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Criminal Law -- Reflections: Insanity, Bifurcation, Burden of Proof

Charles O. Peed Jr.

all the factors involved in a given situation, and in the case of corporal punishment it is necessary to consider the potential abuse of the privilege to inflict the punishment as well as the burden of procedures and the potential harm to the student. An Indiana court has observed that "[T]he practice of corporal punishment has an inherent proneness to abuse,"[40] and in view of the control that a teacher exercises over students, the frequency or severity of the punishment cannot be controlled by defining permissible punishment as that which is "reasonable." In *Jackson* Justice Blackmun noted that such regulations are easily circumvented and that where "power to punish is granted to persons in lower levels of administrative authority, there is an inherent and natural difficulty in enforcing the limitations of that power."[41]

Requiring authorization prior to the infliction of the punishment or requiring that the punishment be inflicted only in the presence of another adult would go far to eliminate the potential abuse of corporal punishment. The imposition of such minimal procedures in the context of secondary schools would not unduly burden school authorities in their attempt to maintain discipline and control among their students but would be an important step in guaranteeing the full constitutional rights of those who attend public schools.

JOHN C. LILLIE

Criminal Law—Reflections: Insanity, Bifurcation, Burden of Proof

Can an insane person "intend to commit a crime"? May the state exclude evidence of his mental disorder at the trial of his guilt? May it require him to disprove his sanity during the separate trial of that issue? The threshold question may be answered in the affirmative: In some superficial sense, at least, insane persons intend the crimes they commit. Yet the *mens rea* required for a crime such as homicide has commonly been supposed to connote something more profound.[1]

This note will examine these and other questions as singularly highlighted in the context of the bifurcated trial procedure. Recent Wiscon-

[40]Cooper v. McJunkin, 4 Ind. 290, 292 (1853).
[41]404 F.2d at 579.

[1]*See generally* MODEL PENAL CODE § 2.02, Comments 1-4 (Tent. Draft No. 4, 1955) and authorities cited therein.

sin cases answering each of the above questions will provide the perspective for our examination.

In *Sprague v. State*[2] the defendant was convicted of first degree murder. During an argument, he had pushed his wife down the basement stairs and then had struck her several times with a nearby board, killing her. At trial the sole defense offered was that defendant had experienced a psychomotor epileptic seizure[3] which had rendered him incapable of forming the specific intent required for first degree murder. Defendant elected to be tried in a bifurcated procedure, thereby gaining the benefit of the Model Penal Code definition of insanity but assuming the burden of proof on that issue. During the trial to determine guilt, medical testimony and electroencephalograms tending to substantiate his claim of epileptic seizure were excluded, as was testimony tending to rebut the contention. The Wisconsin Supreme Court found these rulings proper[4] and thereby approved an exclusionary rule which substantially removes the issue of *mens rea* from that portion of trial at which guilt and degree of offense are determined. This was done despite Wisconsin's statutory definitions of homicide, which require "the mental purpose to take the life of another human being" for first degree murder[5] and "conduct evincing a depraved mind, regardless of human life"[6] for second degree murder.

Sprague is the latest decision in what has been termed "the Wisconsin experiment,"[7] which was begun in 1966 in *State v. Schoffner*.[8] There, defendant claimed that he was a paranoid schizophrenic and that he lacked substantial capacity to conform his conduct to the requirements

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[2]52 Wis. 2d 89, 187 N.W.2d 784 (1971).

[3]W. NEUSTATTER, PSYCHOLOGICAL DISORDER AND CRIME 123 (1957) describes a psychomotor epileptic seizure. The author says the "fit" is "a peculiar psychological state" in which

> [t]he patient apparently lapses into a dreamy condition where he feels temporarily abstracted rather as if he were in a trance. . . . Post epileptic automatism sometimes follows psychomotor epilepsy. . . . It is characterised by the performance of a number of quite automatic acts, which may, nevertheless, appear purposeful to an observer.

Id. at 123.

[4]52 Wis. 2d at ____, 187 N.W.2d at 788.

[5]WIS. STAT. ANN. § 940.01 (1958).

[6]*Id.* § 940.02.

[7]Note, *Criminal Law—Burden of Proof for Insanity Defense*, 1969 WIS. L. REV. 969, 977.

[8]31 Wis. 2d 412, 143 N.W.2d 458 (1966). M'Naghten's Case, 8 Eng. Rep. 718, 722 (H.L. 1843):

> [T]o establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the 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 that what he was doing was wrong.

of the law, although admittedly he understood the nature and quality of his acts and was able to differentiate between right and wrong. The court divided evenly on the question whether the *M'Naghten* test of insanity[9] or the alternative posed by the *Model Penal Code*[10] would be applied.[11] In the ensuing compromise, the *Schoffner* court created an optional procedure whereby a defendant could, as Schoffner and Sprague did assume the burden of proof as to his insanity and gain the benefit of the *Model Penal Code* definition of insanity, a test that is more liberal than the *M'Naghten* rule. Moreover, the *Schoffner* decision allowed a defendant to contend in the alternative that he did not do the act and that if he did he was insane. Sprague failed to take advantage of this option.

The exclusionary question raised in *Sprague,* received its first consideration in *Curl v. State.*[12] In *Curl* the trial court had admitted, at the initial guilt phase of the trial, testimony showing that on the day of the crime defendant had consumed seventeen ounces of whiskey, twelve Librium pills, and sixteen Darvon pills. Expert testimony showed that such consumption would have rendered Curl incapable of forming the specific intent required for the crime of burglary. However, the trial court excluded evidence that Curl had been hospitalized as a paranoid schizophrenic some years earlier and that Librium had been prescribed for this disorder. In upholding the conviction, the Wisconsin Supreme Court said:

> To bifurcate a trial is to separate completely the issue of lack of accountability due to insanity from the issue of whether the crime was committed. If the testimony of earlier hospitalizations and mental condition . . . is also material on the issue of guilt, there would be no reason to hold split trials.
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> . . . In the law the dividing line . . . is the test of sanity, whatever the legal definition of [this term] may be or come to be.[13]

The language of *Curl,* sweeping well beyond its factual basis, was applied in *State v. Hebard.*[14] The *Hebard* defendant denied committing

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[9]MODEL PENAL CODE § 4.01 (Proposed Final Draft No. 1, 1961) inquires whether the defendant lacks either a substantial capacity to appreciate the criminality of his conduct or the substantial capacity to conform that conduct to the requirements of the law.

[11]31 Wis. 2d at 415, 143 N.W.2d at 464-65. The author of the opinion candidly recounted the division of the court and the way in which the issue was resolved.

[12]40 Wis. 2d 474, 162 N.W.2d 77 (1968).

[13]*Id.* at 484-86, 162 N.W.2d at 82-83.

[14]50 Wis. 2d 408, 184 N.W. 2d 156 (1971).

the crime and claimed on appeal that the exclusion during the guilt phase of his trial of evidence of his mental condition was constitutionally impermissible. Instead of limiting *Curl* to the reading its facts seemed to require and holding that the exclusion of the evidence of mental condition was erroneous, the court appeared to feel the entire *Schoffner* procedure was threatened. The court felt that "[i]f the position of [Hebard] were upheld, more would be involved than a complete reversal of the reasoning of the *Curl Case.* The entire matter of permitting bifurcating trials would have to be re-examined."[15] This assertion clearly cannot be justified on logical grounds, for *Curl* had permitted a limited inquiry into the defendant's mental state during the guilt phase of trial. *Hebard* must therefore be taken as a significant, if unwitting, extension of the *Curl* position.

In *Sprague,* this exclusionary rule was again extended. *Sprague's* facts peculiarly silhouette the prejudice that may accrue to a defendant who chooses to exercise the "*Schoffner* option." Unlike Hebard, Sprague did not deny the act of which he was accused. Moreover, there was apparently no doubt that his claim of epileptic seizure would amount to insanity under any test; the question was whether a seizure had in fact occurred.[16] Yet by electing to be judged by the liberal definition of insanity, Sprague was saddled with the burden of proof on that issue. It seems more than passing strange that the Wisconsin court has never considered this "bargain" aspect of the *Schoffner* procedure or confronted the problems presented when a defendant elects a bifurcated trial to his obvious prejudice.

Two explanations are possible. First, the Wisconsin court may believe that the "trade" its procedure sanctions will always prove beneficial to the defendant. Alternatively, it may feel that the allocation of the burden of proof is of minimal significance.

To the degree that the former explanation differs from the latter, it is clearly untenable. First, it is quite common for an insanity defense to fail for lack of proof of impairment at the time of the offense. *Sprague* affords an obvious example. Moreover, many types of insanity result in just the sort of cognitive disorder that the *M'Naghten* test purports to evaluate.[17] It is clear that a defendant with certain disorders

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[15] *Id.* at 416-17, 184 N.W. 2d at 161.

[16] The effect of a seizure has been described as "so clearly incapacitating as to make frivolous any effort to measure the resulting behavior by the rules of *mens rea.*" A. GOLDSTEIN, THE INSANITY DEFENSE 203 (1967).

[17] W. NEUSTATTER, *supra* note 3, at 19-20, 58-59.

would be wise to leave the burden of proving sanity on the state and have his disorder judged by the *M'Naghten* rule. If the defendant believed that his victim was a zombie or a devil in human form, for example, he would err in electing the *Schoffner* bifurcated procedure.

The second explanation merits more lengthy examination. In other contexts the United States Supreme Court has held that the state must prove all elements of a criminal offense "beyond a reasonable doubt."[18] Yet in *Leland v. Oregon*[19] the Court held constitutional an Oregon statute requiring criminal defendants to establish their insanity beyond that same reasonable doubt.[20] Paradoxically, the *Leland* opinion leaves little doubt that *mens rea* presupposes sanity. The Fourth Circuit Court of Appeals has noted the grave prejudice done defendants by such a shifting of the burden of proof and has expressed doubts about its continued constitutional viability.[21] Nevertheless, the Supreme Court has not recently considered the issue.

Besides Wisconsin, four state courts have recently considered the constitutionality of resting the burden of proving insanity on the defendant. Unlike Wisconsin, however, these courts have thought the issue of critical significance.

In *State v. Cuevas*[22] the Hawaii Supreme Court held unconstitutional a statute that required the defendant to disprove the existence of malice aforethought once the state had shown that he had done the act. " '[T]he burden of proof,' " the court said, " ' is never upon the accused to establish his innocence, or to disprove those facts necessary to establish the crime for which he is indicated.' "[23] The Hawaii court had previously held that mental defects not amounting to insanity may negative the ability to formulate specific intent to kill or to harbor malice aforethought.[24] This linking of issues necessarily implies that in the Hawaii view the existence of *mens rea* requires sanity and thus makes it apparent that the *Cuevas* holding includes shifting the burden on insanity within its constitutional ban.

Similarly, in *People ex rel. Juhan v. District Court,*[25] the Colorado Supreme Court struck down a statute shifting the burden of proving

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[18]*E.g., In re* Winship, 397 U.S. 358, 364 (1970).
[19]343 U.S. 790 (1952).
[20]*Id.* at 794-95.
[21]Timmons v. Peyton, 360 F.2d 327 (4th Cir. 1966).
[22]____Hawaii____, 488 P.2d 322 (1971).
[23]*Id.* at ____, 488 P.2d at 324, *quoting* Davis v. United States, 160 U.S. 469, 487 (1895).
[24]State v. Moeller, 50 Hawaii 110, 433 P.2d 136 (1967).
[25]165 Colo. 253, 439 P.2d 741 (1968).

insanity to the defendant as being violative of the due process clause of the Colorado Constitution. The Colorado court observed that the state must prove all elements of the offense charged.[26] The court looked to an earlier Colorado case, *Becksted v. People*,[27] which involved the other half of the "*Schoffner* option," the question of admissibility at the guilt portion of trial of evidence relating to mental condition. The court took a view directly opposite to that held by Wisconsin and said with some exasperation that "[*a*] *defendant in a first degree murder case has the right, without reference to a plea of insanity, to establish mental deficiency as bearing upon his capacity to form the specific intent essential to first degree murder.*"[28] The recognition of this same right led the Arizona Supreme court to declare the Arizona bifurcated trial statute unconstitutional. In *State v. Shaw*[29] the Arizona court reasoned that evidence of mental incapacity must be inadmissible at the guilt portion of trial—otherwise the insanity portion would be redundant. However, the court found that criminal intent would not exist without sanity. To remove consideration of sanity could prevent the finding of culpable intent, an essential element of the crime. This, it was held, the legislature is without power to do.

Shaw of course rests entirely on its assumption that repetition of evidence as to mental condition would be so unthinkable that the legislature could not possibly have intended it. This assumption is hardly more reasonable than the analogous Wisconsin belief that it would involve an intolerable waste of judicial resources.[30] Both ignore the relative infrequency of the insanity plea.[31]

The constitutional problems raised both by the shifting of the burden of proof and by the exclusion of evidence relating to mental condition seem to have completely escaped the Wisconsin court. Both issues were considered in *Hebard*, and both were given short shrift. The *Hebard* court first considered the constitutionality of excluding evidence of mental condition at the guilt phase. In what can only be described as a bootstrap operation, the court equated due process with fairness or

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[26]*Id.* at ____, 439 P.2d at 748.

[27]133 Colo. 72, 292 P.2d 189 (1956).

[28]*Id.* at 82, 292 P.2d at 194 (emphasis by the court).

[29]106 Ariz. 103, 471 P.2d 715 (1970), *cert. denied*, 400 U.S. 1009 (1971).

[30]Curl v. State, 40 Wis. 2d 474, 484, 162 N.W.2d 77, 82 (1968).

[31]A. MATTHEWS, MENTAL DISABILITY AND THE CRIMINAL LAW 28 (1970): "[I]n each jurisdiction surveyed, criminal responsibility cases constituted a small percentage of all cases. In Illinois, Michigan, and Florida only a handful of cases occur each year; there is a somewhat higher frequency in California and a still higher frequency in the District of Columbia."

fair play and then went on to hold that fairness would not be served by depriving a defendant of his right to choose between a single and a bifurcated trial.[32] Then turning to the constitutionality of shifting the burden of proof at the insanity phase, the *Hebard* court largely contented itself with citing *Leland.* It asserted that the burden of proof on the essential elements of the crime did not shift[33] and that "as we see it, a court finding of legal insanity is not a finding of inability to intend; it is rather a finding that under the applicable standard or test, the defendant is to be excused from criminal responsibility for his acts." The court went on to characterize the insanity defense as a plea in confession and avoidance.[35]

This view, as applied in *Sprague,* approaches a position of strict liability for homicide, at least with respect to degree: neither the existence of malice nor the formation of a mental purpose to kill may be rebutted during the guilt portion of trial. Under such a view insanity is not properly characterized as a defense.

The Wisconsin position as it exists after *Hebard* and *Sprague* is strikingly similar to an earlier California view. In *People v. Troche,*[36] in which the California bifurcated trial statute was upheld, the court stated that evidence of defendant's mental condition was not admissible at the guilt portion of trial. The court termed bifurcation a mere procedural matter and implied that insanity did not affect the unlawful quality of the act but served rather to explain or excuse it. A companion case, *People v. Leong Fook,*[37] made this last premise explicit, although in *Leong Fook* the court seemed to recognize that insanity results in an inability to formulate criminal intent.[38] The inconsistency of these statements does not appear to have been noticed by the California court.

These cases, of course, are no longer authority, having long since given way in California to the concept of "diminished responsibility." Under this doctrine, evidence of mental disease or defect not amounting to legal insanity is admitted at the guilt portion of trial.[39] Such evidence

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[32]50 Wis. 2d at 421-22, 184 N.W.2d at 163-64.

[33]*Id.* at 422-23, 184 N.W.2d at 163-64.

[34]*Id.* at 420, 184 N.W.2d at 163.

[35]*Id.* at 423, 184 N.W.2d at 164.

[36]206 Cal. 35, 273 P. 767 (1928).

[37]206 Cal. 64, 273 P.779 (1928).

[38]*Id.* at 71-72, 273 P. at 782.

[39]People v. Gorshen, 51 Cal. 2d 716, 336 P.2d 492 (1959); People v. Wells, 33 Cal. 2d 330, 202 P.2d 53 (1949).

may negative either the ability to premediate[40] or the ability to govern one's conduct in accordance with the law.[41] Consequently there are possibilities of jury verdicts of second degree murder[42] or manslaughter.[43] In the latter case, the mental disorder is regarded as negativing the ability to act with malice.[44] Under the diminished responsibility doctrine, evidence of epilepsy would be considered both on the issue of malice aforethought and on the issue of specific intent.[45] In fact, California has recently characterized the condition of epileptic seizure as one of "totally diminished capacity."[46]

California's view, as unique as Wisconsin's,[47] has been severely criticized as defeating the very purpose for which the bifurcated procedure was enacted.[48] Indeed, California's experience with bifurcated trials was discussed at great length in *State v. Shaw*[49] and may have been a major factor in the Arizona court's conclusion that the bifurcated procedure was either duplicative or unconstitutional.

Moreover, it can be argued that a resolution of insanity cases in terms of one's belief as to whether *mens rea* presupposes sanity involves a fundamental misconception of issues. The same criticism may be made of the pendent issues of allocation of the burden of proof of sanity. Given a disturbed offender, the appropriate inquiry would look to the degree to which the offender's conduct, in view of his disorder, merits criminal sanctions. California has at least realized that this question requires some flexibility in approach. Yet the California procedure has been criticized as being self-defeating and unreasonably wasteful.

Wisconsin is in a unique position in that it could gain California's flexibility while retaining its own judicial economy. Its exclusionary rule operates to postpone the issues of *mens rea* and sanity until the latter stage of trial. In effect, its bifurcated trial is a sequential trial on the issues of *actus reus* and *mens rea*. By judicially recognizing this fact, the

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[40]People v. Wolff, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964).

[41]People v. Conley, 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966).

[42]People v. Wolff, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964).

[43]People v. Conley, 64 Cal. 2d 310, 322, 411 P.2d 911, 918, 49 Cal. Rptr. 815, 822 (1966).

[44]*Id.* at 317, 411 P.2d at 916, 49 Cal. Rptr. at 820.

[45]People v. Williams, ___ Cal. App. 3d ___, 99 Cal. Rptr. 103 (1971).

[46]*Id.* at ___, 99 Cal. Rptr. at 107.

[47]*Compare* People v. Gorshen, 51 Cal. 2d 716, 336 P.2d 492 (1959), *with* State v. Hebard, 50 Wis. 2d 408, 184 N.W. 2d 156 (1971).

[48]Comment, *The Gradual Decay of the Bifurcated Trial System in California and the Emergence of "Partial Insanity": 1966*, 3 CALIF. W. L. REV. 149 (1967).

[49]106 Ariz. 103, 109-11, 471 P.2d 715, 721-23 (1970), *cert. denied*, 400 U.S. 1009 (1971).

court could undertake a further experiment. At the second phase of trial, the jury could be instructed on the factors which would lead to a finding of diminished capacity. Only then would they fix the degree of offense. Should they find, for example, that the defendant was incapable of forming the specific intent to kill, the verdict would be second degree murder. No significant duplication of judicial effort would be involved, and no repetition of expert testimony would be required.

CHARLES O. PEED, JR.

Criminal Procedure—Probable Cause and Due Process at Sentencing

The guilt determination process in the American judicial system is characterized by rigorous procedural and evidentiary standards and extensive appellate review designed to ferret out the slightest harmful error. The criminal defendant's constitutional right to a fair trial is assured by specific procedural guarantees in the Bill of Rights as well as by the broader fourteenth amendment guarantee of due process of law. But once guilt is established, all these procedural safeguards seem to vanish. Although the Supreme Court has said that the sentencing process is subject to scrutiny under the due process clause,[1] the extension of procedural due process safeguards to sentencing has been the exception rather than the rule.[2] Furthermore, there is normally no substantive review of sentences in federal appellate courts,[3] and the vast discretion of the sentencing judge remains largely unfettered. This note will examine the criminal defendant's rights during sentencing and will discuss a case that significantly extends presently recognized due process safeguards surrounding the sentencing process.

Recently in *United States v. Weston*[4] the Ninth Circuit Court of Appeals reviewed the information considered in sentencing a criminal defendant, vacated the sentence, and remanded, holding that "the Dis-

[1]*See* Williams v. New York, 337 U.S. 241, 252 n.18 (1949).

[2]*See* Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821, 824-25 (1968).

[3]*See* Mueller, *Penology on Appeal: Appellate Review of Legal but Excessive Sentences*, 15 VAND. L. REV. 671 (1962); ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCE 13-15 (Approved Draft 1968). At present fifteen states make appellate review of sentences available on a regular basis. *Id.* at 13.

[4]448 F.2d 626 (9th Cir. 1971).