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Bifurcation in Insanity Trials: A Change in Maryland's Criminal Procedure

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BIFURCATION IN INSANITY TRIALS: A CHANGE IN MARYLAND'S CRIMINAL PROCEDURE

The practice of bifurcating criminal trials into separate hearings on the questions of guilt and insanity invariably elicits considerable controversy. Advocates of bifurcation maintain that this procedure diminishes prejudice to defendants and confusion to the trier of fact inherent in combining an insanity defense with a not guilty plea.[1] Opponents of bifurcation question whether, and under what circumstances, defendants may adduce evidence of their mental condition in the course of the hearings on guilt.[2] To date, no court has found that there is a constitutional right to bifurcation,[3] and courts

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1. *See, e.g.*, Holmes v. United States, 363 F.2d 281, 282 (D.C. Cir. 1966) (recognizing that substantial prejudice may result from simultaneous trial of not guilty and not guilty by reason of insanity pleas); *see also* Comment, *Due Process and Bifurcated Trials: A Double-Edged Sword*, 66 Nw. U.L. Rev. 327, 329-31 (1971). Another justification frequently advanced for bifurcation is that it protects defendants asserting an insanity defense from the disclosure during psychiatric testimony of inculpatory statements made during compulsory mental examination, thereby eliminating the possibility of self-incrimination. *See* United States v. Bennett, 460 F.2d 872, 880-81 (D.C. Cir. 1972); Lewis v. Thulemeyer, 189 Colo. 139, 141-42, 538 P.2d 441, 443 (1975); State v. Jenkins, 412 N.W.2d 174, 176 (Iowa 1987); State v. Spurgin, 358 N.W.2d 648, 650-51 (Minn. 1984); State v. Devine, 372 N.W.2d 132, 137 (S.D. 1985); State *ex rel.* Follette v. Raskin, 34 Wis. 2d 607, 626-27, 150 N.W.2d 318, 328-29 (1967); *cf.* State *ex rel.* Johnson v. Dale, 277 Or. 359, 367, 560 P.2d 650, 654 (1977) (holding that ordering bifurcated trial for purpose of avoiding perceived danger of self-incrimination is abuse of discretion).

2. *See* Comment, *supra* note 1, at 328-29; *see infra* notes 72-86 and accompanying text.

3. *See* Penneywell v. Rushen, 705 F.2d 355, 358 (9th Cir. 1983) (holding that failure to grant separate trial on insanity plea did not render trial "arbitrary or fundamentally unfair"); Murphy v. Florida, 495 F.2d 553, 557 (5th Cir. 1974) (holding due process does not require a separate trial on question of insanity), *aff'd*, 421 U.S. 794 (1975) Simpson v. State, 275 A.2d 794, 795 (Del. 1971) (stating that "no decision has been called to our attention holding that a defendant has a constitutional right to a bifurcated trial"); People v. Newberry, 53 Ill. 2d 228, 236, 290 N.E.2d 592, 597 (1972) (holding no constitutional right to bifurcated trial); Hester v. State, 262 Ind. 284, 286, 315 N.E.2d 351, 352 (1974) (stating that it was "aware of no case holding that there is a constitutional right to a bifurcated trial"); State v. Levier, 226 Kan. 461, 464, 601 P.2d 1116, 1119 (1979) (holding refusal of bifurcated trial not violation of fifth amendment); Commonwealth v. Bumpus, 362 Mass. 672, 681, 290 N.E.2d 167, 175 (1972) (holding no constitutional right to bifurcation on issues of participation in allegedly criminal conduct and mental responsibility); State v. Luna, 93 N.M. 773, 780, 606 P.2d 183, 190 (1980) (holding that due process does not require bifurcation); People v. Yukl, 83 Misc. 2d 364, 366, 372 N.Y.S.2d 313, 315 (N.Y. Sup. Ct. 1975) (stating that "no court has yet accepted the argument that the concept of a bifurcated trial is a constitutional right that inures to the defendant in any given case"); State v. Rogers, 17 Ohio St. 3d 174, 177, 478 N.E.2d 984, 988-89 (1985) (holding "due process does not require a separate trial on the issue of insanity"); State v. Smith, 512 A.2d 818, 820 (R.I. 1986) (stating that constitution

in three states have held statutes mandating bifurcation unconstitutional on due process grounds.[4] Nevertheless, the majority of jurisdictions that have wrestled with the bifurcation issue have held in its favor.[5]

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does not require a bifurcated trial); *see also* Spencer v. Texas, 385 U.S. 554, 568 (1967) (observing that "[t]wo-part jury trials are rare in our jurisprudence . . . [and] have never been compelled by this Court as a matter of constitutional law . . .").

4. These three courts held that mandatory bifurcation statutes which restricted evidence of the defendant's mental state to the insanity phase create an impermissible presumption of intent during the guilt phase and deny the defendant the right to introduce evidence probative of his or her innocence, thus violating due process. *See* State v. Shaw, 106 Ariz. 103, 113, 471 P.2d 715, 725 (1970), *cert. denied*, 400 U.S. 1009 (1971); State *ex rel.* Boyd v. Green, 355 So. 2d 789, 794 (Fla. 1978); Sanchez v. State, 567 P.2d 270, 274 (Wyo. 1977). In addition, Texas's bifurcation statute was repealed by the state legislature on due process grounds. *See* Townsend v. State, 427 S.W.2d 55, 61-62 (Tex. Crim. App. 1968). *See also infra* notes 76-80 and accompanying text.

5. There are currently six jurisdictions that provide for bifurcation by statute or court rule. *See* CAL. PENAL CODE § 1026(a) (West 1985 & Supp. 1989); COLO. REV. STAT. § 16-8-104 (1986); ME. REV. STAT. ANN. tit. 17-A, § 40 (1983 & Supp. 1988); MINN. R. CRIM. P. § 20.02, subd. 6 (West Supp. 1989); PA. STAT. ANN. tit. 50, § 7404(c) (Purdon 1969 & Supp. 1988); WIS. STAT. ANN. § 971.165 (West Supp. 1988). Additionally, numerous jurisdictions allow bifurcation, albeit reluctantly in some cases, in the sound discretion of the trial court judge. *See, e.g.*, Holmes v. United States, 363 F.2d 281, 282 (D.C. Cir. 1966) (holding bifurcation permissible when substantial insanity defense may have a prejudicial effect on other defenses); Houston v. State, 602 P.2d 784, 788 (Alaska 1979) (holding bifurcation permissible when substantial insanity defense and a substantial defense on merits); Garrett v. State, 320 A.2d 745, 748 (Del. 1974) (holding bifurcation is required upon demonstration that insanity defense may prejudice defense on merits); *Hester*, 262 Ind. at 288, 315 N.E.2d at 353 ("compelling circumstances" giving rise to probable and substantial prejudice); State v. Jenkins, 412 N.W.2d 174, 176 (Iowa 1987) (discretion of trial court); Commonwealth v. O'Connor, 387 N.E.2d 190, 194 (Mass. App. Ct. 1979) (sound discretion of trial court); People v. Donaldson, 65 Mich. App. 588, 590, 237 N.W.2d 570, 571 (1975) (showing of substantial defense of insanity and meritorious defense on merits); Novosel v. Helgemoe, 118 N.H. 116, 124-25, 384 A.2d 124, 129 (1978) (appropriate whenever not guilty plea is coupled with insanity defense); State v. Khan, 175 N.J. Super. 72, 83, 417 A.2d 585, 592 (1985) (holding when defendant's counsel pursues insanity defense on defendant's behalf, presenting defenses of self-defense and insanity in single trial could result in fundamentally unfair situation for defendant); State v. Helms, 284 N.C. 508, 513, 201 S.E.2d 850, 853 (1974) (holding that when there is a substantial defense on merits and an insanity defense exists, bifurcation is within sound discretion of trial judge); State v. Lohnes, 432 N.W.2d 77, 86 (S.D. 1988) (stating bifurcation may be useful to guard against prejudice to insanity defense and defense on merits); State v. Hohman, 138 Vt. 502, 513, 420 A.2d 852, 859 (1980) (allowing bifurcation only under extraordinary circumstances); State v. Jones, 32 Wash. App. 359, 369, 647 P.2d 1039, 1045 (1982) (finding bifurcation permissible if no significant overlap between evidence relevant to insanity and self-defense pleas); State v. Boyd, 280 S.E.2d 669, 675 (W. Va. 1981) (holding bifurcation permissible if having both defense on merits and insanity defense presented at a unitary trial would create likelihood of prejudice).

In a few states, courts have opined that separate trials on the issues of guilt and insanity should be avoided in the interest of judicial economy. *See, e.g.*, State v. Haseen, 191 N.J. Super. 564, 565, 468 A.2d 448, 449 (1983) (stating that "a single trial is prefer-

The Maryland Court of Appeals recently joined the majority ranks when it approved bifurcation in *Treece v. State*.[6] In large part, this approval stemmed from the major statutory revisions on criminal responsibility adopted in 1984 that shifted the burden of proof on the insanity issue to the defendant, thereby making a bifurcated proceeding desirable in appropriate circumstances.[7] Recognizing the need for uniform statewide standards to regulate the bifurcation process, the Court of Appeals referred the responsibility of developing these standards to the Standing Committee on Rules of Practice and Procedure (Standing Committee).[8]

This comment first will examine the court's decision in *Treece* to realign the State's criminal procedures with the recent changes in Maryland law on criminal responsibility. Next, it will analyze the new bifurcation rule as proposed by the Standing Committee and adopted by the Court of Appeals.[9] In so doing, it will explore the options for bifurcation as evidenced by statutory and case law from other jurisdictions. Finally, it will conclude that the proposed statutory bifurcation procedure, with minor changes, unquestionably will provide criminal defendants asserting an insanity defense with a less prejudicial alternative.

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able because it preserves judicial resources"); *State* ex rel. *Johnson*, 277 Or. at 366, 560 P.2d at 654 (holding that "bifurcated trials should be avoided unless adequate reasons therefor"); *Smith*, 512 A.2d at 822 (stating joint trial is preferable because "it conserves judicial resources" and avoids "inherent unfairness" of giving accused two chances at acquittal).

Other jurisdictions, citing a lack of statutory authority, have dismissed motions for bifurcation cursorily without even considering the prejudicial nature of an insanity defense. *See* Gruzen v. State, 276 Ark. 149, 153-54, 634 S.W.2d 92, 95 (1982) (holding defendant "not entitled to a bifurcated trial . . . because our Rules of Criminal Procedure do not provide for such a trial"); Edison v. State, 256 Ga. 67, 69, 344 S.E.2d 231, 233 (1986) (stating bifurcation not mandated under statute); State v. Sanders, 223 Kan. 273, 281, 574 P.2d 559, 565 (1977) (reasoning that bifurcation is not permissible because "the verdict form . . . contemplates an unbifurcated trial"); State v. Gray, 351 So. 2d 448, 455 (La. 1977) (holding no bifurcation when statute provides that "the defenses available under combined plea of 'not guilty and not guilty by reason of insanity' shall be tried together"); McKenzie v. Osborne, 195 Mont. 26, 36, 640 P.2d 368, 374 (1981) (holding bifurcation statute contemplates the issues of guilt and insanity to be decided in single trial); *cf. Luna*, 93 N.M. at 779-80, 606 P.2d at 189-90 (agreeing that there may be circumstances where bifurcated trial might be preferable to ordinary trial but holding that statute for single trial procedure is to be followed until rules are amended to accommodate for such change).

6. 313 Md. 665, 547 A.2d 1054 (1988).

7. *Id.* at 686-87, 547 A.2d at 1065. *See infra* text accompanying notes 23-28.

8. *Treece*, 313 Md. at 687, 547 A.2d at 1065.

9. 16 Md. Reg. 1533 (codified at MD. R. 4-314). Maryland Rule 4-314 shall apply to all actions commenced on or after July 1, 1989. *Id.*

I. THE TREECE DECISION

James William Treece was indicted for rape in December 1985.[10] His appointed public defender entered pleas of "not guilty" and "not responsible for criminal conduct" on his behalf, coupled with a request that Treece be evaluated to determine whether he was competent to stand trial.[11] A thorough psychiatric examination established Treece's competence to comprehend the charges against him and to assist in his own defense.[12]

At the start of the trial Treece asserted that he disagreed with his attorney's decision to plead not criminally responsible.[13] Nevertheless, over Treece's objections, the trial court permitted his attorney to present evidence that Treece was paranoid and subject to delusions and, therefore, was not criminally responsible at the time of the alleged rape.[14] In his own defense, Treece testified that the sexual intercourse had been consensual.[15] After lengthy deliberations the jury rejected the insanity defense and found Treece guilty of second degree rape.[16]

Treece filed a *pro se* motion for a new trial, contending that the not criminally responsible plea had hopelessly prejudiced his case.[17] The trial court and the Maryland Court of Special Appeals found that despite the objections of a client, the decision to enter a plea of not criminally responsible by reason of insanity is a tactical trial decision for the defense attorney to make.[18] The Maryland Court of Appeals reversed, holding that the ultimate decision as to what plea to enter lies with the defendant, as long as the defendant is competent to stand trial.[19] The court reasoned that while it was reason-

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10. Treece v. State, 313 Md. 665, 668, 547 A.2d 1054, 1055 (1988).

11. *Id.*, 547 A.2d at 1055-56.

12. *Id.*, 547 A.2d at 1056.

13. *Id.* at 668-69, 547 A.2d at 1056.

14. *Id.* at 669-70, 547 A.2d at 1056. Under Maryland law, a defendant found guilty of the offense charged subsequently may be found not criminally responsible for his or her conduct if the defendant is found to be insane at the time of the offense. *See* MD. HEALTH-GEN. CODE ANN. §§ 12-108(a), 12-109(c) (Supp. 1988); *see also infra* notes 38-40 and accompanying text.

15. *Treece*, 313 Md. at 669-70, 547 A.2d at 1056. Consent of the victim is a defense in a criminal prosecution only when it negates an element of the offense charged. Because rape "typically is defined as the 'unlawful carnal knowledge of a woman *without her consent*,' " consent by a woman to sexual intercourse negates an element of the crime of rape. W. LAFAVE & A. SCOTT, CRIMINAL LAW § 5.11(a) (2d ed. 1986) (emphasis added).

16. *Treece*, 313 Md. at 670, 547 A.2d at 1056.

17. *Id.*, 547 A.2d at 1057.

18. *Id.* at 667, 547 A.2d at 1055.

19. *Id.* at 681, 547 A.2d at 1062. In arriving at this decision, the court cited Brookhart v. Janis, 384 U.S. 1 (1966), in which the Supreme Court held that the constitutional

able for Treece's attorney to file a plea of not criminally responsible on his behalf, Treece's competence entitled him to make an intelligent and voluntary decision to withdraw the plea.[20]

Next, the Court of Appeals examined a question of greater significance for the purposes of this comment: was the defense entitled to open and close argument on the issue of criminal responsibility?[21] In addressing this question the court reviewed the major statutory revisions on criminal responsibility adopted by the Maryland General Assembly in 1984.[22]

Prior to the adoption of these statutory revisions, the State had the burden of proving the defendant's sanity beyond a reasonable doubt.[23] Section 12-109(b) of the Health-General Article now places on the defendant "the burden to establish, by a preponderance of the evidence, the defense of not criminally responsible."[24] Additionally, upon a finding of guilty but insane, the prior law pro-

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right of a defendant to plead not guilty cannot be waived by the defendant's counsel. *Id.* at 7. The Court of Appeals also noted Justice White's assertion in North Carolina v. Alford, 400 U.S. 25 (1970), that a plea should not be forced on a defendant, who "must be permitted to judge for himself" which of the various alternative pleas should be made. *Id.* at 33.

20. *Treece*, 313 Md. at 683, 547 A.2d at 1063. Although the Court of Appeals agreed that defense counsel makes the final determinations as to the strategic and tactical decisions connected with a criminal trial, the court advanced a number of reasons for holding that a competent defendant is entitled to decide personally whether to invoke the insanity defense. First, the court noted that a defendant who "successfully" asserts a not criminally responsible plea faces both the stigma of a criminal conviction and indefinite commitment to a state institution. *Id.* at 677, 547 A.2d at 1060. *See* MD. HEALTH-GEN. CODE ANN. §§ 12-111(a), 12-113(d) (Supp. 1988). The court also recognized that if a charged offense carries a low maximum penalty, the defendant may wish to risk imposition of the penalty rather than chance indefinite commitment. *Treece*, 313 Md. at 677, 547 A.2d at 1060. Finally, the court asserted that the stigma frequently attached to insanity and the potential conflict between an insanity defense and a defense on the merits may dissuade a defendant from filing an insanity plea. *Id.* at 677-78, 547 A.2d at 1060. *See also infra* notes 32-34 and accompanying text.

21. *Treece*, 313 Md. at 683-84, 547 A.2d at 1063.

22. *Id.* at 686-87, 547 A.2d at 1064-65. In 1984 the Governor's Task Force to Review the Defense of Insanity recommended a number of substantial changes in the insanity defense which were adopted by chapter 501 of the Acts of 1984. *See* Act of May 29, 1984, ch. 501, 1984 Md. Laws 2657. These changes are contained in the present provisions of title 12 of the Health-General Article. MD. HEALTH-GEN. CODE ANN. §§ 12-101 to -121 (Supp. 1988). *See* Anderson v. Department of Health & Mental Hygiene, 310 Md. 217, 220-22, 528 A.2d 904, 906-07 (1987).

23. *Treece*, 313 Md. at 686, 547 A.2d at 1064; *Anderson*, 310 Md. at 220, 528 A.2d at 906.

24. MD. HEALTH-GEN. CODE ANN. § 12-109(b) (Supp. 1988). In Hoey v. State, 311 Md. 473, 536 A.2d 622 (1988), the Court of Appeals held that it is constitutionally permissible to place the burden of proof on the defendant to prove a lack of criminal responsibility as long as the State retains the burden of proof on all elements of the crime, including *mens rea*. *Id.* at 490-91, 536 A.2d at 630. *See also* Leland v. Oregon, 343 U.S.

vided for an evaluation period during an initial confinement which extended only for a limited time.[25] The State had the burden of establishing the prerequisites for indefinite commitment by clear and convincing evidence. The State also carried this burden when an indefinitely committed defendant sought release from the institution.[26] Section 12-111(a) of the Health-General Article now authorizes indefinite commitment automatically upon finding a convicted defendant not criminally responsible.[27] Further, defendants seeking institutional release must show, by a preponderance of the evidence, that he or she is entitled to release.[28] Taken together, these statutory provisions provide the backdrop for the *Treece* decision.

The general rule in Maryland is that "the party holding the affirmative of the issue . . . has the right to begin and reply, both in the introduction of evidence and in the argument to the jury."[29] According to the *Treece* court, this rule suggests that the defense should be permitted to open and close argument on the issue of criminal responsibility because it is the defense which now bears the burden of proof on that issue.[30] As a matter of practice, however, allowing the prosecutor to argue first and last on the question of guilt and the defense counsel to argue first and last on the question of criminal responsibility in the same proceeding inevitably would produce overlap and confusion.[31]

Moreover, both the nature and the consequences of an insanity defense are altogether unlike that of any other affirmative defense. As the *Treece* court noted, a defense of not criminally responsible seriously could prejudice a defense on the merits.[32] For example,

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790, 798-99 (1952) (upholding Oregon statute which imposed burden of persuasion on the defendant to prove his or her sanity beyond reasonable doubt).

25. *Anderson*, 310 Md. at 221, 528 A.2d at 906. *See* MD. HEALTH-GEN. CODE ANN. § 12-110(a) (1982) (repealed 1984).

26. *Treece*, 313 Md. at 686, 547 A.2d at 1065; *Anderson*, 310 Md. at 221, 528 A.2d at 906; *see also* MD. HEALTH-GEN. CODE ANN. § 12-113(b) (1982) (repealed 1984).

27. MD. HEALTH-GEN. CODE ANN. § 12-111(a) (Supp. 1988).

28. *Id.* § 12-118(c)(4)(i).

29. Harris v. State, 312 Md. 225, 255, 539 A.2d 637, 652 (1988) (citation omitted).

30. 313 Md. at 684-85, 547 A.2d at 1064.

31. *Id.* at 685, 547 A.2d at 1064.

32. *Id.* at 677-78, 547 A.2d at 1060. Commentators opine that evidence of insanity "involves a presentation of the defendant's entire life history, social environment, and emotional and psychological experiences with special emphasis on his past anti-social and criminal behavior . . . tend[ing] to be fatally prejudicial to all other defenses based upon a different and contradictory view of the defendant." Comment, *supra* note 1, at 329-30 (citations omitted). Similarly, in Holmes v. United States, 363 F.2d 281 (D.C. Cir. 1966), the Court of Appeals for the District of Columbia recognized that

> substantial prejudice may result from the simultaneous trial on the pleas of

Treece testified that the sexual intercourse was consensual, while his attorney presented a defense based on paranoia and delusions at the time of the alleged rape.[33] Although intended to depict Treece's mental state at the time of the alleged rape, the evidence introduced may have thwarted substantially the credibility of his consent defense in the eyes of the jury.[34] Yet the same jury might conclude that Treece's impaired mental condition did not constitute legal insanity.[35] Furthermore, while the effective assertion of an ordinary affirmative defense typically results in acquittal, grave consequences flow from a "successful" insanity defense.[36]

The combination of these factors led the Court of Appeals to conclude that "at least under some circumstances, it would be better practice to bifurcate a trial in which criminal responsibility is an issue, with the decision on guilt or innocence to be made first, and then, if the verdict is guilty, the decision on criminal responsibility is made."[37] The decision to harmonize Maryland's criminal procedures with its revised statutory provisions on criminal responsibility by bifurcating the questions of guilt and criminal responsibility is sound. Under Maryland law, criminal responsibility is not even an

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> insanity and not guilty. The former requires testimony that the crime charged was the product of the accused's mental illness. Ordinarily, this testimony will tend to make the jury believe that he did the act. Also, evidence of past anti-social behavior and present anti-social propensities, which tend to support a defense of insanity, is highly prejudicial with respect to other defenses. Moreover, evidence that the defendant has a dangerous mental illness invites the jury to resolve doubts concerning commission of the act by finding him not guilty by reason of insanity, instead of acquitting him, so as to assure his confinement in a mental hospital.

Id. at 282 (citations omitted). *See also* Houston v. State, 602 P.2d 784, 788 (Alaska 1979) (holding that denial of motion for bifurcated trial substantially prejudiced defendant in presenting self-defense theory in view of defense psychiatrist's testimony that he did not believe self-defense claim).

33. *Treece*, 313 Md. at 678, 547 A.2d at 1060.

34. *Id.* Additionally, coupling an insanity plea with another defense may appear inconsistent or confusing to the jury because the insanity defense traditionally has been viewed as an admission of guilt and an attempt to evade criminal punishment. *See Holmes*, 363 F.2d at 282; Louisell & Hazard, *Insanity as a Defense: The Bifurcated Trial*, 49 CALIF. L. REV. 805, 806 n.2 (1961).

35. *Treece*, 313 Md. at 678, 547 A.2d at 1060.

36. *See* W. LAFAVE & A. SCOTT, *supra* note 15, at § 4.5(a); *see also supra* notes 27-28 and accompanying text.

37. *Treece*, 313 Md. at 685, 547 A.2d at 1064. The Court of Appeals and the Court of Special Appeals previously have held that bifurcation is not necessary when the issue of criminal responsibility is raised. *See* Tull v. State, 230 Md. 596, 601, 188 A.2d 150, 153 (1963); Bremer v. State, 18 Md. App. 291, 315, 307 A.2d 503, 519, *cert. denied*, 269 Md. 755, *cert. denied*, 415 U.S. 930 (1974). In *Treece* the Court of Appeals distinguished these cases by noting that they antedate the major revisions in the law on criminal responsibility. 313 Md. at 686, 547 A.2d at 1064.

issue until a guilty verdict has been returned.[38] As recently expounded by the Court of Appeals in *Hoey v. State*,[39] the *mens rea* requirements of a crime are quite distinct from the requirements necessary to show a lack of criminal responsibility.[40] Additionally, while evidence of *mens rea* bears on culpability, evidence of criminal responsibility or a lack thereof goes instead to the appropriateness *vel non* of criminal punishment.[41]

Thus, while it is evident that severing the criminal responsibility issue from the guilt phase of the trial is both warranted and feasible under Maryland law, the question remains of precisely how the bifurcated proceeding should be structured and governed. Notably, several subsidiary issues exist. Should bifurcation be mandatory or discretionary? If discretionary, what threshold of evidence would warrant bifurcation? Should psychiatric evidence or evidence of mental state be admissible during the guilt phase of the trial to negate the intent element of the crime? Should there be separate juries for the guilt and insanity phases of trial? And finally, if a single jury is to be impaneled, should it be informed during *voir dire* of the not criminally responsible by reason of insanity plea? An examination of the procedure for bifurcation adopted by the Court of Appeals reveals that the court carefully considered and provided answers for all of these questions. While this list certainly is not exhaustive, it raises most of the debated issues regarding bifurcation and will comprise the focus of analysis of the new rule.

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38. The Health-General Article provides in pertinent part that

> if the trier of fact finds that the State has proved beyond a reasonable doubt that the defendant committed the criminal act charged, then if the defendant has pleaded not criminally responsible, the trier of fact separately shall find, by a preponderance of the evidence, whether the defendant was at the time criminally responsible or not criminally responsible by reason of insanity . . . .

MD. HEALTH-GEN. CODE ANN. § 12-109(c) (Supp. 1988). *Cf.* Pouncey v. State, 297 Md. 264, 268, 465 A.2d 475, 477 (1983) (holding that a defendant can be found both guilty and insane).

39. 311 Md. 473, 536 A.2d 622 (1988).

40. *Id.* at 492-93, 536 A.2d at 631. *Mens rea*, or "guilty mind," is the mental element of most criminal offenses and often includes the requirement of intent to commit a crime. W. LAFAVE & A. SCOTT, *supra* note 15, at §§ 3.4, 3.5. By contrast, the standard to establish a lack of criminal responsibility under Maryland law is: "A defendant is not criminally responsible for criminal conduct if, at the time of that conduct, the defendant, because of a mental disorder or mental retardation, lacks substantial capacity: (1) To appreciate the criminality of that conduct; or (2) To conform that conduct to the requirements of law." MD. HEALTH-GEN. CODE ANN. § 12-108(a) (Supp. 1988). The distinction between intent and insanity is important because bifurcation is premised on the notion that guilt and insanity are separable. *See infra* notes 72-86 and accompanying text.

41. *Hoey*, 311 Md. at 494, 536 A.2d at 632.

II. THE RULE ON BIFURCATION

In response to the *Treece* decision, the Standing Committee drafted a new procedure to regulate the defense of not criminally responsible by reason of insanity.[42] Maryland Rule 4-314 is by far the most detailed rule written on bifurcation and borrows substantially from bifurcation statutes, rules, and case law of other states.[43] This comment will concentrate on three major issues—the role of discretion in a bifurcation procedure, the admissibility of psychiatric evidence during the guilt phase, and the role of the jury—in light of the statutes and case law of other jurisdictions that have considered bifurcation. In addition a miscellany of other pertinent portions of the new rule will be noted briefly.

A. The Role of Discretion

Maryland Rule 4-314(a)(1) gives the trial judge discretion to utilize a two-staged trial proceeding (1) if the defendant pleads not guilty and not criminally responsible by reason of insanity, and (2) if the defendant requests a jury trial.[44] Conversely, out of the six jurisdictions with statutes or court rules providing for bifurcation, four states—California, Colorado, Minnesota, and Wisconsin—mandate bifurcation when a defendant files simultaneous pleas of not guilty and not criminally responsible.[45] Only Minnesota, however, has addressed specifically its rationale for compelling bifurcation. In *State v. Jackman*[46] the Supreme Court of Minnesota asserted that "[m]andatory bifurcation promotes the policy goals of excluding psychiatric testimony regarding intent . . . and obviates objections to admissibility at trial of self-incriminating statements made by defendant in the compulsory mental examination."[47]

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42. 16 Md. Reg. 1533 (codified at MD. R. 4-314).

43. *Id.*

44. *Id.* (codified at Md. R. 4-314(d)(1)).

45. CAL. PENAL CODE § 1026 (West 1985 & Supp. 1989); COLO. REV. STAT. § 16-8-104 (1986); MINN. R. CRIM. P. § 20.02 (West Supp. 1989); WIS. STAT. ANN. § 971.165 (West Supp. 1988).

46. 396 N.W.2d 24 (Minn. 1986). In *Jackman* the defendant, in an attempt to obtain a unitary trial proceeding, filed a single plea of not guilty by reason of mental illness and refused to plead as to the elements of the crime. *Id.* at 27. The Supreme Court of Minnesota held that the trial court properly entered a plea of not guilty on the defendant's behalf and that the Minnesota Rules of Criminal Procedure require a bifurcated trial where the defendant does not admit the elements of the crime and also relies on the defense of mental illness, regardless of whether the defendant affirmatively pleads both issues. *Id.* at 29.

47. *Id.* at 28-29 (citing State v. Spurgin, 358 N.W.2d 648, 650-51 (Minn. 1984), and State v. Bouwman, 328 N.W.2d 703, 705 (Minn. 1982)).

Although this may be true,[48] the *Treece* court reasoned that a bifurcation proceeding is intended to benefit the defendant and "the defendant must bear the ultimate consequences of any decision [regarding an insanity plea]."[49] Raising an insanity defense is essentially a tactical trial decision; therefore, the defendant should be given the option of presenting an insanity defense in a unitary trial if it strategically would be advantageous to do so.[50] Making bifurcation discretionary rather than mandatory also would promote judicial economy by allowing the trial court to deny frivolous or unsubstantiated motions.[51] Overall, a discretionary bifurcation proceeding such as that prescribed in rule 4-314 clearly is preferable to compulsory bifurcation.

Subsection (a)(1) of rule 4-314, however, does present one relatively minor difficulty. The rule stipulates that *either the defendant or the State* may move for a bifurcated trial when the defendant raises the insanity defense.[52] Although the added time and expense make it unlikely that the prosecutor would request a bifurcated trial,[53] the defendant should retain the exclusive option because the decision to plead not criminally responsible is predominantly a matter of trial strategy.[54]

A crucial question in determining whether a court should exercise discretion to bifurcate a criminal proceeding is exactly what proffer of evidence warrants bifurcation. Maryland Rule 4-314(a)(3) states that "the court shall grant a request for bifurcation unless the court finds and states on the record a compelling reason to deny the motion."[55] This language, however, provides little practical guidance for the trial court. A review of case law in those jurisdictions

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48. Under the proposed rule, it appears that psychiatric evidence regarding intent will be admissible during the guilt phase of the trial. *See infra* text accompanying notes 93-100.

49. 313 Md. 665, 679, 547 A.2d 1054, 1061 (1988) (quoting Frendak v. United States, 408 A.2d 364, 378 (D.C. 1979)). *See also supra* note 20.

50. *See* Novosel v. Helgemoe, 118 N.H. 116, 125, 384 A.2d 124, 130 (1978) (observing that "[a] defendant may wish not to bifurcate but nonetheless to plead not guilty and raise the insanity issue"). Maryland Rule 4-314 specifically prescribes a procedure for a unitary trial with a limited separation of issues if the defendant refuses to request a bifurcated trial or if a request is made and denied. 16 Md. Reg. 1533 (codified at MD. R. 4-314(c)).

51. *See infra* text accompanying notes 55-66.

52. 16 Md. Reg. 1533 (codified at MD. R. 4-314(a)(1)).

53. *But see* Louisell & Hazard, *supra* note 34, at 807-09 (observing that bifurcation historically was viewed as an aid to the prosecution).

54. *See supra* notes 49-50 and accompanying text.

55. 16 Md. Reg. 1533 (codified at MD. R. 4-314(a)(3)). The trial court's decision presumably will be subject to an "abuse of discretion" review. 16 Md. Reg. 621.

that already allow bifurcation at the discretion of the trial court reveals a fairly well-established test for determining the appropriateness of bifurcation.[56] The cases outlining and interpreting this test will furnish direction to the Maryland courts faced with the ambiguities of the new rule and, therefore, warrant careful scrutiny.

The prevailing test for determining whether to grant a bifurcated trial was established by courts in the District of Columbia, which, by judicial decision, allow bifurcation at the discretion of the trial court.[57] The leading District of Columbia case on bifurcation, *Holmes v. United States*,[58] declared that "[r]elevant considerations upon a request for bifurcation include the substantiality of [the defendant's] insanity defense and its prejudicial effect on other de-

56. *See infra* notes 57-63 and accompanying text.

57. The District of Columbia has produced a considerable body of persuasive case law on the bifurcation issue. *See, e.g.*, United States v. Taylor, 510 F.2d 1283, 1289 (D.C. Cir. 1975) (finding it desirable for second jury to hear insanity defense if necessary to eliminate prejudice); United States v. Bennett, 460 F.2d 872, 881 (D.C. Cir. 1972) (stating trial court should determine in advance whether government psychiatrists intend to disclose statements of accused which could prejudice defense on the merits on motion to bifurcate); Contee v. United States, 410 F.2d 249, 250 (D.C. Cir. 1969) (finding bifurcation appropriate when there are both substantial defense on merits and substantial insanity defense); Higgins v. United States, 401 F.2d 396, 398 (D.C. Cir. 1968) (holding defendant carries burden of demonstrating need for bifurcation); Parman v. United States, 399 F.2d 559, 561-62 (D.C. Cir.), *cert. denied*, 393 U.S. 858 (1968) (finding that trial court's denial of motion for bifurcation conditioned upon impaneling separate juries for guilt and insanity phases not an abuse of discretion); Harried v. United States, 389 F.2d 281, 284 (D.C. Cir. 1967) (holding that trial judge has discretion but not duty to consider bifurcation in absence of request from defense counsel, even when trial court injects issue of insanity over defendant's objections); Holmes v. United States, 363 F.2d 281, 282-83 (D.C. Cir. 1966) (finding that substantial prejudice may result from simultaneous trial on pleas of insanity and not guilty); Lucas v. United States, 497 A.2d 1070, 1072-75 (D.C. 1985) (holding that impeachment of government evidence may constitute "substantial defense on the merits" requisite for bifurcation); Kleinbart v. United States, 426 A.2d 343, 353-55 (D.C. 1981) (finding that trial court abused its discretion in refusing bifurcated trial when there was substantial defense on the merits and substantial insanity defense); Jackson v. United States, 404 A.2d 911, 925-26 (D.C. 1979) (holding separate *voir dire* required for insanity phase); Harris v. United States, 377 A.2d 34, 39 (D.C. 1977) (stating trial court has broad discretion in considering impaneling of two juries); Shanahan v. United States, 354 A.2d 524, 527-28 (D.C. 1976) (request for new jury at insanity phase is addressed to discretion of trial judge). Virtually every jurisdiction which allows bifurcation in the discretion of the trial court by judicial decision closely follows the procedures for bifurcation established by District of Columbia case law. *See supra* note 5.

58. 363 F.2d 281 (D.C. Cir. 1966).

fenses."[59] Similarly, *Contee v. United States*[60] held that "a sound exercise of the trial court's discretion ordinarily will result in bifurcation whenever a defendant shows that he has a substantial insanity defense and a substantial defense on the merits to any element of the charge, either of which would be prejudiced by simultaneous presentation with the other."[61]

Pennsylvania, the only other state which prescribes a discretionary bifurcation procedure by statute,[62] employs a similar standard for deciding whether to separate the issue of criminal responsibility from the issue of guilt. In ruling on a motion for bifurcation, the Pennsylvania statute explicitly directs the trial court to consider "the substantiality of the defense of lack of responsibility and its effect upon other defenses."[63]

In light of the case law in other jurisdictions, the Maryland courts presumably will weigh both the substantiality of a defense on the merits and the insanity defense and the likelihood of prejudice to either if presented in a unitary trial when considering whether a compelling reason exists to deny the motion for bifurcation. The application of this test should be fairly straightforward in cases in which the defendant intends to assert self-defense or a consent defense (as in *Treece*) or another affirmative defense which is highly susceptible to prejudice from an insanity plea.[64]

Additionally, separation of the issues will promote judicial economy because repetition of evidence is avoided in the guilt and insanity phases.[65] In fact, judicial economy might even be fostered

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59. *Id.* at 283. This appeal followed the district court's denial of Holmes's post-conviction motion to vacate his sentence for robbery and impersonating a police officer due to ineffective assistance of counsel after his counsel failed to invoke the insanity defense at trial because he was concerned with the threat of prejudice to Holmes's defense on the merits. *Id.* at 282. The District of Columbia Circuit Court of Appeals recognized that trial counsel's appraisal of the prejudicial effect of the insanity defense on the defense of not guilty was reasonable and held that such prejudice may be remedied in the future by a bifurcated trial procedure. The court, however, refused to grant Holmes the retrospective application of this remedy. *Id.* at 283-84.

60. 410 F.2d 249 (D.C. Cir. 1969).

61. *Id.* at 250. The *Contee* court further opined that "[i]n cases of doubt, the question should be resolved in favor of bifurcation . . . ." *Id.*

62. PA. STAT. ANN. tit. 50, § 7404 (Purdon 1969 & Supp. 1988). In Maine a defendant who files a not criminally responsible plea has the choice of electing either a bifurcated or unitary trial; the trial court, however, does not have the discretion to refuse to bifurcate when a defendant opts for separate hearings on the issues of criminal responsibility and guilt. ME. REV. STAT. ANN. tit. 17-A, § 40 (1983 & Supp. 1988).

63. PA. STAT. ANN. tit. 50, § 7404(c) (Purdon 1969 & Supp. 1988). *See* Commonwealth v. Murphy, 493 Pa. 35, 39, 425 A.2d 352, 354 (1981).

64. *See supra* notes 32-35 and accompanying text.

65. Contee v. United States, 410 F.2d 249, 250 (D.C. Cir. 1969).

further if the defendant is acquitted because an acquittal on the merits will eliminate altogether the usually long and complex hearing on the insanity issue.[66]

Complications may arise, however, when a defendant presents a defense predicated either upon disproving an element of the crime charged or discrediting the government's case. For example, if the defendant attempts to negate the *mens rea* or intent element of a crime by presenting psychiatric evidence or evidence of an impaired mental state, the introduction of psychiatric evidence in both stages of the trial may result in repetition in the insanity portion.[67] Such cases will require the trial court to balance the desire to eliminate the prejudice inherent in raising an insanity defense concurrently with a defense on the merits with the necessity to promote judicial economy.[68] Alternatively, a defendant's case on the merits may consist entirely of challenging the government's evidence, such as impeaching the credibility of a state's witness. It is unclear, however, whether such a defense constitutes a "substantial defense on the merits" or is sufficiently incompatible with an insanity defense to justify a bifurcated trial.[69] Maryland courts will be forced to scrutinize bifurcation motions more carefully under such circumstances, and again will have to balance the possibility of prejudice with the reality of the need for efficient judicial administration.

B. Admissibility of Psychiatric Evidence

The question of whether, and under what circumstances, a de-

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66. *Id.*

67. *See* Louisell & Hazard, *supra* note 34, at 829-30.

68. *See Contee*, 410 F.2d at 250 (doubting whether bifurcation should be allowed if the evidence on criminal responsibility significantly overlaps the evidence on the merits); State v. Jones, 32 Wash. App. 359, 369, 647 P.2d 1039, 1045 (1982) (finding bifurcation inappropriate where there was significant overlap of evidence relevant to both insanity and not guilty pleas).

69. In Jackson v. United States, 404 A.2d 911 (D.C. 1979), the court concluded that the "defense's serious challenge to the government's circumstantial evidence" presented a substantial defense on the merits, notwithstanding that the defense did not proffer any evidence on the merits to the trial court at the time the court was considering bifurcation. *Id.* at 925. *See also* Lucas v. United States, 497 A.2d 1070, 1075 (D.C. 1985) (reaffirming that a proffer of defense evidence is not necessarily a prerequisite to bifurcation); *cf.* United States v. Ashe, 427 F.2d 626, 630 (D.C. Cir. 1970) (holding failure to bifurcate was abuse of discretion when government presented relatively weak evidence on the merits). A number of jurisdictions, however, have held that maintaining a defense based on a defendant's presumption of innocence or "putting the government to its proof" does not warrant bifurcation. *See, e.g.*, Garrett v. State, 320 A.2d 745, 748 (Del. 1974); State v. Smith, 512 A.2d 818, 821 (R.I. 1986); State v. Hohman, 138 Vt. 502, 513, 420 A.2d 852, 859 (1980); State v. Boyd, 280 S.E.2d 669, 676 (W. Va. 1981).

fendant may introduce psychiatric or mental state evidence during the guilt phase of a bifurcated trial highlights the focus of the controversy over bifurcation. Commentators have observed, "To draw a line between evidence of mental condition admissible at the first trial, and that admissible only at the second trial, a line that is logically satisfactory and administratively feasible, is a herculean task."[70]

The fundamental problem in this area stems from the manner in which the criminal law regards insanity. While every jurisdiction recognizes the insanity defense,[71] two distinct schools of thought have developed to explain the effect of the defense at trial. As will be detailed below, the admissibility of psychiatric evidence during the guilt phase of a trial largely depends upon the way in which the relationship between insanity and crime is defined. The admissibility of psychiatric evidence under rule 4-314 also will hinge on where Maryland falls within this dichotomy.

1. Insanity and Mental State.—The first school of thought posits that a mentally diseased person is *incapable* of committing a crime.[72] Stated another way, an insane person cannot formulate the intent which is an essential element of guilt.[73] Because intent logically is inseparable from guilt,[74] any procedure which purports to separate the issues of guilt and insanity would be unworkable.[75]

Jurisdictions endorsing this theory have found that bifurcation is not feasible or at least is more difficult.[76] This is because psychiatric or mental state evidence presumably will be relevant, and thus should be admissible, with regard to both the intent element of the

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70. Louisell & Hazard, *supra* note 34, at 820 (footnote omitted).

71. *See* Gallivan, *Insanity, Bifurcation and Due Process: Can Values Survive Doctrine*, 13 LAND & WATER L. REV. 515, 527 (1978); Louisell & Hazard, *supra* note 34, at 805.

72. *See, e.g.*, Wheeler v. State, 344 So. 2d 244, 246 n.2 (Fla. 1977) (stating that "the law does not hold a person criminally accountable for his conduct while insane, since an insane person is not capable of forming the intent essential to the commission of a crime"); Sanchez v. State, 567 P.2d 270, 277 (Wyo. 1977) (finding that insanity "would *preclude* the elements of intent and thus require a finding of no criminal violation"); *see also* Gallivan, *supra* note 71, at 520; Louisell & Hazard, *supra* note 34, at 805.

73. *Wheeler*, 344 So. 2d at 246 n.2; *Sanchez*, 567 P.2d at 277. It has been noted, however, that the insanity defense theoretically would be available in a prosecution for a strict liability crime which requires no evidence of intent or mental state. W. LAFAVE & A. SCOTT, *supra* note 15, at § 4.1(a).

74. *See* Comment, *supra* note 1, at 328.

75. *See, e.g.*, State v. Shaw, 106 Ariz. 103, 113, 471 P.2d 715, 725 (1970), *cert. denied*, 400 U.S. 1009 (1971) (holding that bifurcated trials violate due process); State *ex rel.* Boyd v. Green, 355 So. 2d 789, 794 (Fla. 1978) (same); *Sanchez*, 567 P.2d at 274 (same).

76. *See infra* notes 80-86 and accompanying text.

crime adjudicated in the guilt stage and the criminal responsibility issue determined in the insanity stage of a bifurcated trial.[77] Allowing the introduction of psychiatric evidence in both stages not only would undermine the purpose of bifurcation, which is to mitigate the possibility of prejudice by separating as much as possible the issues of guilt and insanity, but would make the insanity stage largely repetitive of the guilt stage.[78] Restricting psychiatric evidence to the insanity proceeding, however, creates an irrefutable presumption of guilt violative of due process.[79] Thus, courts in Arizona, Florida, and Wyoming, which adhere to the notion that insanity renders a person incapable of committing a crime, have held their statutes mandating bifurcation unconstitutional.[80]

Curiously, two other states following this approach to insanity—California and Colorado—have allowed psychiatric evidence during the guilt stage for the limited purpose of showing diminished

77. *See Shaw*, 106 Ariz. at 109, 471 P.2d at 721; *Green*, 355 So. 2d at 792; *Sanchez*, 567 P.2d at 278.

78. *See infra* note 84 and accompanying text.

79. Under this approach, the determination of sanity, an essential element of intent, in isolation of the determination of guilt would deny the defendant the right to disprove a material element of the crime prior to a determination of guilt. *See Shaw*, 106 Ariz. at 112, 471 P.2d at 724 ("To prohibit the introduction of any or all the evidence bearing on proof of insanity at the trial of guilt or innocence would deprive a defendant of the opportunity of rebutting intent, premeditation, and malice, because an insane person could have none."); *State* ex rel. *Boyd*, 355 So. 2d at 793 ("Under the bifurcated system established by our legislature, no evidence of insanity is admissible during that phase of the trial on which guilt or innocence is determined. Sanity is, in effect, presumed, giving rise to an irrebuttable presumption of the existence of the requisite intent . . . in violation of due process."); Sanchez v. State 567 P.2d 270, 280 (Wyo. 1977) ("In meeting [its] burden, the state was impermissibly aided by a presumption of intent which arose before appellant had an opportunity to present his defense of insanity.").

80. Shaw v. State, 106 Ariz. 103, 113, 471 P.2d 715, 725 (1970) (striking down a nonelective two trial statute); State *ex rel.* Boyd v. Green, 355 So. 2d 789, 792 (Fla. 1978) (finding that "the bifurcated trial procedure established by the legislature for the adjudication of guilt and insanity denies a defendant his right to due process of law"); *Sanchez*, 567 P.2d at 278 (holding that bifurcation statute "fails to satisfy due-process requirements with respect to specific-intent crimes, such as . . . rape").

responsibility.[81] In *People v. Wetmore*[82] the California Supreme Court held that if evidence of a defendant's mental state indicates that the defendant lacked the specific intent to commit the crime charged, this evidence is admissible during the guilt stage notwithstanding that it also may be probative of insanity.[83] The admission of psychiatric evidence during the guilt stage to establish diminished responsibility, however, has rendered California's bifurcation procedure so inconsistent and cumbersome as to make it almost unworkable.[84] Colorado, which also allows evidence of an impaired mental condition during the guilt phase for specific intent crimes,[85] arguably circumvents this problem by trying the sanity issue first with the burden of proof on the state, and then if the defendant is found to be sane, trying the guilt issue before a different jury.[86]

2. Insanity and Punishment.—The second viewpoint on the nexus between insanity and crime maintains that mentally ill persons are capable of forming the intent necessary to commit a crime but should not be subjected to punishment for their illegal acts.[87]

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81. Diminished responsibility refers to a lack of capacity "to achieve the state of mind requisite for the commission of the crime." People v. Anderson, 63 Cal. 2d 351, 364, 406 P.2d 43, 52, 46 Cal. Rptr. 763, 772 (1965) (footnote omitted). The concept of diminished responsibility, which has been adopted as an affirmative defense in a number of jurisdictions, permits the trier of fact to consider the impaired mental state of the defendant in mitigation of the punishment or the degree of the offense even though the impairment does not qualify as insanity under the prevailing test. BLACK'S LAW DICTIONARY 412 (5th ed. 1979). In Johnson v. State, 292 Md. 405, 439 A.2d 542 (1982), the Court of Appeals held that diminished responsibility is not a defense in Maryland. *Id.* at 418, 439 A.2d at 550. The court reaffirmed this in Hoey v. State, 311 Md. 473, 495 n.5, 536 A.2d 622, 632 n.5 (1988).

82. 22 Cal. 3d 318, 583 P.2d 1308, 149 Cal. Rptr. 265 (1978).

83. *Id.* at 324, 583 P.2d at 1312, 149 Cal. Rptr. at 269. The court's decision in *Wetmore* rejected dictum to the contrary in People v. Wells, 33 Cal. 2d 330, 350, 202 P.2d 53, 65, *cert. denied*, 338 U.S. 836 (1949). *See Wetmore*, 22 Cal. 3d at 321, 583 P.2d at 1310, 149 Cal. Rptr. at 267.

84. *See also* State v. Shaw, 106 Ariz. 103, 112, 471 P.2d 715, 724 (1970), *cert. denied*, 400 U.S. 1009 (1971) (noting the difficulties California has encountered in the administration of its bifurcated trials). *See generally* Isaacs, *The Gradual Decay of the Bifurcated Trial System in California and the Emergence of "Partial Insanity"*, 3 CAL. W.L. REV. 149 (1967) (suggesting that California's bifurcation procedure has been defeated by altering the rules to admit evidence of insanity at the first trial).

85. People v. Morgan, 637 P.2d 338, 343 (Colo. 1981) (limiting affirmative defense of impaired mental condition to specific intent crimes did not infringe on defendant's due process rights).

86. COLO. REV. STAT. §§ 16-8-104, 16-8-105 (1986). *See* Comment, *supra* note 1, at 334. Colorado's procedure presents another problem, however, in that a defendant may be found insane and committed to a state institution without ever having an opportunity to prove his or her innocence of the crime charged. *See id.*

87. For example, in State v. Hebard, 50 Wis. 2d 408, 184 N.W.2d 156 (1971), the

The intent element of a crime is altogether distinguishable from the issue of sanity under this line of thought. Thus, a separation of guilt from criminal responsibility in a bifurcated trial proceeding remains a viable alternative.[88] The restriction of psychiatric evidence to the insanity phase would follow logically from this approach.

Wisconsin and Minnesota follow this logic by strictly prohibiting the introduction of psychiatric evidence or evidence of mental condition during the guilt stage of trial. In *Steele v. State*[89] the Wisconsin Supreme Court barred the introduction of any expert opinion testimony tending to prove or disprove the defendant's capacity to form criminal intent from the guilt phase of the trial, insisting that exclusion of such evidence was necessary to preserve the integrity of the bifurcated trial system.[90] The Minnesota Supreme Court reached a similar conclusion in *State v. Jackman*[91] in which it held that psychiatric testimony is inadmissible on the issues of intent and premeditation.[92] Both of these cases draw a critical distinction between intent as a factual issue and the question of mental capacity and assert that psychiatric evidence has no probative value on the issue of intent.

Although Maryland similarly distinguishes intent and criminal responsibility,[93] the Court of Appeals recently concluded in *Hoey v. State*[94] that psychiatric evidence or evidence of an impaired mental

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Wisconsin Supreme Court stated, "[A]s 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." *Id.* at 420, 184 N.W.2d at 163 (footnote omitted). *See also* Gallivan, *supra* note 71, at 521.

88. *See Hebard*, 50 Wis. 2d at 420, 184 N.W.2d at 163.

89. 97 Wis. 2d 72, 294 N.W.2d 2 (1980).

90. *Id.* at 85, 294 N.W.2d at 7-8. *See also* State v. Repp, 122 Wis. 2d 246, 257-62, 362 N.W.2d 415, 420-22 (1985) (holding that psychiatric evidence on issue of capacity to form intent is inadmissible in guilt phase of bifurcated trial).

91. 396 N.W.2d 24 (Minn. 1986).

92. *Id.* at 29.

93. In Langworthy v. State, 284 Md. 588, 399 A.2d 578 (1979), the Court of Appeals noted that "the clear legislative intent regarding the successful interposition of a plea of insanity is not that an accused is to be found not guilty of the criminal act it was proved he committed, but that he shall not be punished therefor." *Id.* at 598, 399 A.2d at 584. The court reaffirmed this in Pouncey v. State, 297 Md. 264, 465 A.2d 475 (1983), in which it observed that "a finding of insanity is not tantamount to an absence of *mens rea*, or inconsistent with a general intent to commit a crime." *Id.* at 269, 465 A.2d at 478.

In addition, along with the bifurcation rule, the Court of Appeals also has adopted an amendment to Maryland Rule 4-242 which eliminates references to "the defense of insanity" and substitutes "a plea of not criminally responsible by reason of insanity" to clarify this distinction. 16 Md. Reg. 1533 (amending MD. R. 4-242). *See also supra* notes 38-41 and accompanying text.

94. 311 Md. 473, 536 A.2d 622 (1988).

state may be admitted to show an absence of *mens rea*.[95] In fact, the text of rule 4-314 dictates only that "evidence of mental disorder or mental retardation . . . shall not be admissible in the guilt stage of the trial *for the purpose of establishing lack of criminal responsibility*."[96] This language was based on the language of Maine's bifurcation statute,[97] which was interpreted in *State v. Burnham*[98] as allowing the introduction during the guilt phase of "*any* evidence, including evidence of mental abnormality, which raises a reasonable doubt as to whether the defendant had the culpable mental state."[99] Presumably then, psychiatric evidence should be admissible in the guilt stage of a trial bifurcated under rule 4-314, not to show insanity or diminished responsibility but rather to establish a complete absence of intent.[100]

C. *Jury Issues in Bifurcation*

The final major question implicated in a bifurcation scheme concerns the trier of fact. The proposed rule specifies that a jury first will hear the issue of guilt, and then if the defendant is found guilty, the same jury will hear the issue of criminal responsibility.[101] It also provides for a consolidated *voir dire* in which prospective jurors will be informed of and examined with respect to the criminal responsibility issue before the trial on the merits.[102]

This provision of rule 4-314 is troubling in that it allows the jury to decide the guilt question knowing that insanity is at issue, quite possibly restoring all the prejudice inherent in a unitary trial.[103] Even though the jury will not hear evidence of insanity dur-

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95. *Id.* at 495 n.5, 536 A.2d at 632 n.5. For a thorough discussion of *Hoey*, see *Survey of Developments in Maryland Law, 1987-88—Criminal Law*, 48 MD. L. REV. 602, 616 (1989).

96. 16 Md. Reg. 1533 (codified at MD. R. 4-314(b)(6)(A)) (emphasis added).

97. 16 Md. Reg. 621. Although the reporter's note is not regarded as an official commentary or interpretation of the proposed Rule, it is helpful at this point in determining the intent of the Standing Committee. According to the note, the language in paragraph (b)(6)(A) of Rule 4-314 is based on ME. REV. STAT. ANN. tit. 17-A, §§ 40(2), (4) (1983 & Supp. 1988). 16 Md. Reg. 621, reporter's note.

98. 406 A.2d 889 (Me. 1979).

99. *Id.* at 895 (emphasis in original) (footnote omitted).

100. *Id.* at 896 (declaring that "[o]nly if the evidence is relevant to a culpable state of mind and otherwise comports with the rules of evidence must it be admitted . . ."). Not all evidence pertaining to the proof of the defense of lack of criminal responsibility will be relevant to intent and, therefore, admissible during the guilt stage of the trial. *Id.*

101. 16 Md. Reg. 1533 (codified at MD. R. 4-314(b)(2),(5)(A)).

102. *Id.* (codified at MD. R. 4-314(b)(3)).

103. For example, in United States v. Bennett, 460 F.2d 872 (D.C. Cir. 1972), the court acknowledged that in some cases

> bifurcation alone cannot prevent [prejudice] unless the two parts of the trial are

ing the first stage, the mere knowledge that an insanity plea has been raised could impair substantially the credibility of a defense on the merits.[104] Alternatively, a jury might resolve any doubts as to the defendant's guilt by finding the defendant not criminally responsible, thereby assuring indefinite commitment of the defendant in a state institution.[105]

The most obvious solution to this dilemma is to require two different juries, one for the guilt issue and another for the criminal responsibility issue. In this scheme, the jury passing on the question of guilt will not know that the defendant's insanity is at issue, and the jury trying the insanity question will not be aware of the facts surrounding the guilt issue. Thus, using separate juries completely abolishes the possibility of prejudice from having one jury hear both issues. Judicial economy, however, largely has precluded this practice. Only two states, Colorado and Pennsylvania, currently require separate juries in bifurcated trials.[106] California's bifurcation statute permits separate juries in the discretion of the trial court,[107] but with few exceptions the guilt and insanity hearings are tried before the same jury.[108] Finally, while District of Columbia courts have recognized the desirability of separate juries if necessary to eliminate prejudice, the trial courts are given broad discretion in decid-

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> presented to different juries. It would surely be unreasonable to expect a jury to ignore the lurid details of the crime when turning to the insanity defense even if the defense on the merits had already been resolved.

Id. at 881. *See also* United States v. Taylor, 510 F.2d 1283, 1289 (D.C. Cir. 1975) (finding that "the likelihood of prejudice was sufficient to require separate juries" where the claim of rationality in support of self-defense was inconsistent with the claim of irrationality in support of the insanity defense).

104. *Bennett*, 460 F.2d at 880-81. *See supra* note 32 and accompanying text.

105. Holmes v. United States, 363 F.2d 281, 282 (D.C. Cir. 1966).

106. Colorado's statute specifically commands that "[t]he issues raised by the plea of not guilty by reason of insanity shall be tried separately to different juries . . . ." COLO. REV. STAT. § 16-8-104 (1986). The language in Pennsylvania's statute appears discretionary, providing that "the court, in the interest of justice, may direct that the issue of criminal responsibility be heard and determined separately from the other issues in the case and, in a trial by jury, that the issue of criminal responsibility be submitted to a separate jury." PA. STAT. ANN. tit. 50, § 7404(c) (Purdon 1969 & Supp. 1988). Nevertheless, in Commonwealth v. DiValerio, 283 Pa. Super. 315, 423 A.2d 1273 (1981) the Superior Court of Pennsylvania held that "[i]f, on the issue of criminal responsibility, the defendant demands a jury, then that jury may not also determine the other issues. If, on those other issues, the defendant demands a jury, there must be a separate jury." *Id.* at 320, 423 A.2d at 1276.

107. California's statute directs that once a defendant has been found guilty, the insanity question shall be tried "either before the same jury or before a new jury in the discretion of the court." CAL. PENAL CODE § 1026(a) (West 1985 & Supp. 1989).

108. *See* Comment, *supra* note 1, at 327 n.4.

ing whether to impanel a second jury for the insanity phase.[109]

The alternative is to forego informing the jury of the not criminally responsible plea prior to the guilt stage and to conduct a separate *voir dire* on the insanity issue if the jury returns a verdict of guilty. The benefit of this procedure is that the jury would render the verdict on the guilt issue unaware that the defendant has filed an insanity plea. Maine's bifurcation statute authorizes such a procedure at the election of the defendant,[110] and at least one jurisdiction has held that to do otherwise would be reversible error.[111] Although separate *voir dires* and separate juries will impose additional burdens on the court system in terms of time and resources, Maryland courts should at least be given the discretion to weigh this burden against the possibility of prejudice on a case-by-case basis and to conduct separate *voir dires* or impanel separate juries when individual circumstances dictate such measures to eliminate prejudice.

D. Other Provisions of Maryland Rule 4-314

Finally, rule 4-314 contains a miscellany of other provisions outlining procedural aspects of bifurcation. The rule specifies the time and manner of moving for bifurcation.[112] It stipulates that if a defendant enters a plea of guilty the court will conduct a trial solely on the issue of criminal responsibility.[113] Maryland Rule 4-314 also provides for the selection of alternate jurors and permits the option of trying the criminal responsibility issue before a judge instead of a jury.[114] Furthermore, the new rule states that the State may move for judgment on the issue of criminal responsibility at the close of the defendant's case.[115] Lastly, Rule 4-314 notes that the order of

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109. *See* Parman v. United States, 399 F.2d 559, 561-62 (D.C. Cir.), *cert. denied*, 393 U.S. 858 (1968) (holding defendant is not entitled to two trials as a matter of right); Harris v. United States, 377 A.2d 34, 39 (D.C. 1977) (finding that "the court has broad discretion in considering the impaneling of two juries"); Shanahan v. United States, 354 A.2d 524, 527-28 (D.C. 1976) (stating that in "a request for a new jury at the insanity phase, appellant must have proffered a 'substantial claim' in the trial court before [it] can find an abuse of discretion") (footnote omitted).

110. ME. REV. STAT. ANN. tit. 17-A, § 40 (1983 & Supp. 1988).

111. In Jackson v. United States, 404 A.2d 911 (D.C. 1979), the District of Columbia Court of Appeals averred that "[b]y injecting the issue of insanity at this stage, the [trial] court fatally prejudiced the appellant's defense on the merits because the jury, aware of a possible insanity defense, 'will tend . . . to believe that [appellant] did the act.' " *Id.* at 926 (citations omitted).

112. 16 Md. Reg. 1533 (codified at MD. R. 4-314(a)(2)).

113. *Id.* (codified at MD. R. 4-314(a)(4)).

114. *Id.* (codified at MD. R. 4-314(b)(4), (5)(B)).

115. *Id.* (codified at MD. R. 4-314(b)(7)).

proof and argument in either a bifurcated or unitary trial shall reflect the fact that the defendant has the burden of proof on the issue of criminal responsibility.[116]

III. CONCLUSION

By acknowledging the intrinsic prejudice of coupling an insanity defense with a defense on the merits in a unitary trial, the Court of Appeals in *Treece* paved the way for a major change in Maryland's criminal procedures. Even without the modifications recommended in this comment, namely authorizing bifurcation only upon the motion of the defendant and mandating either separate juries or separate *voir dires* for the questions of criminal responsibility and guilt, the bifurcation procedure outlined in proposed Maryland Rule 4-314 promises the elimination of at least some of the bias inherent in a defense of not criminally responsible.

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116. *Id.* (codified at MD. R. 4-314(b)(6)(B), (c)).