brand, he has determined, at least in his own mind, that the products are dissimilar. Whatever his reasoning, however irrational, the fact is that he will not buy.[15]

The validity of this argument is, of course, not the decisive factor. No matter how accurately it may reflect the realities of the marketplace, the precise question is whether or not the test of consumer acceptance

[13] See note 5 *supra.*

[14] Not to be overlooked, however, is the possibility of actual cost differences attributable to the expenses of quality control and advertising. For example, Borden attempted to show that the large sums expended solely on the Borden labeled milk to ensure high quality while the milk was on its customer shelves had resulted in real differences between the brands. The Court noted that "if Borden could prove the difference it is unlikely that the case would be here." 383 U.S. 637, 642 (1966). The commission has allowed cost differences resulting from advertising and promotion expenses when the cost can be directly attributable "to any particular customer, to any particular product or line of products or to any particular class, discount or otherwise of customers." C. E. Niehoff & Co., 51 F.T.C. 1114, 1137 (1955).

[15] See CHAMBERLAIN, THE THEORY OF MONOPOLISTIC COMPETITION (8th Ed. 1962); Brown, *Advertising and the Public Interest: Legal Protection of Trade Symbols,* 57 Yale L.J. 1165 (1948).

was intended by Congress to be included in the concept of "like grade and quality," in view of the wording and policy of the Act.

The Robinson-Patman Act, as an amendment to the Clayton Act,[16] was an extension of the desire of Congress to end the "common practice of great and powerful combinations engaged in commerce" of slashing prices in certain localities with the intent of destroying competition.[17] From the environs of Congressional emotionalism[18] came an act aimed at bolstering the antitrust laws by placing purchasers on equal footing and ensuring that price differences would be reasonably related to cost differences.[19]

When traveling beyond generalities, one is struck by an astonishing scarcity of evidence as to what congress meant by the "like grade and quality" phrase.[20] Two considerations, at least, suggest the intended meaning. First, the wording in the Clayton Act, relative to the requisite degree of product similarity, was in fact altered by the Robinson-Patman amendment. Section 2 of the original Clayton Act denounced price discrimination which threatened "to substantially lessen competition or tend toward monopoly in any line of commerce," but afforded the defense that the discount was granted "on account of differences in grade, quality, *or* quantity of the commodity sold." In the amended version, on the other hand, the like grade or quality defense was transformed into the affirmative element of "like grade *and* quality." Thus likeness in grade and quality became a determinant of when the Act applies, with Section 2(a) relegating the immunity of quantity discounts to a defense applicable only when justified by cost. To determine whether or not the amended phrase incorporated the concept of consumer acceptance necessitates passing to the second consideration. As the amendment passed through the legislative process, attempts were made to alter the phrase so as to include goods of like "design"[21] in one instance, and in another, goods of like grade, quality and "brand."[22] Both attempts were attacked as subtle devices to emasculate the Act. The Court, in the present case, noted the latter proposal, and particularly its denunciation by the bill's draftsman, Mr. Teegarden, who stated:

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[16] 38 Stat. 730 (1914).
[17] H.R. Rep. No. 627, 63d Cong., 2d Sess. 8 (1914).
[18] For an interesting collection of "congressional demagoguery verging on hysterical" see Rowe, *Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act,* 66 Yale L.J. 1 (1956).
[19] Goodyear Tire and Rubber Co., 22 F.T.C. 232, 330 (1936).
[20] For suggested interpretations of "like grade and quality" and associated materials see, Rowe, *Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act,* 66 Yale L.J. 1 (1956); Cassady and Grether, *The Proper Interpretation of "Like Grade and Quality" Within the Meaning of Section 2(a) of the Robinson-Patman Act,,* 30 So. Cal. L.R. 241 (1957).
[21] 80 Cong. Rec. 82 34-34 (1936).
[22] Hearings on H.R. 4995 before the House Committee on the Judiciary, 74th Cong. 2d Sess., p. 421.

> To amend the bill by inserting "and brands" . . . is a specious suggestion that would destroy entirely the efficacy of the bill against large buyers . . . [and] would impose no limitation whatever upon price differentials except as between different purchasers of the same brand . . . [but] would leave every manufacturer free to put up his standard goods under a private brand for a particular purchaser and give him any price discount or discrimination that he might demand.[23]

Although the Teegarden statement hardly amounts to a Congressional mandate, it was sufficient to permit the Court to speculate:

> We doubt that Congress intended to foreclose these inquiries [into alleged discriminations] in situations where a single seller markets the identical product under several different brands, whether his own, his customers or both.[24]

Notwithstanding this expression of doubt, it is suggested that the ambiguity in the Act's history and expression[25] is such as would have left the Court relatively unhampered by legislative commitment and free to interject into the law either the economic or physical test.[26]

The Court bolstered its position by using an economic argument of its own, which dealt primarily with the ease of circumvention of the statute if a contrary holding were reached. To escape the Act, a seller would only need

> . . . to succeed in selling some unspecified amount of each product to some unspecified portion of his customers, however large or small the price differential might be. The seller's pricing and branding policy being successful would apparently validate itself by creating a difference in "grade" and thus taking itself beyond the purview of the Act.[27]

An obvious inconsistency would also result. Suppose, for example, that a wholesaler purchased a quantity of milk from Borden, and packaged it under two different, private labels. Through the wholesaler's effort in advertisement and promotions, one label might gain greater consumer appeal than the other. Applying the market acceptability test to this situation, the result is that the milk is no longer of like grade and quality in the hands of the wholesaler, even though it was of like grade and quality when purchased from Borden. "Such an approach would obviously focus not on consumer preference as determinative of grade

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[23] Hearings on H.R. 4995 before the House Committee on the Judiciary, 75th Cong., 1st Sess., p. 9.

[24] 383 U.S. 637, 642 (1966).

[25] "Precision of expression is not an outstanding characteristic of the Robinson-Patman Act." Automatic Canteen Co. v. FTC, 346 U.S. 61, 65 (1953).

[26] Mr. Justice Stewart, writing for the minority noted: "The spare legislative history of the Robinson-Patman Act is in no way inconsistent with a construction of §2(a) that includes market acceptance in the test of like grade and quality." 383 U.S. 647 (1966).

[27] *Id.* at 642.

and quality but on who spent the advertising money that created the preference. . . ."[28]

If successful, the seller could discriminate at will, placing favored retailers at a competitive advantage, for only the favored retailer could offer the wide selection of goods at the variety of prices which would attract a greater number of consumers. Perhaps a greater economic hardship, though not discussed by the Court, would befall the small independent distributor.

> A competitive problem may arise if one or more large firms are engaged in dual branding and are in competition with firms selling only distributor brands. On this structural setting, the dual-brand seller which has a strong branded product is in a position to "spoil" the distributor-brand market by selling some products in this market at very low prices, while continuing to sell products under its differentiated product at higher prices. This, of course, establishes a cost price squeeze on the distributor-brand seller and may force him out of business. In this market setting, although the smaller firm may be an efficient producer of distributor-label products, he pursues a perilous existence in competing with his larger dual-brand rivals.[29]

The Court's decision goes no further than to hold that in Section 2 (a) cases, the test of "like grade and quality" is to be based solely on a physical comparison of the goods, without consideration of the "economic factors inherent in brand names and national advertising."[30] Manufacturers may continue to package and sell private brand goods which are identical to their premium product and sell them at a lower price, providing that the price differential is not discriminatory within the meaning of the Act, or under the defenses of cost justification and good faith meeting of competition under Sections 2 (a) and 2 (b).

A determination of consumer preference, however, has not been obliterated from the Act. Although inapplicable to the "like grade and quality" test when the goods are identical, it is applicable to the defenses within the Act. "[T]angible consumer preferences as between branded and unbranded commodities should receive due legal recognition in the more flexible 'injury' and 'cost justification' provisions of the statute."[31] Furthermore, the Federal Trade Commission has employed the market acceptability test in situations where the goods are not chemically identical. In one situation, the commission has used consumer preference to resolve the issue of "like grade and quality" in cases where minor physical differences in the products accompanied brand differences.[32]

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[28] *Ibid.*
[29] See note 3 at 148.
[30] See note 1 at 1098.
[31] *Ibid.*
[32] Universal-Rundle Corp., CCH Trade Reg. Rep. Transfer Binder 16948 (FTC Drt. 8070, June 12, 1964); Quaker Oats Co., CCH Trade Reg. Rep. Transfer Binder 17134, (FTC Drt. 8112, Nov. 18, 1964).

In other instances, the commission has resorted to consumer preferences to determine whether or not a seller met competition in good faith under Section 2 (b) when he reduced the price of his premium product to that of a non-premium competitor.[33] The majority of the Court in its decision ignored the former situation and avoided the latter, leaving the law in question in these areas.

A careful reading of the case reveals a conspicuous absence of two factors vital to a clear understanding of the meaning of "like grade and quality." First, although the physical test has been selected, no definition of the test was presented. Obviously, comparison of physical characteristics is involved. The questions are: (1) Which characteristics are critical to the determination; and (2) By what means can the differences be measured? Some characteristics may be non-functional, for example, the color of spark plugs, and hence not play a significant part in the determination. Other characteristics may be functional but their particular role may be difficult to determine. Thus, in *Champion Spark Plug Co.*,[34] spark plugs differing only in the design of the insulators and "ribs" were held to be not of "like grade and quality." The effect which the alteration had upon the performance of the spark plugs was not discussed.

Second, guide lines or limits were not established within which a determination could be made of how dissimilar goods may be, and yet be found of "like grade and quality." In *American Can Co. v. Bruce's Juices, Inc.*,[35] different sized (2/16 of an inch) tin cans were held to be of "like grade and quality" because "nominal physical differences in appearance of some items not affecting their functional utility may not except differentials from the act."[36]

The reasons for the Supreme Court's unwillingness to enter into these issues, at present, are apparent. In the first place, the fact situation in *Borden* (identical goods) did not demand the construction of either definition or guidelines. By definition, identical goods must be of "like grade and quality." If a consumer preference has been manifested, it must be founded upon illusion or fancy, for nothing about the taste, smell or nourishing qualities of the milk justifies that preference. In the second place, the words "like grade and quality" nearly defy clear-cut definition. No tribunal has satisfactorily explained them. The concepts of grade and quality flow together like quicksilver.[37] Though

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[33] See Callaway Mills Co., CCH Trade Reg. Rep. Transfer Binder 1963-1965, 16, 800: Anheuser-Busch, Inc., 54 F.T.C. 277 (1957).
[34] Champion Spark Plug Co., 50 F.T.C. 30 (1953).
[35] 87 F. Supp. 985 (S.D. Fla. 1949) aff'd 187 F.2d 919 (5th Cir. 1951). Compare E. Edelman & Co., 51 F.T.C. 978 (1955).
[36] 87 F. Supp. 985, 987 (1949).
[37] For a valiant attempt at definition, see Cassidy and Grether, *The Proper Interpretation of "Like Grade and Quality" Within the Meaning of Section 2(a) of the Robinson-Patman Act*, 30 So. Cal. L. Rev. 241, 252-256 (1957).

such phrases as "functional utility" are employed, as in *Brice's Juices, supra,* they have little practical application and engender confusion.[38] The Borden case marks the first time that the Supreme Court has had the opportunity to interpret the "like grade and quality" phrase. Prudence dictates a firm foundation upon which to construct a meaningful interpretation of the phrase, one devoted strictly to the issue at hand, stripped of inconsequential dicta. The Borden decision clearly establishes that foundation.

ANTHONY KARPOWITZ

Criminal Law: A New Approach to the Defense of Insanity: State v. Shoffner: Alexander William Shoffner was charged with burglary, arson and armed robbery. The jury rejected his plea of not guilty by reason of insanity and convicted him on all charges. Although many interesting questions were raised on appeal, this discussion will be limited to the problems involved in the defense of insanity.

In the trial court, the testimony on the issue of insanity presented a most unusual situation. The two sets of expert witnesses did not testify in terms of the same legal concepts. The expert witnesses for the defense testified essentially in terms of the American Law Institute formulation of insanity[1] and gave opinions as to Shoffner's capacity for cognition and volition. The court appointed experts were questioned in terms of the Wisconsin standard of *State v. Esser*[2] which deals

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[38] The phrase could be interpreted to mean that the function of a can is to contain something with its utility determined by its usefulness in performing that task. The difficulty with *Brice's* case is that what was denominated as "nominal physical differences in appearances" (more accurately, differences in the size of the cans) do, in fact, affect the usefulness of the cans, although not their function. A 12 oz. can is not useful for holding 13 ounces. Another interpretation may be that the buyer is willing to use either size can. For that matter, he may be willing to use any size can. But does that mean that all cans are of like grade and quality? Apparently not. But the slippery concepts do spawn questionable conclusions. See General Foods Corp., 52 F.T.C. 798 (1956); Atlanta Trading Corp., 53 F.T.C. 565 reversing 258 F.2d 365.

[1] The American Law Institute provisions which will be referred to throughout this discussion are:

> Article 4. Responsibility
> Sec. 4.01 Mental Disease or Defect Excluding Responsibility.
> (1) A person is not responsible for criminal conduct if, at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law.
> (2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

Model Penal Code §4.01 (Proposed Official Draft, May 4, 1962).

[2] 16 Wis.2d 567, 115 N.W.2d 505 (1962). The supreme court in *Shoffner* clarified the scope of the *Esser* test for insanity when it said:

> In instructing the jury, the learned circuit judge faithfully followed our decision in *State v. Esser* and defined the defense of insanity in terms of capacity to understand the nature and quality of the act and capacity to distinguish between right and wrong with respect to it.

State v. Shoffner, 31 Wis.2d 412, 418, 143 N.W.2d 458, 460 (1966).

with only the cognitive capacity of the defendant, and may loosely be termed the "right-wrong" M'Naughten test.[3]

The defense called the chief psychologist and the clinical director (a psychiatrist) from the Milwaukee County Mental Health Center, North Division. Essentially, their testimony was that Shoffner was mentally ill and suffered from a type of schizophrenia which caused him to act as he did. In the opinion of these witnesses, Shoffner would not have committed the acts in question if he had not been suffering from this illness. Their testimony further asserted that Shoffner lacked substantial capacity to conform his conduct to the requirements of the law which he was alleged to have violated; he did not have any real insight into his conduct; and, consequently, he could not make any real moral judgment regarding his conduct. However, these witnesses also testified that Shoffner had a good fundamental understanding of right and wrong and was aware that it was wrong to commit the acts in question.

Two other psychiatrists were appointed by the court. These witnesses, in response to questions by the court, testified that Shoffner was "sane", that he had sufficient mental capacity to understand the nature and quality of his acts, and that he could distinguish between right and wrong with regard to these acts. They were not asked, and did not testify as to whether Shoffner suffered from a mental disorder; consequently, they gave no opinion as to the characteristics, symptoms or affect on Shoffner's behavior of a mental disorder if he did suffer from such.

The trial court charged the jury on the issue of insanity in terms of the *Esser* definition, which considered whether the defendant understood the nature and quality of the act and had to distinguish between right and wrong with respect to it. The issues on appeal, with which this discussion will deal, challenged this concept of the insanity defense.

The decision of the Wisconsin Supreme Court in *State v. Shoffner*[4] announced a new and somewhat novel approach to the perplexing problems inherent in the defense of insanity. Prior to the *Shoffner* decision, the defendant had to raise a reasonable doubt as to his capacity to understand the nature and quality of his act and his capacity to distinguish between right and wrong with respect to it.[5] This has been interpreted to mean that once a defendant introduces evidence which raises the question of insanity, the state must prove beyond a reasonable doubt that he was, in fact, sane.[6] This procedure is still available to a defendant.

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[3] M'Naughten Case, 10 Clark & F. 200, 8 Eng. Reprint 718 (1843).
[4] 31 Wis.2d 412, 143 N.W.2d 458 (1966).
[5] State v. Esser, 16 Wis.2d 567, 115 N.W.2d 505 (1962). See WIS. STAT. §957.11 (1965).
[6] State v. Esser, *supra* note 5.

Now, however, the defendant may, at his option, proceed under a more liberal definition of insanity if he also assumes the burden of proof which has previously been upon the state. The court's formulation of this option is quite specific.

> Such waiver should be written, signed by defendant and his counsel, and filed with the court before trial, with notice to the district attorney, along with a written request for appropriate instructions based on the American Law Institute definition of the defense of insanity, and an instruction that the defendant has the burden, to satisfy or convince the jury, on this issue, to a reasonable certainty, by the greater weight of the credible evidence.[7]

In a footnote to this statement of the option and waiver, the court specifically referred to the Wisconsin Jury Instructions—Civil, Part 1; 200,[8] with regard to the burden of proof. This open adoption of a civil standard in a criminal proceeding is quite significant. Since *this* civil standard is to apply to the defense of insanity, there are strong arguments that other civil standards related to the burden of proof are also applicable.

One particularly relevant civil standard or rule is the rule that the party with the burden of proof may make the opening and closing arguments to the jury. In fact, in *Carmady v. Kolocheski,* the court accorded this the status of a right when it stated:

> *The right to open and close is a matter of substance* and the advantage which it gives is properly placed with the party that has the burden of establishing his claims. Not only can the party who opens and closes in a large measure delimit the field of the debate, but he can also reply to his adversary and show to the jury the fallacy, if any, in his argument, and he has the opportunity of making the last strong impression upon the minds of the jury. *One who is wrongfully deprived of such an advantage in a close case can properly be said to be prejudiced thereby.*[9] (Emphasis supplied.)

The difficulty in a criminal case may be to decide who in fact has the burden of proof when the defense of insanity is introduced under the *Shoffner* option. From the language of the court in *Shoffner,* the defendant has the burden of establishing his insanity "by the greater weight of the credible evidence." One might speculate as to whether this requires the defendant to prove the nonexistence of an element of a crime, and if so, whether this denies him due process of law.

The United States Supreme Court dealt with exactly this sort of challenge in *Leland v. Oregon.*[10] The defendant in *Leland* failed to establish his defense under a statute which required him to prove his

[7] State v. Shoffner, 31 Wis.2d 412, 427, 143 N.W.2d 458, 465 (1966).
[8] *Id.* at 427, n.21, 143 N.W.2d at 465, n.21.
[9] Carmady v. Kolocheski, 181 Wis. 394, 397-398, 194 N.W. 584, 585 (1923).
[10] 343 U.S. 790 (1952).

insanity beyond a reasonable doubt. The statute was challenged as being violative of due process in that it required an accused to prove the nonexistence of an element of a crime—*i.e.*, the requisite mental state. The Supreme Court found no denial of due process because it concluded that the ultimate burden on the state did not shift; the burden on the defendant was merely a measure or quantum of proof required to establish a defense.

> These . . . instructions, and the charge as a whole, make it clear that the burden of proof of guilt, and of all the necessary elements of guilt, was placed squarely upon the State. As the jury was told, this burden did not shift, but rested upon the State throughout the trial, just as, according to the instructions, the appellant was presumed to be innocent until the jury was convinced beyond a reasonable doubt that he was guilty.[11]

The instructions quoted in the court's opinion[12] make it clear that the evidence related to defendant's mental state is to be considered in two contexts. The first question is whether there is a sufficient quantum of evidence to establish the defense of insanity. The evidence, if it fails to establish insanity, is then weighed to determine whether it raises a reasonable doubt as to the existence of the requisite mental state. Under these circumstances, there is apparently no constitutional conflict.

The dual aspects of an insanity defense were rather clearly delineated by the United States Supreme Court in *Leland*. The court referred to the jury instructions[13] which required evidence of insanity to be considered with the question of intent even if the the jury did not believe the defendant was insane. The distinction is further emphasized in the following statement:

> We have seen that, here, Oregon required the prosecution to prove beyond a reasonable doubt every element of the offense charged. Only on the issue of insanity *as an absolute bar to the charge* was the burden placed upon appellant.[14] (Emphasis added.)

The approach of the United States Supreme Court does not appear to conflict with the line of Wisconsin decisions supporting the proposi-

[11] *Id.* at 795.

[12] *Id.* at 794-795. The judge directed the jury as follows:

> I instruct you that the evidence adduced during this trial to prove defendant's insanity shall be considered and weighed by you, with all other evidence, whether or not you find defendant insane, in regard to the ability of the defendant to premeditate, form a purpose, to deliberate, act willfully, and act maliciously; and if you find the defendant lacking in such ability, the defendant cannot have committed the crime of murder in the first degree.
>
> I instruct you that you should find the defendant's mental condition to be so affected or diseased to the end that the defendant could formulate no plan, design, or intent to kill in cold blood, the defendant has not committed the crime of murder in the first degree.

[13] Leland v. Oregon, 343 U.S. 790, 794, 795 (1952).

[14] *Id.* at 799.

tion that the ultimate burden of proving guilt beyond a reasonable doubt is on the state. Wisconsin has also consistently held that facts peculiarly within the knowledge of the defendant, which mitigate or excuse the crime charged, must be proved by the defendant.[15] Consequently, the rationale underlying the *Shoffner* decision would seem to be entirely consistent with both state and federal concepts, if the issue of insanity is viewed as serving a dual function—a bar to prosecution if established by the requisite quantum of proof, and a challenge to the element of criminal intent regardless of whether insanity is alternatively established.

The significance of this duality is not entirely clear, although its existence has, to some degree, been recognized in Wisconsin decisions.[16] The lack of clarity is a result of several factors which may or may not have been clarified by *Shoffner.*

First, accepting the proposition that the defendant must raise facts peculiarly within his knowledge to mitigate or excuse his actions, the quantum of proof required of him is not easily understood. In *Kreutzer v. Westfahl,* for example, the court said:

> But it has been held in many cases that when a negation of a fact lies peculiarly within the knowledge of the defendant, it is incumbent on him *to establish* that fact.[17] (Emphasis supplied.)

Shoffner, of course, requires that the defense of insanity be established "by the greater weight of the credible evidence." This criteria is probably understood fairly well by a majority of lawyers. However, this criteria may control only one aspect of the insanity question. The *Shoffner* decision could be read as dealing only with that aspect which is a complete defense—a bar to prosecution.

In other words, the quantum of proof required by *Shoffner* to establish insanity as a bar to prosecution is probably not the quantum of proof which will *necessarily* raise a reasonable doubt as to the defendant's intent to do the act in question. As the same evidence seems applicable to both questions, the distinction between these aspects of the insanity question could be especially apparent if there were separate trials for the defense of insanity and the criminal charge.

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[15] Kreutzer v. Westfahl, 187 Wis. 463, 204 N.W. 595 (1925).

[16] The supreme court of New Mexico in State v. Padilla, reversed a conviction of first degree murder, rape, and kidnapping when the trial court refused to instruct the jury ". . . that they might consider mental defects and mental condition in ascertaining whether or not the defendant had the power to deliberate the acts charged, so as to reduce the charge from first degree murder to second degree murder." State v. Padilla, 66 N.M. 289, 292, 347 P.2d 312, 314 (1959).

Before reaching their decision, the court pointed out that eleven states adopted this position. The states listed included Wisconsin.

[17] 187 Wis. 463, 478, 204 N.W. 595, 601 (1925).

A second difficulty involved in the plea of insanity is the subjective nature of the element of intent, and the presumptions that have consequently resulted. These premises have been concisely stated by the Wisconsin Supreme Court:

> It is a general rule, applicable in all criminal cases, including those where a specific intent is an element of the crime, that accused, *if sane,* is presumed to intend the necessary or the natural and probable consequences of his unlawful voluntary acts, knowingly performed.[18] (Emphasis supplied, citation omitted.)

This statement could reasonably be interpreted to mean the presumption of intent is removed when the sanity of the defendant is in issue. It could also mean the presumption of intent, raised by proof of the consequences, remains until insanity and lack of intent is established by the defendant.

The fact situation of *State v. Carlson*[19] seems to indicate that even when the issue of insanity is raised, the presumptions remain. In *Carlson,* a doctor offered to testify to the results of an electroencephalograph test which she performed on the defendant. The testimony offered was to the general effect that the defendant suffered from an organic disorder of the brain which was further affected by instability in his emotional environment. The result of such disease was behavior over which the individual had virtually no control—behavior governed by irresistible impulses. The refusal to admit the testimony was held not to be in error, although the court's rationale underlying that conclusion tends to make the decision somewhat confusing.

> The offered testimony suggests no reason why defendant could not form an intent to burn a building, nor does it tend to rebut the presumption that he intended the natural and probable consequences of his acts. We are of the opinion, however, that if the offered testimony, together with other expert testimony, had sufficiently tended to prove that at the time of the offense defendant was subject to a compulsion or irresistible impulse by reason of the abnormality of his brain, the testimony should have been admitted. Even 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.[20]

The implication here is that proof of a general state of insanity, which *could* cause the act in question, is not sufficient to rebut the presumption of intent.

A third difficulty is involved in the dual aspects of insanity as it appears in criminal proceedings. When dealing with the quantum of proof that will *necessarily* raise a reasonable doubt as to the defend-

[18] State v. Vinson, 269 Wis. 305, 309e, 68 N.W.2d 712, 70 N.W.2d 1, 4 (1955).
[19] 5 Wis.2d 595, 93 N.W.2d 354 (1958).
[20] *Id.* at 607, 93 N.W.2d at 360-361.

ant's intent to commit a given act, it is not clear what amount of evidence is required. The only evidentiary standard discussed in any detail by the court is whether the evidence is sufficient to convict. This standard is articulated by the Wisconsin Supreme Court in *Gauthier v. State*:

> When testing the sufficiency of the evidence, this court is not required to be convinced of the guilt of the defendant beyond a reasonable doubt, but only that the jury or the court could find the defendant guilty beyond a reasonable doubt.[21]

Consequently, we do not know what is necessary, as a practical matter, before the court, in a jury trial, will find that the defendant did not form the requisite intent. If a defendant in fact need only raise a reasonable doubt (rather than prove his lack of intent beyond a reasonable doubt), it is curious that the court does not more often remove the issue from the jury's consideration.

The *Shoffner* decision may give rise to situations which will require clarification of this state of affairs. It does not seem unreasonable, for example, that a case may occur in which uncontradicted scientific testimony is given to the effect that a defendant did not have substantial capacity to conform his conduct to the requirements of law and that he did not intend to do the act in question. Assuming that the credibility of the expert witness is not in question, the question could well be whether the jury would be allowed to ignore such testimony or whether the defendant had raised a reasonable doubt as a matter of law. Whether it is possible practically to raise a reasonable doubt as to intent, as a matter of law, without proving insanity beyond a reasonable doubt is a question that will have to be decided.

The *Shoffner* decision, consequently, raises several questions which the court may be called upon to answer. If a defendant elects to proceed under the *Shoffner* option, does failure to establish insanity by the greater weight of the credible evidence necessarily preclude a subsequent claim that a reasonable doubt as a matter of law has been raised as to capacity to form intent? Will uncontradicted medical testimony be sufficient to raise such a doubt as a matter of law, or may a jury ignore uncontradicted unimpeached medical evidence? Will assumption of the burden of proof on the issue of insanity entitle the defendant to make the influential opening and closing arguments to the jury, or entitle him to a separate trial on this issue? If the defense of insanity is tried separately, and prior to the criminal trial, to what extent will testimony on the question of insanity be admissible on the question of intent?

JOAN KESSLER

[21] 28 Wis.2d 412, 416, 137 N.W.2d 101, 103-104 (1965), *cert. denied* 383 U.S. 916 (1966).