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Mens Rea, Due Process and the Burden of Proving Sanity or Insanity

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I

INTRODUCTION

Courts in the United States have long recognized that before guilt can be found in the commission of a common law type offense, an actus rea in union with a mens rea must be present. While the idea of the necessity of a combination of an actus rea with a mens rea determined prior to a finding of guilt has remained constant, the conception of the mental element of the common law crime, the mens rea or morally blameworthy intent, has not remained unchanged. For example, an indian who is posted as a sentry to guard an encampment and who shoots and kills an escaping figure under the mistaken belief that it is an evil spirit seeking to do harm would probably not have been convicted when the concept of mens rea was based largely on the morality of the action. Today, however, he would be guilty of at least manslaughter.[1] The role of the intent element in crime has been further confused by the development of modern strict liability offenses.[2] This uncertainty surrounding the modern definition of the mens rea has had a direct influence on the direction which both the state and federal courts have taken in determining the relevance of sanity or insanity to the existence of the morally blameworthy intent element of a crime. The different conclusions arrived at by the jurisdictions have given rise to distinctly different procedural approaches for handling the insanity defense.

Twenty-two states and the District of Columbia currently place the burden of proving insanity by a preponderance of the

1. Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 1019 (1932).

2. The concept of strict liability in crime presents a methodological problem for a defense of insanity based on lack of intent in all criminal activity, but as pointed out by the Colorado Supreme Court, "No one has yet contended that mental capacity to commit a crime is not a material element of the crime of murder, or any other offense." People v. District Court, 165 Col. 253, 266, 439 P.2d 741, 748 (1968).

evidence on the defendant.[3] The basis for the responsibility assumed by the defendant in these jurisdictions is either: (1) that sanity is deemed relevant to assessing the severity of punishment rather than the presence of intent, or (2) that while sanity can be considered during the guilt phase of a trial, sanity need not be proven by the state per se because the prosecution can show the existence of the requisite intent without proving sanity. The alternate approach adopted by twenty-eight states and the federal courts[4] requires that, once the issue of sanity has been raised, the prosecution bear the burden of proving the defendant's sanity beyond a reasonable doubt, as with any other element of the crime. Under this view, the prosecution is generally entitled initially to rely on the presumption of sanity to satisfy its burden and need only make an affirmative proof of sanity beyond a reasonable doubt when insanity is put in issue by the defense.[5] In some jurisdictions even the prosecution's case may be sufficient to raise the sanity issue.[6] In *Rivera v. State*,[7] the United States Supreme Court had the opportunity to reconcile the differing conclusions as to the relevance of sanity to the requisite mens rea of a crime, and, at the same time, determine whether constitutional requirements of due process of law mandate the federal and majority approach to proof of sanity.

Carmen Nereida Rivera had been charged with first degree murder. She was convicted of second degree murder. She then appealed her conviction to the Supreme Court of Delaware,[8] charging as error that: (1) Title 11 Section 401 of the Delaware Code,[9] classifying mental illness as an affirmative defense

3. Note, *Constitutional Limitations on Allocating the Burden of Proof of Insanity to the Defendant in Murder Cases*, 56 B. UNIV. L. REV. 499, 503 n.35 (1976).

4. *Id.* at 505 n.41; *See* also Note, *Insanity-The Burden of Proof*, 30 LOU. L. REV. 117, n.1 and 2 (1969); Annot. 17 A.L.R. 3d Supp. 6, 6-17 (1976); annot. A.L.R. 3d 146, 154 (1968).

5. Battle v.U.S., 209 U.S. 36 (1908).

6. Annot. 17 A.L.R. 3d 146, 154 (1968).

7. 429 U.S. 877 (1976).

8. Rivera v. State, 351 A.2d 561 (1976).

9. 11 DEL. CODE § 401 (Michie 1974) provides:

§ 401. Defendant's mental illness or mental defect as affirmative defense; verdict of 'not guilty by reason of insanity'.

(a) In any prosecution for an offense, it is an affirmative defense that, at the time of the conduct charged, as a result of mental illness or mental defect, the accused lacked substantial capacity to appreciate the wrongfulness of his conduct or lacked sufficient will-power to choose whether he would do the act or refrain from doing it.

(b) If the defendant prevails in establishing the affirmative defense provided in subsection (a) of this section, the trier of facts shall return a verdict of 'not guilty by reason of insanity'.

which the defendant must prove by a preponderance of the evidence under Title 11 Section 304 of the Delaware Code,[10] was violative of due process[11] and (2) a jury instruction limiting the mitigating defense of extreme emotional distress to the crime of first degree murder was violative of due process and equal protection.[12] The Delaware Supreme Court sustained the constitutionality of Title 11 Section 401 of the Delaware Code,[13] but found Carmen Rivera's second defense to be good.[14] The court then reversed and remanded the case with instructions to strike the murder conviction and to enter a judgment of conviction for manslaughter.[15] Rivera thereupon appealed her conviction to the United States Supreme Court questioning the constitutionality of the Delaware statutes requiring a criminal defendant raising an insanity defense to prove mental illness by a preponderance of the evidence.[16] Her appeal was dismissed by the Court for want of a substantial federal question.[17] Justice Stevens noted probable jurisdiction and Justices Brennan and Marshall filed a dissenting memorandum opinion.[18]

In the aftermath of *Hicks v. Miranda*,[19] and its affirmation of the constitutional rule, the Court's summary dismissal of *Rivera v. State*[20] establishes precedential weight to the constitutionali-

10. 11 DEL. CODE § 304 (Michie 1974) provides:
§ 304. Defendant's affirmative defenses; prove by preponderance of evidence;
(a) When a defense declared by this Criminal Code or by another statute to be an affirmative defense is raised at trial, the defendant has the burden of establishing it by a preponderance of the evidence.
(b) Unless the court determines that no reasonable juror could find an affirmative defense established by a preponderance of the evidence presented by the defendant, the defendant is entitled to a jury instruction that the jury must acquit him if they find the affirmative defense established by a preponderance of the evidence.
(c) An affirmative defense is established by a preponderance of the evidence when the jury is persuaded that the evidence makes it more likely than not that each element of the affirmative defense existed at the required time.
11. 35 A.2d at 561.
12. *Id.* at 562.
13. *Id.* at 563.
14. *Id.*
15. *Id.*
16. Rivera v. State, 429 U.S. 877 (1976).
17. *Id.*
18. *Id.*
19. 422 U.S. 332 (1975).
20. 351 A.2d 561 (1976).

ty of statutes requiring a criminal defendant raising an insanity defense to prove mental illness or defect by a preponderance of the evidence.

Although the majority in *Rivera*[21] declined to hear argument on the case, Justice Brennan, joined by Justice Marshall, argued[22] that the time had come to reconsider the wisdom of restricting the holding in *Davis v. State*[23] to the federal courts as had been done in *Leland v. Oregon*.[24] The *Leland* decision was predicated upon the Court's reluctance "(T)o interfere with Oregon's determination of its policy with respect to the burden of proof on the issue of insanity since we cannot say that policy violates generally accepted concepts of basic standards of justice".[25] Subsequent to that decision the Supreme Court has, on several occasions,[26] held that state prosecutions must, to comport with the due process requirements of the constitution, prove beyond a reasonable doubt every fact essential to constitute the crime charged. By summarily disposing of *Rivera*,[27] the majority was apparently remiss in overlooking a very ripe and critical issue. If sanity is an element necessary to a person's guilt as held in *Davis*,[28] it is apparent that in order to insure due process of law, the prosecution should, just as it must with any other element of the offense charged, bear the burden of proving beyond a reasonable doubt the sanity of the defendant once the issue has been raised. The key to the question revolves around the meaning of criminal intent. Before any due process argument can be made, therefore, it is necessary to understand whether sanity has a material influence on the presence of intent. This is done by first briefly analyzing the meaning of mens rea at common law, and the meaning adopted by the majority of state and federal courts, and second by determining what the term has come to mean in a minority of the jurisdictions. Of the minority approaches, two states, California and Delaware, have been selected as representative of the views to be examined in more detail. After these two minority views have been fully explored, this paper will again focus on the requirements of due process.

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21. 429 U.S. 877 (1976).
22. *Id.* at 227.
23. 160 U.S. 469 (1895).
24. 343 U.S. 790 (1952).
25. *Id.* at 799.
26. Speiser v. Randall, 357 U.S. 513 (1958); Lynch v. Overholster, 369 U.S. 705 (1962); In Re Winship, 397 U.S. 358 (1969); Mullaney v. Wilber, 421 U.S. 684 (1975).
27. 429 U.S. 877 (1976).
28. 160 U.S. at 485.

II

THE CONCEPT OF INTENT AS A NECESSARY ELEMENT TO A CRIME

A. At Common Law

Up until at least the twelfth century, feudal criminal law was based largely on strict liability. The conception of mens rea, as used in a modern sense, was virtually non-existent. It was possible in certain cases for criminal liability to attach irrespective of the actor's state of mind. The concept of a morally blameworthy state of mind, as an essential element of a crime, was an evolutionary development occurring during the thirteenth and fourteenth centuries under the influences of the cannon and Roman law.[29] By the eighteenth century, the concept of the mental element in crime had developed sufficiently so that definite defenses based upon the lack of moral blameworthiness had been established. It was at this point that Blackstone presented these defenses in a logical order in his Commentaries.[30] The state's right to inflict punishment depended not only on the occurrence of the overt act constituting the offense charged, but additionally upon the simultaneous presence of a vicious will.[31] An involuntary act could not induce any guilt. Culpability was dependent upon the existence of the will to make a choice either to do or to avoid the overt act.[32] The absence of this choice between committing or avoiding the criminal act or omission excused the idiot or lunatic from criminal liability at the common law. The extant law recognized that such a person suffered from a defective or vitiated understanding which excused any criminal guilt.[33] The non compus person was incapable of committing even treason itself.[34]

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29. For a short history of mens rea in the early common law *See*: Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1932); Levitt, *The Origin of the Doctrine of Mens Rea*, 17 ILL. L. REV. 117 (1922); Turner, *The Mental Element in Crimes at Common Law*, 6 CAM. L.J. 31 (1936); Remington and Helstad, *The Mental Element in Crime-A Legislative Problem*, 1952 WIS. L. REV. 644, 648-52.

30. 2 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Book IV § 20-34 (4th ed. 1899).

31. *Id.* at § 21.

32. *Id.*

33. *Id.* at § 24.

34. *Id.*

B. *The Federal And Majority Conception*

The common law requirement of a union between the criminal act and a criminal intent before punishment can be legitimately inflicted upon the accused, was subsequently recognized by the courts in the United States.[35] As the United States Supreme Court stated in *Morissette v. United States*:[36]

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in nature systems of law as belief in freedom of the human will, and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.[37]

Upon this precept early courts found that the proof of this intent was necessarily on the prosecution. Some courts then went on to reason that if, in fact, a criminal intent is an essential element in every crime, and if, by reason of insanity a person is incapable of forming any intent, he cannot be regarded by law as guilty.[38] These courts consider the mental element, mens rea or morally blameworthy intent to be something entirely different from mere immorality of motive.[39] They recognize the existence of the common law concept of a voluntary will, the ability to freely exercise a choice between alternative modes of behavior, as an essential element of the crime.[40]

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35. Dennis v. United States, 341 U.S. 494, 500 (1951); Smith v. People, 361 U.S. 147, 150 (1959).

36. 342 U.S. 246 (1952).

37. *Id.* at 250-51.

38. Davis v. United States, 160 U.S. 469 (1895); Commonwealth v. Pomeray, 117 Mass. 143 (1875).

39. In Shelvlin-Carpenter Co. v. Minnesota, 218 U.S. 57 (1910), the Supreme Court recognized the possibility of strict liability crimes. In United States v. Balint, 258 U.S. 250 (1922), the Court upheld the conviction where the defendant had violated a federal narcotics law and was ignorant of the facts that made his act a crime. For a criticism of strict liability crimes in general see Hippard, *The Unconstitutionality of Criminal Liability Without Fault; An Argument For a Constitutional Doctrine of Mens Rea*, 10 HOUS. L. REV. 1039 (1973).

40. The Supreme Court of the United States has on several occasions recognized the importance of the intent element of a crime: "The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American Criminal jurisprudence." Smith v. People, 361 U.S. 147, 150 (1959); Dennis v. United States, 341 U.S. 494, 500 (1951). The single statement by the Court in Powell v. Texas, 392 U.S. 514, 535 (1967), to the effect that the Court has never articulated a general constitutional doctrine of mens rea cannot be considered controlling. Powell was convicted of being drunk in a public place and the court was careful to note he was not being convicted for being a chronic alcoholic. For a review of mens rea and cases involving alcohol or drug addiction see; Robin-

> The conception of blameworthiness or moral guilt is necessarily based upon a free mind voluntarily choosing evil rather than good; there can be no criminality in the sense of moral shortcoming if there is no freedom of choice or normality of will capable of exercising a free choice.[41]

In these jurisdictions, therefore, the essential element of criminal responsibility, the capacity to exercise a voluntary will, is absent if the defendant is insane.

C. The Minority Conception

A minority of jurisdictions, even though adopting the precept of a union of a criminal act with a criminal intent, found that the general presumption of sanity required that it be overcome by a preponderance of evidence presented by the defendant.[42] One justification for placing the responsibility of disproving sanity on the defendant was the nature of the insanity defense.

1. California

By viewing a defense of insanity offered by itself as a plea of nonamenability, the issue of the mental element of the offense is never reached. Pure pleas of nonamenability admit, for purposes of the plea, the commission of the crime and all of its elements. The defense is not that a crime has not been committed, but rather for other reasons no criminal liability should attach to the offense. In California, a jurisdiction in which a plea of insanity by itself is considered a nonamenable plea,[43] for example, an act or omission does not constitute a criminal offense unless there exists a union of the action and an intent.[44] Yet, if the defendant pleads not guilty by reason of insanity, and joins with it another plea or pleas, he is first tried on the merits of such other plea or pleas. For purposes of trial on such other

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son v. California, 370 U.S. 660 (1962); Powell v. Texas, 392 U.S. 514 (1967); Driver v. Hinnant, 356 F.2d 761, 764 (4th Cir. 1966) (alcohol); Kelly v. United States, 361 F.2d 50, 52 (D.C. Cir. 1966) (alcohol); Gaster v. District of Columbia, 351 F.2d 50 (D.C. Cir. 1966) (alcohol); United States v. Lindsey, 324 F. Supp. 55 (D.C. Cir. 1971) (narcotics); After Powell a lack of mens rea still seems to remain a valid defense.

41. Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 993-94 (1932).

42. State v. Marler, 2 Ala. 43, 36 Am. Dec. 398 (1841); People v. Myers, 20 Cal. 518 (1852).

43. CAL. PENAL CODE § 1016 (West Supp. 1977).

44. CAL. PENAL CODE § 20 (West 1972) provides: "In every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence."

pleas, the defendant is conclusively presumed sane and cannot question the absence of the general mental element of the crime as a result of his insanity. If the defendant is found guilty on the other plea or pleas, or has pleaded not guilty by reason of insanity alone, then the issue of sanity is tried separately and apart from the defendant's guilt or innocence of the crime charged.[45] In reality, once a plea of insanity has been entered, the requirements of California Penal Code Section 20, that an intent be present, is never satisfactorily addressed during trial on the issue of guilt.

Generally in California, the intent with which the unlawful act was done must be proven as well as the material facts stated in the indictment.[46] This intent can be proved by evidence directly or indirectly establishing the fact, or more commonly, with the use of presumptions. Under California Evidence Code Section 665, a person is presumed to intend the ordinary consequences of his *voluntary* act. Further, an unlawful intent is presumed from the doing of an unlawful act.[47] Both of these presumptions are expressly inapplicable in proving the specific intent element of any crime.[48] These presumptions simply indicate that when a person does an act, he "intends" to do that act. What then is meant by the word "intend"? Does it involve some judgment on the morality of the action contemplated? California Penal Code Section 7(1) defines the word "willfully", when applied to the "intent" with which an act is done or omitted, as implying "(s)imply a purpose or willingness to commit the act, or make the omission referred to . . . . It does not require any intent to violate law, or to injure another, or to acquire any advantage". If a willful intention does not convey the meaning of an immoral act, certainly the use of the word intent without the adjective cannot convey a stronger meaning on the morality of an action. A more reasonable interpretation of the word is that the act or omission of the person was the result of a free mind voluntarily choosing between alternative modes of behavior which may be good or evil. The presumptions regarding intent embrace this interpretation when they exclude themselves from applicability to elements of specific intent.[49] The issues of specific intent are not directed at choosing a particular course of conduct over another, rather, they are addressed to the intention of particular consequences to be the result of specific acts. It follows that the

45. CAL. PENAL CODE § 1026 (West Supp. 1977).
46. People v. Harris, 29 Cal. 678, 681 (1866).
47. CAL. EVID. CODE § 688 (West 1968).
48. *See* note 47, *supra*.
49. *Id.*

intent required in combination with the overt act refers to the voluntariness of the action and not the morality of the act itself and that the mens rea requirement under California law is that the individual have the capacity to voluntarily select a mode of behavior. Even though it appears that culpability is directly dependent upon the existence of a free will, evidence directly relating to the presence of such mental capabilities is excluded on the basis that it operates only to excuse the crime and does not determine whether a crime has been committed at all.[50]

California recognizes, however, that "a person who cannot comprehend the nature and quality of his act is not responsible therefore".[51] "An act done in the absence of the will is not any more the behavior of the actor than is an act done contrary to his will".[52] California law expressly states that insane persons are incapable of committing crimes.[53] Legal insanity in California denotes a diseased or deranged condition of the mind which either makes a person incapable of knowing or understanding the nature and quality of his act or makes a person incapable of knowing or understanding that the act was wrong.[54] A person who is insane may very possibly understand the nature of his act yet still not be capable of understanding its quality or whether the act itself is right or wrong. That process involves the exercise of a voluntary will, freely distinguishing between alternative actions. The process of contemplating between right and wrong is the intent element necessary both at common law and in California before a person engaging in criminal activity can be found guilty of a crime. Instead of focusing on whether there was this kind of voluntariness about the act, the courts

50. People v. Troche, 206 Cal. 35, 47, 273 P.767, 772 (1928), held:
It follows, therefore, that any evidence tending to establish the insanity of the defendant under his plea of not guilty by reason of insanity at the time of the commission of the homicide, other than evidence of the immediate circumstances of the offense, would have been irrelevant and immaterial on the trial of the general issue as to the guilt or innocence of the defendant raised by the general plea of not guilty. As the statute accorded the defendant his full right, and ample opportunity to submit to a jury his plea of insanity at the time of the commission of the offense, in excuse of his act and as a reason why no penalty of the law should be visited upon him, it follows that the trial court correctly excluded the evidence on the trial of the general issue.

51. People v. Freeman, 61 Cal. App. 2d 110, 142 P.2d 435 (1943).

52. *Id.*

53. CAL. PENAL CODE § 26 (West 1972).

54. CAL JIC No. 4.00 (West 1970).

overlook this aspect of insanity, preferring to use it as an excuse to preclude punishment. It is true that for humanitarian reasons[55] it may not be morally right to punish the insane. A policy decision should not be controverted, however, into a justification for denying a person the protection gained from the necessity that *all* elements to a crime be proven before guilt can be imputed, including the mens rea element. Even though evidence of insanity has been prevented from entering into the guilty phase of the trial, it has been recognized that even a "(C)onclusive persumption of sanity . . . is not a conclusive capacity to commit a crime".[56] Indeed, California acknowledges the importance of the mental element of intent even while refusing to view the issue of sanity as important in a determination of guilt.[57] By definition, a person who is found to be insane, under the California definition of insanity, does not have the capacity to voluntarily exercise a free will. Without that capability, there can never be a union of the intent and the overt act necessary to constitute the offense. Logically, therefore, the issue of sanity is a vitally important factor in a trial of guilt. There is no guilt in the absence of the mens rea requirement.[58] If a person does not possess a free will to choose between alternative actions as a result of his insanity, he cannot have the requisite intent. Thus, he is not guilty of any offense.[59]

2. Delaware

Not all states view the defense of insanity as a mere plea of nonamenability.[60] Delaware appears to avoid the problems which a jurisdiction like California encounters by allowing the

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55. People v. Troche, 206 Cal. 678, 273 P. 767 (1866).

56. People v. Wells, 33 Cal. 2d 330, 348, 202 P.2d 53, 64 (1949).

57. It would seem elementary that a plea of not guilty to a charge of murder puts in issue the existence of the particular mental states which are essential elements of the two degrees of murder and of manslaughter. . . . Accordingly, it appears only fair and reasonable that defendant should be allowed to show that in fact, subjectively, he did not possess the mental state or states in issue.

People v. Gorshen, 51 Cal. 2d 716, 733, 336 P.2d 492, 502-03 (1959)

Whenever a particular mental state, such as a specific intent, is by statute made an essential element of a crime, that specific state must be proved like any other fact.

People v. Wells, 33 Cal. 2d 330, 350, 202 P.2d 53, 65 (1949).

58. Again, we are not referring to strict liability offenses.

59. Yet this is not to say insane persons may not be confined. Even Blackstone recognized that though an insane person lacked the mental element necessary to be guilty of an offense, his confinement might be necessary to protect society.

2 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Book IV § 25 (4th ed. 1899).

60. State v. Murphy, 338 Mo. 291, 90 S.W.2d 103 (1936).

defendant to introduce evidence of insanity at the guilt phase of trial.[61] Further, Delaware requires that the people prove, beyond a reasonable doubt, every material element of a crime.[62] It also requires that a person's guilt must be based on conduct which includes a voluntary act.[63] Under Delaware's definition of insanity, however, the voluntariness of the defendant's actions is assumed and must be disproved by the defense by a preponderance of the evidence.[64] Relying on the presumption of sanity which the defendant must overcome, the prosecution is not required to offer proof of any criminal intent. The rationale in jurisdictions abiding by this rule is that the sanity of the defendant is not an element of the crime. As such, the absence of sanity cannot be used to deny the mental element of the crime required under Delaware law.

The Delaware Code provides that insanity exists where "(T)he accused lacked substantial capacity to appreciate the wrongfulness of his conduct or lacked sufficient *will power to choose* whether he would do the act or refrain from doing it".[65] (emphasis added).

The Delaware Code also provides that a person is not guilty of an offense unless his guilt is predicated upon conduct which includes a voluntary act,[66] defined as a bodily movement performed consciously or habitually as a result of effort or determination.[67] Like California, the Delaware Code does provide

61. 11 DEL. CODE § 401 (Michie 1974); However, upon proper application for a bifurcated trial, the judge may, at his discretion, grant the motion. Garrett v. State, 320 A.2d 745 (1974).

62. State v. Johnson, 36 Del. 341, 175 A.669 (1934).

63. 11 DEL. CODE § 242 (Michie 1974) provides:

> A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act which he is physically capable of performing.

11 DEL. CODE § 243 (Michie 1974) provides:

> 'Voluntary Act' means a bodily movement performed consciously or habitually as a result of effort or determination, and includes possession if the defendant knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession.

64. 11 DEL. CODE § 304 (Michie 1974), *see* note 10, *supra* for text.

65. 11 DEL. CODE § 401 (Michie 1974), *see* note 9, *supra* for text.

66. 11 DEL. CODE § 242 (Michie 1974), *see* note 63, *supra* for text.

67. 11 DEL. CODE § 243 (Michie 1974), *see* note 63, *supra* for text.

further help in determining the meaning of voluntariness.[68] Similiarly, the commission of a crime requires a conscious determination to commit the act. Underlying the rule is the philosophy that everyone is held bound to contemplate and be responsible for the natural consequences of his own voluntary act.[69] Contemplation necessarily involves a knowledge of alternative courses of action and a voluntary will to choose between them. But if a person is insane under Delaware Law, he lacks the will power to choose whether he would do the act or refrain from doing it. His bodily movements are no longer necessarily performed consciously or habitually as a result of effort or determination. The accused, if insane, does not have the capacity to make a voluntary choice in his actions. Logically, therefore,

68. 11 DEL. CODE § 231 (Michie 1974), provides:

(a) 'Intentionally.' A person acts intentionally with respect to an element of offense when:

(1) If the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause that result; and

(2) If the element involves the attendant circumstances, he is aware of the existence of such circumstances or believes or hopes that they exist.

(b) 'Knowingly.' A person acts knowingly with respect to an element of his offense when:

(1) If the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(2) If the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause that result.

(c) 'Recklessly.' A person acts recklessly with respect to an element of an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the element exists or will result from his conduct. The risk must be of such a nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto.

(d) 'Criminal negligence.' A person acts with criminal negligence with respect to an element of an offense when he fails to perceive a risk that the element exists or will result from his conduct. The risk must be of such a nature and degree that failure to perceive it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

11 DEL. CODE § 232 (Michie 1974), provides:

'Elements of an offense' are those physical acts, attendant circumstances, results, and states of mind which are specifically included within the definition of the offense or, if the definition is incomplete, those states of mind which are supplied by the general provisions of this Criminal Code. Facts establishing jurisdiction and venue and establishing that the offense was committed within the period prescribed in § 205 of this Criminal Code must also be proved as elements of the offense.

69. State v. Johnson, 36 Del. 341, 175 A.669 (1934).

since insanity precludes the requisite intent under Title 11 Section 242 of the Delaware Code, and since the prosecution is required to prove beyond a reasonable doubt every material element of the offense charged, it appears essential that once the question of the defendant's sanity is put at issue, that the prosecution prove his sanity beyond a reasonable doubt as a necessary element of the crime.

As seen however, both California and Delaware, while accepting the general common law idea of the necessity of intent in defining criminal behavior, reject the relationship between sanity and intent. This is accomplished in either type jurisdiction by never squarely confronting the issue. A later case in at least one of these jurisdictions expressed regret with the rule.[70] Arguably, the mental element necessary to satisfy such intent statutes may be presumed.[71] The defense of insanity would not go to the absence of such an intent, but would be directed at showing that the defendant lacked the requisite mental capacity necessary to make the infliction of punishment a moral act. Behind this rationale is the policy decision that,

> (S)anity is not an element of the crime, but rather, involves the ability to understand and comprehend the right and wrong of the commission of the crime, a state of mentality which would render punishment by way of confinement in a penal institution futile and would require institutional confinement of a defendant for treatment rather than for punishment.[72]

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70. State v. Murphy, 338 Mo. 291, 90 S.W.2d 103 (1936); The court stated it would have been inclined to require the prosecution to carry the burden of establishing sanity, if the question were new and open to judicial determination, but did not so hold, believing itself constrained by a line of earlier rulings to the contrary. *Id.* at 301, 108.

71. CAL. EVID. CODE § 665 (West 1968) provides:

> A person is presumed to intend the ordinary consequences of his voluntary act. This presumption is inapplicable in a criminal action to establish the specific intent of the defendant where specific intent is an element of the crime charged.

CAL. EVID. CODE § 668 (West 1968) provides:

> An unlawful intent is presumed from the doing of an unlawful act. This presumption is inapplicable in a criminal action to establish the specific intent of the defendant where specific intent is an element of the crime charged.

72. Commonwealth v. Vogel, 440 Pa. 1, 10, 268 A.2d 89, 94 (1970). This reasoning was adopted by Justice Rehnquist in a concurring opinion in Mullaney v. Wilbur, 421 U.S. 684 (1975) ("(E)vidence relevant to insanity as defined by State law, may also be relevant to whether the required mens rea was present, the existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime"). *Id.* at 705-06.

There is a fundamental contradiction in the universal requirement of a mens rea in union with an overt act, a state's definition of insanity which precludes that intent, and a state's policy of refusing to consider sanity as an element of the crime. There appears no logical reason why the

> (L)aw should discriminate against a defendant who was insane at the time of the commission of the (criminal) act by casting upon him the burden of establishing that defense by a preponderance of the evidence while throwing the mantle of presumptive innocence around a deliberate, calculating (criminal) as to other similar defenses.[73]

Perhaps the best explanation of why sanity is not considered an element of the crime in these jurisdictions can be seen in *Leland v. State*,[74] adopted as the controlling authority by the Delaware Supreme Court in *Rivera v. State*.[75] *Leland*[76] involved the constitutionality of an Oregon statute requiring the defendant to prove his insanity beyond a reasonable doubt.[77] The law was upheld by the United States Supreme Court because it was unwilling to say that Oregon's determination of its policy, with respect to the burden of proof on the issue of sanity violated "(G)enerally accepted concepts of basic standards of justice".[78] The Court put great emphasis, however, on the fact that the jury was told that the prosecution was required to prove every element of the crime charged.[79] In fact, the jury was instructed that the State had to prove guilt beyond a reasonable doubt, and only after finding the defendant guilty of homicide, was the jury to consider the mental capacity of the defendant.[80] Legal sanity was a separate issue per se and was set apart from the offense charged. Although nominally acknowledging that

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73. State v. Murphy, 338 Mo. 291, 301, 90 S.W.2d 103, 108 (1936). The Missouri Supreme Court illustrated that rationale with the following statement,

> Suppose, for example, in such a case the defense were that the killing was accidental, or in self-defense, or in necessarily overcoming resistance to lawful arrest by an authorized conservator of the peace for commission of a felony, etc.; or, in a prosecution for an assault by a married woman, suppose the defense were that she acted under coercion of her husband. In all these instances for the purposes of the defensive plea the act of killing or assaulting would be admitted and the denial would go only to the criminal intent; but under the law of this state it could not be contended the accused must assume the burden of proving himself, or herself, innocent by a preponderance of the evidence. *Id.* at 301, 108.

74. 343 U.S. 790 (1952).

75. 351 A.3d 561 (1976).

76. 343 U.S. 790 (1952).

77. 1940 Or. Laws § 26.926, the pertinent part of which provided, "when the commission of the act charged as a crime is proven, and the defense sought to be established is the insanity of the defendant, the same must be proven beyond a reasonable doubt . . . ."

78. 343 U.S. at 799.

79. *Id.* at 795.

80. *Id.*

sanity is relevant during the guilt phase of trial, Delaware, like Oregon and similar jurisdictions, implicitly adopt the same procedure as California does explicitly with its bifurcated trial. The policy behind such bifurcation is identical to policy in California.[81] Like California, however, a policy decision should not be justification for a defendant to be found guilty without proof of all of the material elements of a crime. "The existence of a mens rea is the rule of, rather than the exception to the principles of Anglo-American Criminal jurisprudence".[82] Even jurisdictions requiring the defendant to bear the burden of proving his insanity accept this principle. Recognizing the fundamental requirement of a mens rea necessitates acknowledgement of the primary purpose that voluntariness of will has played in that concept historically. As Blackstone wrote in his Commentaries:

> (W)here there is no discernment, there is no choice; and where this is no choice, there can be no act of the will, which is nothing else but a determination of one's choice to do or to abstain from a particular action: he, therefore, that has no understanding can have no will to guide his conduct.[83]

The fact that moral guilt was originally based upon freedom of choice seems to have been overlooked in many instances where the morality of the act was not at issue. In his concurring opinion, Chief Justice Rudkin, in *State v. Strasburg*,[84] recognized that there could be little analogy between an individual who was found guilty of a strict liability type offense and an insane person who was not allowed to raise the issue of his insanity to the offense charged.[85] While the former may not have had the knowledge of the criminality of his action, he does intend to do the act and, as a free moral agent, has the power to refrain from its commission until he determines the nature and quality of such act. In the latter instance, the insane person does not have the capacity to make such a determination before he acts. While comprehending the nature of his acts, an insane person may take life, destroy property or even choose means singularly fitted to accomplish those ends and still not have the

81. Commonwealth v. Vogel, 440 Pa. 1, 268 A.2d 89 (1970).
82. Smith v. People, 361 U.S. 147, 150 (1959).
83. 2 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Book IV § 21 (4th ed. 1899).
84. 60 Wash. 106, 110 P. 1020 (1910).
85. *Id.* at 128, 1027.

capacity to distinguish the quality of the act as to whether it is right or wrong.[86] The insane person is not a voluntary actor. "To be guilty of a crime a person must engage responsibly in action. Thus, an insane person who does the act is not guilty of the crime."[87]

The court's concern with the issue of sanity should not be with whether the defendant is sufficiently morally blameworthy to justify his punishment, but rather it should be at the guilt phase of the trial to determine the defendant has the mental capacity to commit the crime. Simply, the court must ask, did the defendant have a free mind, voluntarily choosing evil rather than good? Unless the question can be answered affirmatively at the guilt phase of the trial, there can be no criminal liability. The distinction between the morality of actions and a voluntary will must be strongly emphasized. Moral blameworthiness is not ascertained in a retrospective examination made after guilt has been decided to determine the morality of punishment. Moral blameworthiness, the mens rea, is a voluntary free will present simultaneously with an overt act which must exist before guilt can be found. When the common law spoke of the combination of a vicious will with an overt act, as necessary elements of any crime, it was not limiting the meaning of vicious will to immoral acts. Quite the contrary, the emphasis was on the absence of the capacity to choose freely between a good or an evil act. Only where such capacity existed could the court then decide whether an action was morally blameworthy.[88]

Although the California-type jurisdictions and those professing the Delaware and Oregon view, appear to take different approaches as to when the defendant's sanity becomes a determinable issue, in reality, both achieve the same end, i.e., the question of sanity is not addressed until the finder of fact has determined that a crime has been committed. Both acknowledge that before there can be a crime, both an intent and an overt act must exist. But implicit in their presumption of sanity, is a predetermination that the defendant has the requisite mens rea. This rationale is directly contrary to the concept of criminal intent adopted from the common law. While the morality of the act is no longer of such primary importance, the key emphasis remains on the exercise of a free will, i.e., the capability of

86. Knights v. State, 58 Neb. 225, 228-29, 78 N.W. 508, 509 (1899).

87. Easter v. District of Columbia, 361 F.2d 50, 51 (D.C. Cir. 1966).

88. For an excellent discussion of the role of voluntariness in criminal intent see Wasserstrom, *H.L.A. Hart and the Doctrines of Mens Rea and Criminal Responsibility*, 35 UNIV. CHI. L. REV. 92, 93-106 (1967).

choosing voluntarily between alternative patterns of good and evil behavior. Under the statutes examined defining insanity, a person cannot, where he is insane, have this capacity. Without the existence of voluntariness of action, the mental element of crime is absent. Sanity, therefore, is a prerequisite to any crime. A finding that a crime has been committed without a finding of sanity is totally untenable and contradictory. There can be no crime without sanity since without sanity no intent exists. Sanity is, and has always been, an essential element in the commission of any crime requiring a mens rea.[89]

III

DUE PROCESS REQUIREMENTS OF PROOF BEYOND A REASONABLE DOUBT

As previously discussed, since intent, a free will to choose between alternative modes of behavior, is an essential element of every crime, the absence of such an intent precludes a finding of guilt. Therefore, since the finding of insanity under a McNaughton-type test excludes the presence of such an intent by definition, the insane defendant cannot have the capacity to commit crime. Once this proposition is established it is logically necessary that the burden of proving the presence of criminal intent, or the capacity of having such intent (sanity), if put in issue, remains on the prosecution.[90] Such was the argument of dissenting Justice Brennan in *Rivera*:[91]

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89. Whether this statement is applicable to strict liability crimes is unimportant. This analysis has been directed at crimes in which the mental element of the offense has been historically recognized.

90. Note, *The Insanity Defense in Criminal Trials-Burden of Proof*, 10 SUFFOLK U.L. REV. 1037 (1976);

> (I)n accordance with treatment given other 'affirmative' defenses, the defendant should only be required to bring forth evidence tending to show his insanity at the time of the commission of the offense, and should not be required to bear the burden of persuasion. . . . *Id.* at 1048.

Hippard, Sr., *The Unconstitutionality of Criminal Liability Without Fault: An Argument For a Constitutional Doctrine of Mens Rea*, 10 HOUS. L. REV.1039 (1973)

> The defense of insanity inferentially rebuts the mens rea element of the state's case. If mens rea is an essential element of the crime, the state should have the burden of proving it beyond a reasonable doubt; there is neither logic nor justice in shifting that burden of proof to a defendant. It is the state that is supposed to justify use of the criminal sanction before it deprives a citizen of his good name, his property and perhaps his freedom. *Id.* at 1045, n. 30.

91. 429 U.S. 877 (1976).

> (T)he plea of insanity, whether or not the State chooses to characterize it as an affirmative defense, relates to the accused's state of mind, an essential element of the crime, and bears upon the appropriate form of punishment . . . . We said in Mullaney that the requirement of Winship that the State prove all elements of the crime was one of substance, not limited to 'a State's definition of the elements of the crime . . .'.[92]

The rationale for requiring the prosecution to prove the defendant's sanity once it has been put in question was stated by the United States Supreme Court, in the following terms:

> (S)trictly speaking the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence, or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial, and applies to every element necessary to constitute the crime . . . . How, then upon principle, or consistently with humanity, can a verdict of guilty be properly returned, if the jury entertains a reasonable doubt as to the existence of a fact which is essential to guilt, namely, the capacity in law of the accused to commit the crime?[93]

In *Mullaney*,[94] a Maine statute required the defendant to prove by a preponderance of the evidence that he acted in the heat of passion or sudden provocation to reduce the homicide charged from murder to manslaughter. The Court, citing *Speiser v. Randall*,[95] found that due process required the prosecution to bear the burden of producing evidence proving beyond a reasonable doubt every element of the offense charged.[96] The federal courts[97] and 28 other state courts[98] currently apply this rule in sanity cases. Justice Rehnquist, joined by Chief Justice Burger, argued, in his concurring opinion in *Mullaney*,[99] that *Leland v. Oregon*[100] was not inconsistent with the holding in *Mullaney* because: "(T)he issue of insanity as a defense to a criminal charge was considered by the jury only after it had found that all elements of the offense, including the mens rea, if any, required by state law, had been proved beyond a reasonable doubt".[101] However, the defect in such reasoning has already been shown. By definition the accused cannot have the requisite mens rea if he is found insane and the prosecution must bear the burden of proving sanity along with all other elements of a crime if requirements of due process are to be met.

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92. *Id.* at 227.
93. Davis v. United States, 106 U.S. 469, 487-88 (1895).
94. 421 U.S. 684 (1975).
95. 357 U.S. 513 (1958).
96. 421 U.S. at 701.
97. Davis v. United States, 160 U.S. 469 (1895).
98. *See* note 4 *supra*.
99. 421 U.S. 684 (1975).
100. 343 U.S. 790 (1952).
101. 421 U.S. at 705, Justice Rehnquist concurring.

> Lest there remain any doubt about the constitutional statute of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.[102]

In Re Winship[103] involved a 12 year old boy found to have committed an act that, if done by an adult, would have constituted a larceny. Although the juvenile judge acknowledged that the proof might not establish guilt beyond a reasonable doubt, he rejected the defense counsel's contention that such was required by the Fourteenth Amendment, and found the boy guilty under a preponderance of the evidence standard. The United States Supreme Court held, in reversing the conviction, that it was incumbent upon the state to prove beyond a reasonable doubt every element necessary to constitute the crime charged.[104]

In *Morissette v. United States*[105] the Supreme Court found that:

> As we read the record, this case was tried on the theory that even if criminal intent were essential its presence (a) should be decided by the Court (b) as a presumption of law, apparently conclusive, (c) predicated upon the isolated act of taking rather than upon all of the circumstances. In each of these respects we believe the trial court was in error.[106]

Judge Lay, speaking in *Stump v. Bennett*[107] for the Federal Courts of the Eighth Circuit, found that "(W)hen the burden of persuasion is shifted to the defendant to disprove essential elements of a crime, . . . then it is certain that the due process clause of the Fourteenth Amendment has been violated".[108]

In explaining why the prosecution must bear the burden of proving all essential elements of a crime, the Supreme Court replied:

> There is always in litigation a margin of error, representing error in fact finding which both parties must take into account. Where one party has at stake an interest of transcending value-as a criminal defendant his liberty-this margin of error is reduced as to him by the

102. *In Re* Winship, 397 U.S. 358, 364 (1969).
103. *Id.*
104. *Id.* at 364.
105. 342 U.S. 246 (1952).
106. *Id.* at 273-74.
107. 398 F. 2d 111 (8th Cir. 1968).
108. *Id.* at 118.

> process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the fact finder of the guilt.[109]

Finally, in *Davis*, the Supreme Court, dealing with the question of the burden or proof of sanity or insanity, said:

> If the whole evidence, including that supplied by the presumption of sanity, does not exclude beyond reasonable doubt the hypothesis of sanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offense charged. His guilt cannot be said to have been proved beyond a reasonable doubt-his will and his acts cannot be held to have joined in perpetrating the murder charged . . . .[110]

Plainly, due process requires that all states carry the responsibility of proving all material elements of a crime beyond a reasonable doubt, including the requisite intent. It follows that since sanity can be a material factor in the existence of such an intent, once the question of sanity is raised, due process necessarily requires that the prosecution prove the defendant's sanity beyond a reasonable doubt as one of the elements of the offense charged.

IV

CONCLUSION

Jurisdictions such as Delaware,[111] which excludes sanity as a factor of criminal intent,[112] or such as California,[113] which employs a bifurcated trial procedure, do so because they hold the existence or nonexistence of legal insanity as bearing no necessary relationship with the existence or nonexistence of the required mental elements of a crime.[114] This conclusion is an erroneous misconception of the true intent element of a crime at common law. It is through this misconception of the intent element of crime that these jurisdictions can acknowledge that a person cannot be guilty of a crime without the union of an act with a criminal intent,[115] and, at the same time, either preclude a defendant from asserting his insanity to show the absence of the mens rea requirement at the guilt stage of trial,[116] or covertly accomplish the same end by presuming evidence of insanity

109. Speiser v. Randall, 357 U.S. 513, 525-26 (1958).
110. 160 U.S. at 448.
111. 11 DEL. CODE §304 (Michie 1974)*see* note 10,*supra* for text.
112. Commonwealth v. Vogel, 440 Pa. 1, 268 A. 2d 89 (1970).
113. CAL. PENAL CODE § 1026 (West Supp. 1977).
114. People v. Trouche, 206 Cal. 35, 47, 273 P. 767, 772 (1928).
115. CAL. PENAL CODE § 20 (West 1972).
116. People v. Troche, 206 Cal. 35, 273 P. 767 (1928).

during the guilt phase of the trial as irrelevant in determining whether an offense has been committed.[117]

By failing to hear argument in *Rivera v. State*,[118] the Supreme Court lost the opportunity to squarely confront the due process requirements of proving sanity or insanity in such cases. By summarily dismissing Rivera's appeal, the Court reaffirmed its decision in *Leland*[119] allowing the States to disassociate the issue of sanity from the determination of the existence of the mental element of a crime. In not hearing the case, the Court could not reconsider the meaning of criminal intent. Had the Court entertained this case, not only would the import of *Leland* have been reconsidered, but much of the confusion surrounding intent and the relevancy of sanity would have been resolved. These questions remain unanswered and will hopefully be addressed by the Court in the future. When such time comes the Court should decide that since the concept of intent is a necessary element of the crime, due process requires that once the defendant's sanity is put in issue the prosecution must prove such sanity beyond any reasonable doubt.

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117. Commonwealth v. Vogel, 440 Pa. 1, 268 A.2d 89 (1970).
118. 429 U.S. 877 (1976).
119. 343 U.S. 790 (1952).