SELF-INCRIMINATION AND THE COMPULSORY MENTAL EXAMINATION: A PROPOSAL

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During the last decade, the practice of compelling a criminal defendant who raises the issue of competency or insanity to undergo a mental examination has been decried by most commentators, principally on the ground that it violates the defendant's privilege against self-incrimination.[1] Though there can be no doubt of the incriminating potential of some aspects of the compulsory examination, the general criticism of the procedure has been based on analysis which is over-simplified. While the fifth amendment has rightly been called the mainstay of our accusatorial system of justice,[2] it is not an absolute and is deserving only of the intrinsically limited application due any other legal principle. If it is not to be reduced to absurdity, its meaning must be functionally related to the context in which the incrimination problem occurs. Thus, when a writer concludes that, because the psychiatric examination occurs while the defendant is in custody and is conducted by state-employed doctors, the protections of *Miranda v. Arizona*[3] should apply,[4] he is evading the challenge of

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1. *See, e.g.*, Danforth, *Death Knell of Pre-Trial Mental Examinations? Privilege Against Self-Incrimination*, 19 RUTGERS L. REV. 489 (1965); Lefelt, *Pretrial Mental Examinations: Compelled Cooperation and the Fifth Amendment*, 10 AM. CRIM. L. REV. 431 (1972); Nunez, *Mental Examinations of Criminal Defendants in Federal Court*, 9 SAN DIEGO L. REV. 839 (1972); Note, *Requiring a Criminal Defendant to Submit to a Government Psychiatric Examination: An Invasion of the Privilege Against Self-Incrimination*, 83 HARV. L. REV. 648 (1970); Note, *Pre-Trial Psychiatric Examination: A Conflict With the Privilege Against Self-Incrimination?*, 20 SYRACUSE L. REV. 738 (1969); Note, *Mental Examinations of Defendants Who Plead Insanity: Problems of Self-Incrimination*, 40 TEMP. L.Q. 366 (1967); Note, *Pre-Trial Psychiatric Examinations and the Privilege Against Self-Incrimination*, 1971 U. ILL. L.F. 232; Comment, *Changing Standards for Compulsory Mental Examinations*, 1969 WIS. L. REV. 270; Comment, *Compulsory Mental Examinations and the Privilege Against Self-Incrimination*, 1964 WIS. L. REV. 671.

2. Malloy v. Hogan, 378 U.S. 1, 7 (1964).

3. 384 U.S. 436 (1966).

4. *See* Note, *Pre-Trial Psychiatric Examinations and the Privilege Against Self-Incrimination*, 1971 U. ILL. L.F. 232, 237-39.

legal analysis. The differences between the mental examination and custodial interrogation[5] are no less important than the similarities. The hospital is not necessarily a police station; the psychiatrist need not be a police agent.[6]

At a more fundamental policy level, such a scrupulously severe approach ignores more significant problems confronting the mentally ill criminal defendant. As nearly every commentator concedes, the criminal process identifies and responds to only a small proportion of the mentally afflicted who are accused of crimes.[7] Many jurists and psychiatrists have criticized the law for clinging to antiquated notions of guilt, responsibility and mental disease, thereby preventing the recognition and treatment of such problems according to more progressive theories.[8] Whatever the ultimate resolution of this tension between modern psychiatric doctrine and the law, it can only be impeded by unnecessary extension of the self-incrimination privilege. Such an approach would reduce the access of professional diagnosticians to the defendant, and, necessarily, the significance of their input to the disposition of his case. At the risk of speaking heresy, I believe that mentally disturbed offenders as a class would benefit far more from the partial removal of mental issues to a more professional plane than by the random tactical advantage that may follow an extension of the self-incrimination privilege. This assertion is not meant to denigrate the importance of the adversary process to the determination of a defendant's mental condition, nor to elevate the infant and imprecise disciplines of psychology or psychiatry to the status of oracles.[9] It is offered only to suggest that the clash of opposing opinion should be on as an enlightened and scientific a level as possible. At least two commentators, for example, have suggested that in place of expert witnesses the prosecution could rebut a defense showing on a mental issue by use of lay witness testimony and in-court observation by experts.[10]

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5. In Miranda v. Arizona, 384 U.S. 436 (1966), the Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in a significant way." *Id.* at 444.

6. Undoubtedly psychiatrists and psychiatric techniques can be used (or misused) to further the ends of an interrogation. *See* People v. Leyra, 302 N.Y. 353, 98 N.E.2d 553, 151 N.Y.S.2d 658 (1951), *aff'd in relevant part sub nom.*, Leyra v. Denno, 347 U.S. 556 (1954). This point is discussed further at note 65 *infra*.

7. *See* Diamond, *Criminal Responsibility of the Mentally Ill*, 14 STAN. L. REV. 59, 84-85 (1961). *See generally* A. GOLDSTEIN, THE INSANITY DEFENSE (1967).

8. *See, e.g.*, J. BIGGS, THE GUILTY MIND (1955); P. ROCHE, THE CRIMINAL MIND (1958).

9. Note the comments on over-reliance on psychiatric expertise in Diamond & Louisell, *The Psychiatrist as an Expert Witness: Some Ruminations and Speculations*, 63 MICH. L. REV. 1335, 1342-43 (1965).

10. Lefelt, *supra* note 1, at 447; Note, *Requiring a Criminal Defendant to Submit to a Government Psychiatric Examination: An Invasion of the Privilege Against Self-Incrimination*, 83 HARV. L. REV. 648, 671 (1970). This procedure would no doubt

Even conceding that such evidence in a proper case could counterbalance concrete expert testimony offered by the defendant, this would hardly be an advance over the present situation. If the ultimate objective of legal reform relative to the mentally disturbed offender is to insure a more sympathetic recognition of his problems, the interdiction of the compulsory mental examination is a reactionary, not a progressive, suggestion.

The object of this article is to clarify the conceptual confusion that surrounds the self-incrimination privilege in this situation. The central thesis is that all previous analyses have failed to appreciate the crucial distinction between the incidental material divulged by the method of the examination, *i.e.*, the defendant's statements, and the material which is its aim to produce—an analysis of the defendant's personality. This failure is largely attributable to the analogy between a psychiatrist's interrogative technique and that of a police sergeant obscuring the fact that the purposes of the two are entirely different. If the defendant is adequately immunized against all adverse uses of his communication to the examiner, the examination is similar to a physical display—a "mind print"—and can be justified constitutionally under the recognized exception to the fifth amendment for "real," "nontestimonial" evidence.

What follows, then, is first, an analysis of the possible incriminating material which may be divulged in the mental examination, and second, a proposal by which the possiblity of in-court self-incrimination can be minimized while the benefits of the examination are retained. To place these thoughts in perspective, they are prefaced by a discursive description of mental examinations as currently mandated by statutes in the United States.

THE COMPULSORY MENTAL EXAMINATION

A defendant's mental condition may be the subject of inquiry at two stages in a criminal proceeding: at the outset, whether he is competent to stand trial at that time and, later, whether he was legally sane at the time of the act complained of. The Supreme Court has held that the state has a constitutional duty to determine the mental condition of any defendant whose competency to stand trial is in question.[11] Incompetency is generally defined as the inability of a defendant either to understand the charges against him or assist in his own defense.[12]

be accompanied by an appeal to all the prevalent prejudice about mental disease, since such state's evidence could hardly compete with the defendant's on a purely scientific basis.

11. Pate v. Robinson, 383 U.S. 375, 385-86 (1966).

12. This is the standard of competency in the federal courts and in most states.

Second, except for a limited number of *malum prohibitum* offenses for which the defendant is culpable without regard to his state of mind,[13] the establishment of the requisite *mens rea* is an essential element of criminal offenses.[14] Thus, where the insanity defense is raised, the state must show that the defendant was legally sane at the time of the allegedly criminal act pursuant to one of a number of standards, depending on the jurisdiction in which the trial takes place.

Approximately 40 states and the federal system have provided statutory authorization for court-ordered mental examinations when either or both of these issues are raised.[15] The primary purpose of

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See Dusty v. United States, 362 U.S. 402 (1960); Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 457 (1967).

13. *Cf.* Morissette v. United States, 342 U.S. 246 (1952).

14. *See* People v. Wells, 33 Cal. 2d 330, 350-51, 202 P.2d 53, 61-62 (1949); Ingles v. People, 92 Colo. 518, 525-26, 22 P.2d 1109, 1112 (1933); State v. Strasburg, 60 Wash. 106, 111, 110 P. 1020, 1022 (1910).

Depending on the jurisdiction in which the trial takes place, this means that the defendant, to avoid criminal responsibility, must show that he: (1) "was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; of if he did know it, that he did not know he was doing what was wrong," M'Naghten's Case, 8 ENG. REP. 718 (1843) (discussed extensively in A. GOLDSTEIN, *supra* note 7, at 45-66); or (2) that "his unlawful act was the product of mental disease or defect" (the "Durham test," first proposed by Judge Doe in State v. Pike, 49 N.H. 399 (1869), and later reformulated by Judge Bazelon in Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954). The Durham test has been much discussed, little adopted, and was rejected in 1972 in the District of Columbia itself. United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972); or (3) that he "lack[ed] substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law," MODEL PENAL CODE § 4.01 (Proposed Official Draft, 1962). Most recently, the Nixon administration has proposed that the test in the federal courts be whether the defendant "lacked the state of mind required as an element of the offense chargd," S. 1400, 93d Cong., 1st Sess. § 502 (1973). While this would tend to reduce greatly the cases in which the defense was available, it would not lessen the difficulty of making accurate factual determinations when the defense did apply.

15. *See* notes 16-18, *infra*.

Some have argued that an additional purpose of the examination is to obviate the "battle of the experts" by introducing an ostensibly neutral expert into the fray. *See* A. GOLDSTEIN, *supra* note 7, at 131. There is some justification for this assertion in the language of a few statutes that grant access to "adversary" experts during the "neutral" examination. *E.g.*, CONN. GEN. STAT. REV. § 54-40(b) (Cum. Supp. 1973); MONT. REV. CODES ANN. § 95-506(b) (1969); FLA. R. CRIM. P. 1.210(c). A. GOLDSTEIN, *supra* note 7 at 132-33, cites in support of this thesis three statutes that required special treatment for "neutral" experts. *Id.* at 133 n.27. But no such provision appear in more recently enacted statutes, and at least one has been repealed. *Compare* LA. REV. STAT. ANN. § 15-268 (1951) *with* LA. CODE CRIM. PRO. ANN. arts. 646, 650 (West 1967). Hence, it seems unlikely this is still a widespread practice.

Moreover, the very possibility of neutrality on such subjective issues has been questioned, *see* Diamond, *The Fallacy of the Impartial Expert*, 3 ARCHIVES OF CRIMINAL PSYCHODYNAMICS 221 (1959) *excerpts reprinted in* D. LOUISELL &. G. HAZARD, CASES & MATERIALS ON PLEADING AND PRACTICE 1256, 1259-60 (2d ed. 1968); A. GOLDSTEIN, *supra* note 7, at 131-36. This attitude is also reflected in the statutes. Many allow either side to adopt the "neutral" expert as its own, *e.g.*, CAL. PENAL CODE § 1027 (West 1970); COLO. REV. STAT. ANN. § 39-8-2(2) (1963); UTAH CODE ANN. § 77-24-17 (1953), thus implicitly recognizing that an examiner may be impartial at the beginning of an examination, but not at its end.

Finally, although it is not properly within the scope of this paper, it is essential in the interests of accuracy to note that the compulsory mental examination has often been criticized at the practical level, on the grounds of its super-faciality, *see generally*, A. MATTHEWS, MENTAL DISABILITY AND THE CRIMINAL LAW 22-71 (1970);

the procedure is to insure an adequate investigation of the defendant's mental condition in such situations.

A comprehensive catalogue of the types and variations of the statutory examination is much too large a project to be undertaken here. The purpose of this survey is primarily to acquaint the reader with some of the salient features of the group, rather than to present an exhaustive study.

The most basic distinction that can be made between statutes is the particular mental issue which the examination addresses: (1) the defendant's competency to stand trial; or (2) his sanity at the time of the offense. A majority of American jurisdictions authorize the examination when either issue has been raised;[16] a slightly smaller number authorize it to produce evidence on the competency question alone;[17] and a small minority authorize it only to aid in the sanity determination.[18] This breakdown, however, is slightly misleading, since courts in a number of jurisdictions whose statutes mention examinations with reference to only one issue have held that the trial court has the inherent power to order an examination on the other.[19] Indeed, in only two states has it been explicitly held that the court's authority is limited to the terms of the mental examination statute.[20]

Note, *supra* note 12; and the actual bias in favor of the state shown by supposedly neutral examiners. *See* A. GOLDSTEIN, *supra* note 7, ch. 9. The problem is particularly exacerbated when the expert is presented as the court's "neutral" witness—a practice which is specifically interdicted by the statutes of some states. *E.g.*, MONT. REV. CODES ANN. § 95-506(c) (1969). These problems involve due process and equal protection issues which are not relevant here. *See generally Symposium: The Right to Treatment*, 57 GEO. L.J. 673 (1969). *See also* Jackson v. Indiana, 406 U.S. 715 (1972); Rollerson v. United States, 343 F.2d 269 (D.C. Cir. 1964).

16. ALA. CODE tit. 15, § 425 (1958); ARK. STAT. ANN. § 43-1301 (Supp. 1971); IDAHO CODE § 18-211 (Supp. 1973); ILL. ANN. STAT. ch. 38, §§ 115-6 (Smith-Hurd Supp. 1973), 1005-2-1 (Smith-Hurd 1973); IND. ANN. STAT. §§ 9-1702, -1706(a) (Burns 1956); ME. REV. STAT. ANN. tit. 15, § 101 (Supp. 1973-74); MASS. ANN. LAWS ch. 123, § 15(a) (1972); MISS. CODE ANN. § 99-13-11 (1972); MO. ANN. STAT. §§ 552.020, -.030 (Vernon, Cum. Supp. 1973); MONT. REV. CODES ANN. § 95-505 (1969); N.H. REV. STAT. ANN. § 135:17 (Supp. 1972); OHIO REV. CODE ANN. § 2945.40 (Page 1954); TENN. CODE ANN. § 33-701 (Supp. 1972); VT. STAT. ANN. tit. 13, §§ 4821-4829 (Supp. 1973); WYO. STAT. ANN. § 7-241 (Supp. 1973); ARIZ. R. CRIM. P. 11; FLA. R. CRIM. P. 1.210(a), (c).

17. 18 U.S.C. §§ 4244-4246 (1970); CONN. GEN. STAT. ANN. § 54-40 (Supp. 1973); LA. CODE CRIM. PRO. ANN. arts. 643-45 (West 1967); MICH. STAT. ANN. § 28.966(11) (Supp. 1973); NEB. REV. STAT. § 29-1823 (Supp. 1969); N.M. STAT. ANN. § 41-13-3.2 (1953); N.Y. CODE CRIM. PRO. § 730.30 (McKinney Supp. 1971); N.C. GEN. STAT. § 122-91 (Supp. 1971); N.D. CENT. CODE § 29-20-01 (Supp. 1973); OKLA. STAT. ANN. tit. 22, § 1171 (Supp. 1972-73); PA. STAT. ANN. tit. 50, §§ 4407-4410 (1969); R.I. GEN. LAWS ANN. § 26-4-3 (Supp. 1972); VA. CODE ANN. § 19.1-228 (Supp. 1973).

18. CAL. PENAL CODE § 1027 (West 1971); NEV. REV. STAT. § 178.415 (1967); S.D. COMPILED LAWS ANN. § 23-37.2 (1969); UTAH CODE ANN. § 77-24-17 (1953).

19. *See* United States v. Albright, 388 F.2d 719, 722-23 (5th Cir. 1968); State v. Mulrine, 55 Del. 65, 183 A.2d 831 (1962).

20. Green v. State, 222 Ark. 308, 313, 259 S.W.2d 142, 144 (1953) (court's authority limited to statutory terms); State v. Olsen, 274 Minn. 225, 233, 143 N.W.2d 69, 75 (1966) (court has no power to order an examination in the absence of statute).

The procedural mechanics of obtaining an examination also vary widely. Generally speaking, the court has discretion to order an examination either on its own motion or on the motion of either party.[21] In a small number of jurisdictions, an examination is mandatory upon the defendant's filing of notice of intent to present an insanity defense or the occurrence of reasonable cause to doubt his competency to proceed.[22] In no jurisdiction is the power to request the examination restricted to the prosecution alone; in New Mexico it appears that only the defendant may move for it.[23] A small minority of jurisdictions, however, permit the state to obtain an "adversarial examination" after completion of the court-ordered one.[24]

The trial court's power to choose the particular examiners is similarly diverse. In many jurisdictions, the court, upon finding cause to doubt a defendant's competency, must commit him to a state mental hospital,[25] where presumably the head of the institution will designate the actual examiner.[26] In a roughly equal number, the court may itself appoint the examiners.[27] Often, these courts can also commit the defendant to an institution either on its own initiative or

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21. *See* notes 16-18 *supra.*

22. *See, e.g.,* CAL. PENAL CODE § 1027 (West 1971).

23. N.M. STAT. ANN. § 41-13-3.2 (1953) speaks only of the defendant's right to move for an examination; no appellate court has determnned whether the prosecutor should enjoy a similar power.

24. *See, e.g.,* MONT REV. CODES ANN. § 95-506(b) (1969); S.D. COMPILED LAWS ANN. § 23-37-2 (1967); FLA. R. CRIM. P. 1.210(c).

25. For an exhaustive analysis of the legal problems presented by the commitment process in both the civil and criminal area, see Special Project, *The Administration of Psychiatric Justice: Theory and Practice in Arizona,* 13 ARIZ. L. REV. 1, (1971).

The power granted to a court to commit a defendant to an institution for the purposes of the examination as well as the period of commitment are also markedly different. The length and cause for commitment are particularly important in view of the Supreme Court's recent decision in Jackson v. Indiana, 406 U.S. 715, 731-39 (1972), which casts doubt on the validity of even short-term commitments made without good cause. In some states, for example, the commitment may be indefinite. *E.g.,* ALA. CODE tit. 15, § 425 (1958); NEB. REV. STAT. § 29-1823 (Supp. 1964); N.H. REV. STAT. ANN. § 135.17 (Supp. 1972); VA. CODE ANN. § 19.1-228 (Supp. 1973). This is definitely a suspect procedure after *Jackson.* Most states have limited the commitment to a maximum number of days, which vary from 10, HAWAII REV. STAT. 711-91 (1968) (since raised to 30 days. *See* [1972] Laws of Hawaii 60, effective Jan. 1, 1973), to 60, *e.g.,* IDAHO CODE § 18-211 (Supp. 1973); MICH. STAT. ANN. § 28.966(11) (Supp. 1973); N.C. GEN. STAT. § 122-91 (Supp. 1971); OKLA. STAT. ANN. tit. 22 § 1171 (Supp. 1972-73). Some jurisdictions permit small extensions of time at the request of the examiners or to achieve the purposes of the examination. *E.g.,* IDAHO CODE § 18-211 (Supp. 1973); LA. CODE CRIM. PRO. ANN. art. 645 (West 1967); MASS. ANN. LAWS ch. 123, § 15(b) (1972). Only three states make explicit provision for the preservation of the defendant's right to bail during the course of the examination. ME. REV. STAT. ANN. tit. 15, § 101 (Supp. 1973-74); MD. ANN. CODE art. 59, § 23 (1972); N.Y. CODE CRIM. PRO. § 730.20 (McKinney Supp. 1971).

26. *See,e.g.,* ARK. STAT. ANN. § 43-1301 (Supp. 1971); D.C. CODE ANN. § 24-301(a) (1967); N.C. GEN. STAT. § 122-91 (Supp. 1971).

27. *See, e.g.,* CONN. GEN. STAT. ANN. § 54-40 (Supp. 1973); MISS. CODE ANN. § 99-13-11 (1972); FLA. R. CRIM. P. 1.210(a), (c). One federal circuit has held that the trial judge must not arbitrarily disregard the defendant's nominees for the examiner. United States v. Matthews, 472 F.2d 1173 (4th Cir. 1973).

at the request of the examiners.[28] Direct choice and delegation of the choosing of examiners are alternatives within the discretion of the court in a few states.[29] In the remainder, the official who is responsible for the state's mental health program has the power to designate either all or some of the examiners.[30]

With regard to the qualifications of the selected examiner, some statutes refer only to "disinterested experts,"[31] although the great majority of jurisdictions further restrict the court's choice to medical doctors,[32] thus prohibiting the use of clinical psychologists. Some statutes refer to "physicians,"[33] or "medical experts," others to "physicians who are specialists in mental disease,"[34] or explicitly, "psychiatrists."[35] Under another approach, the court is directed to appoint two or more physicians, only one of whom need be a psychiatrist.[36] Only two states explicitly authorize the participation of clinical psychologists in the examination.[37] The statutes of a few states still contain the old-fashioned notion of a lunacy commission,[38] usually composed of three members, one of whom, in Pennsylvania, may be a lawyer[39] and one of whom, in Delaware, must be a layman.[40]

Relative to the techniques of the examination itself, no state restricts examination techniques, and three specifically permit the use of any generally approved medical procedure.[41] The examination meth-

28. *See, e.g.*, LA. CODE CRIM. PRO. ANN. art. 644 (West 1967); PA. STAT. ANN. tit. 50, § 4408(c) (1969); OHIO REV. CODE ANN. § 2945.40 (Page 1954).

29. *E.g.*, COLO. REV. STAT. ANN. § 39-8-2 (1963); ME. REV. STAT. ANN. tit. 15, § 101 (Supp. 1973-74); N.D. CENT. CODE § 29-20-0 (Supp. 1973); WIS STAT. ANN. § 971.14(2) (Supp. 1973).

30. *E.g.*, IDAHO CODE § 18-211 (Supp. 1973); MD. ANN. CODE art. 59, § 23 (1972); MO. ANN. STAT. § 552.020(2) (Vernon, Cum. Supp. 1973); *cf.* MODEL PENAL CODE § 4.05(1) (Tent. Draft No. 4, 1956), *as amended*, MODEL PENAL CODE § 4.09 (Proposed Official Draft, 1962).

31. *E.g.*, ILL. ANN. STAT. ch. 38, § 1005-2-1 (Smith-Hurd Supp. 1973) ("qualified experts"); N.D. CENT. CODE. § 29.20.01 (Supp. 1973) ("disinterested qualified experts"); FLA. R. CRIM. P. 1.210(a), (c) ("disinterested experts").

32. *See generally* notes 16-18 *supra.*

33. *See, e.g.*, ARK. STAT. ANN. § 43-1301 (Supp. 1971); LA. CODE CRIM. PRO. ANN. art. 644 (West 1967) (physicians must be licensed for at least 3 years).

34. *See, e.g.*, ALA. CODE tit. 15, § 425 (1959); COLO. REV. STAT. ANN. § 39-8-2 (1964); OHIO REV. CODE ANN. § 2945.40 (Page 1954).

35. *E.g.*, CAL. PENAL CODE § 1027 (West 1971); CONN. GEN. STAT. ANN. § 54-40 (Supp. 1973); MISS. CODE ANN. § 99-13-11 (1973); VT. STAT. ANN. tit. 13, § 1481 (Supp. 1973).

36. NEV. REV. STAT. § 178.415 (1971).

37. ME. REV. STAT. ANN. tit. 15, § 101 (Supp. 1973-74); ILL. ANN. STAT. ch. 38, § 115-16 (Smith-Hurd Supp. 1973).

38. *E.g.*, ALA. CODE tit. 15, § 425 (1959); DEL. CODE ANN. tit. 11, § 4703 (Supp. 1971-72); LA. CODE CRIM. PRO. ANN. art. 644 (West 1967); PA. STAT. ANN. tit. 50, § 4408 (1969).

39. PA. STAT. ANN. tit. 50, § 4408(b) (1969).

40. *See* DEL. CODE ANN. tit. 11, § 4703(b)(1) (Supp. 1971-72). The Delaware statute only applies to incompetency proceedings raised after judgment as a bar to the execution of sentence.

41. COLO. REV. STAT. ANN. § 39-8-2(2) (1963); IDAHO CODE § 18-211 (Supp. 1973); N.Y. CODE CRIM. PRO. § 720-20(1) (McKinney Supp. 1971).

odology, therefore, may vary enormously from one individual examiner to another. However, the personal interview has long been the most important technique at many experts' disposal.[42] The examiner's tools are not limited to this technique, of course, and may include a physical examination, narco-analysis, lie detector tests, and interviews with close associates of the defendant.[43]

Of paramount importance to the defendant in the context of the compulsory mental examination are the rights afforded him in the examination itself. First, and perhaps of most practical importance, a large number of jurisdictions grant the defendant significant discovery rights to the examiner's report by specifically requiring he be given either a copy of the report[44] or the names and addresses of the examiners.[45] In addition, some jurisdictions make explicit provision for the defendant's right to call any of the examiners as a witness on his behalf.[46] Since it is generally held that the defendant has no constitutional right to adversary expert assistance,[47] this may provide the only means of access to such evidence for the indigent accused. No statute explicitly provides a right to counsel during the examination, perhaps out of fear that a lawyer's presence might inhibit the personal interview; a small minority do authorize the presence of the defendant's psychiatrist.[48]

The problems posed by the incriminating potential of the defendant's communications, however, have not gone unnoticed by state legis-

42. *See* Rollerson v. United States, 343 F.2d 269, 274 (D.C. Cir. 1964).

43. H. DAVIDSON, FORENSIC PSYCHIATRY (1965). The laboratory of Community Psychiatry of the Harvard Medical School has recently devised a standardized procedure which could be of use in making the threshold distinction between the clearly competent and more marginal cases. Department of Psychiatry, Harvard Medical School, *Competency Screening Test* (1970). For a description of the test, see Special Project, *The Administration of Psychiatric Justice: Theory and Practice in Arizona,* 13 ARIZ. L. REV. 1, 163 n.85 (1971).

44. *See, e.g.,* CONN. GEN. STAT. ANN. § 54-40(b) (Supp. 1973); IDAHO CODE § 18-211 (Supp. 1973); MD. ANN. CODE, art. 59, § 23 (1972); MO. ANN. STAT. § 552.020(4) (Supp. 1973).

45. *See, e.g.,* OHIO REV. CODE § 2945.40 (Page 1954); FLA. R. CRIM. P. 1.201(c).

46. *E.g.,* CAL. PENAL CODE § 1027 (West 1970); COLO. REV. STAT. ANN. § 39-8-2(2) (1963); UTAH CODE ANN. § 77-24-17 (1953). In the absence of restrictive provisions, there is no reason why the defendant's constitutional right to subpoena witnesses should not apply. The sixth amendment right to compulsory process was held applicable to the states in 1967. Washington v. Texas, 388 U.S. 14, 17-19 (1967). The general objections to the use of the subpoena power against special experts, *see* A. GOLDSTEIN, *supra* note 7, at 127-29, are not applicable here, since the experts are appointed for the purpose of expediting the litigation.

47. *See* A. GOLDSTEIN, *supra* note 7, at 136-40. A few state courts have extrapolated a right to expert assistance from statutory or constitutional statements of the right to counsel. *See* People v. Watson, 36 Ill. 2d. 228, 221 N.E.2d 645 (1966); State v. Hancock, 164 N.W.2d 330 (Iowa 1968).

48. *See, e.g.,* CONN. GEN. STAT. ANN. § 54-40(b) (Supp. 1973); WYO. STAT. ANN. § 7-241 (Supp. 1973). A few appellate courts have indicated that the presence of counsel may be permitted in some instances. *E.g., In re* Spencer, 63 Cal. 2d 400, 413, 406 P.2d 33, 42, 46 Cal. Rptr. 753, 762 (1965) ("Such authorization [for the presence of counsel] would depend on the attitude of the psychiatrist involved."); *accord,* State v. Whitlow, 45 N.J. 13, 27-28, 210 A.2d 763, 766 (1965).

latures. Nine jurisdictions have attached restrictions to the evidentiary use of statements. Of these, seven[49] are modeled after section 4.09 of the *Model Penal Code*:[50]

> A statement made by a person subjected to psychiatric examination or treatment . . . shall not be admissible in evidence against him in any criminal proceeding on any issue other than that of his mental condition, but it shall be admissible upon that issue, whether or not it would otherwise be deemed to be a privileged communication.[51]

The impact of this provision, however, should not be overestimated. It is intended to protect the defendant only from the use of the statements to prove his guilt or innocence. Admissions of fact, or even outright confessions, obtained during the examination may still be admissible at trial if offered in evidence for the permissible purpose, *viz.*, as facts upon which the expert bases his opinion on the mental issue.[52] Of all the states that have adopted a variant of the *Model Penal Code* formula, only Montana has an absolute prohibition against the use at trial, for any purpose, of actual admissions of guilt.[53]

The privileges attaching to communications in Colorado are also quite interesting. Colorado has adopted bifurcated insanity procedures under which the issues of guilt and insanity are tried separately, evidence of insanity being inadmissible at the trial of guilt.[54] The statute specifically authorizes an expert who testifies at the insanity stage to use any "confessions or admissions or other evidence" obtained during the examination to substantiate his conclusions on the defendant's mental condition.[55] However, it forbids the use of such statements or any evi-

49. Illinois, New York, Missouri, Montana, Texas, Vermont, and the federal system. The only jurisdiction which has adopted the *Model Penal Code* formulation in its entirety is New York. N.Y. CODE CRIM. PRO. § 730.20 (McKinney Supp. 1971). However, a number of others have enacted prohibitions against the use of defendant's statements to prove guilt, in accordance with the "permissible use" philosophy of the ALI model, *See* 18 U.S.C. § 4244 (1970) (inadmissible on the issue of guilt); ILL. ANN. STAT. ch. 38, § 1005-2-1 (Smith-Hurd Supp. 1973) (referring to competency exams, forbids use of statements on issue of guilt); *Id.* § 115-6 (referring to insanity exams, permits use of statements only on sanity or drug-influence issues); MO. ANN. STAT. §§ 552.020(9), .030(5) (Supp. 1973) (inadmissible on issue of guilt in any criminal proceeding in state or federal court); MONT. REV. CODES ANN. § 95-509 (1969) (discussed at note 53 *infra*); TEX. CODE CRIM. PRO. art. 46.02(2)(f)(4) (Supp. 1972-73) (inadmissible on issue of guilt); VT. STAT. ANN. tit. 13, § 4823 (Supp. 1973) (statements inadmissible to establish guilt or to impeach defendant). *See also* MODEL PENAL CODE § 4.09, Comment (Tent. Draft No. 4, 1955).

50. MODEL PENAL CODE (Proposed Official Draft, 1962).

51. *Id.* § 4.09.

52. The phrase "otherwise be deemed to be a privileged communication" was intended to obviate potential conflicts with statutory physician-patient privileges. *See* MODEL PENAL CODE § 4.09, Comment (Tent. Draft No. 4, 1955).

53. MONT. REV. CODES ANN. § 95-509 (1969). No statement of the defendant is admissible on the issue of his mental condition; no admission of guilt is admissible for any purpose whatsoever.

54. COLO. REV. STAT. ANN. § 39-8-2 (1963).

55. *Id.* § 39-8-2(3)(a).

dence which is derived from them at the trial of guilt.[56]

These then, are some of the more significant aspects of the compulsory mental examination. Returning to the narrow question of whether compelling the cooperation of the defendant in a mental examination, no matter how well conducted, necessarily violates his right against self-incrimination, the following conclusions can be drawn from the pattern of the statutes. At the risk of sounding disingenuous, the evident purpose of the compulsory mental examination is not to provide the state with evidence that the defendant is guilty of a crime. The fact that either the state or the defendant can move for the examination, the fairly common provisions permitting the appointed experts to be called by the defendant or the state, and broad defense discovery are significant indications that the examination is generally intended to be a neutral fact-finding procedure. Of course, there is often a vast difference between the way statutes concerning the mentally disturbed operate on the theoretical and practical levels.[57] Mental examinations as actually administered are probably far less neutral than they would appear, and the intended legislative purpose for the examination will not absolve it from the consequence of producing incriminating effects in practice, if, in fact, they produce such results.

MODES OF SELF-INCRIMINATION IN THE COMPULSORY MENTAL EXAMINATION

There can be no doubt that compelling a defendant to submit to a mental examination may have incriminating effects, if we define "incrimination" as the increasing propinquity of neck to noose. But, as noted above, it is crucial to distinguish the two forms of incrimination that can occur in this context. First, the defendant may be condemned by the use of the material garnered from the examination. During the interview, for example, he might make admissions which directly implicate him in the offense charged, or he might utter statements which would be useful for impeaching his credibility as a witness. Note that a mental health expert relating such facts at trial would not be speaking as an expert witness. Rather, his testimony is on the same footing as that of any lay witness, albeit with the imprimatur of a supposedly neutral, learned observer.

On the other hand, the expert might testify *qua* expert without relating anything the defendant has said about the particular crime or

56. *Id.* § 39-8-2(3)(b). See text accompanying notes 135-39 *infra* for a discussion of the privileges accorded in Arizona.

57. For a thorough description of the discrepancies between the statutory model enacted for the mentally disturbed and the actual working of the system in Arizona, see Special Project, *The Administration of Phychiatric Justice in Arizona*, 13 ARIZ. L. REV. 1 (1971).

casting any aspersions on his credibility, but damn him by pronouncing his opinion that the defendant is, or was, legally sane. This is the second type of incriminating effect. Such testimony might be the decisive evidence of guilt in a case where the defendant invokes the insanity defense.

Clearly, these two modes of incrimination pose dissimilar conceptual problems, and consequently, they are treated separately in the following text.

Adverse Uses of Statements Made During the Compulsory Mental Examination

There is a fundamental tension between the theoretical exigencies of the compulsory mental examination and a defendant's constitutional privilege against self-incrimination. A major tool of the examiner, as noted earlier, is the personal interview, through which he attempts to gain enough insight into the personality of the defendant to understand his past actions and predict future ones. Thus, an essential means to the end of the examination is the elicitation of statements and other significant behavior from the subject;[58] the examiner must use all his training and resourcefulness to obtain the full and free participation of the subject. But the fifth amendment is generally interpreted as protecting the defendant's right to absolute silence, to complete noncooperation with the criminal process. There can be no completely satisfactory resolution to this problem at the theoretical level.

Statements made by the defendant during the interview that might later be used against him can be placed in four general categories. First, the most dramatic adverse use of a defendant's statements occurs when the examiner takes the stand at trial and repeats confessions or admissions of fact which directly implicate the defendant in the charged offense. Second, statements which are not directly incriminating might still be used to impeach the defendant should he take the stand. Third, even statements which are not directly useful as evidence can provide the prosecution with sources of additional material—impeaching character witnesses, for example. Finally, the defendant in discussing his autobiography could implicate himself in other unrelated crimes.[59]

1. *Admissions.* The starkest clash between the self-incrimination privilege and the mental examination occurs in the case of a de-

58. *See* State v. Whitlow, 45 N.J. 3, 15, 210 A.2d 763, 769 (1965).

59. The defendant's statements may also be used at a sentencing or parole hearing for the purpose of aggravating punishment, classification as a sexual or habitual offender, etc. The constitutionality of such practice would depend on whether the use of the statements in such way is within the scope of the fifth amendment, a question well beyond this article. *Cf.* Humphrey v. Cady, 405 U.S. 504 (1972); Mempa v. Rhay, 389 U.S. 128 (1967).

fendant's admissions, and it is not surprising that the lion's share of legislative and appellate court attention has been directed to this point. There is a fairly even split among American jurisdictions on the admissibility of such admissions; perhaps a slight majority of states still permit their use in evidence, but there is a discernible trend in the other direction in more recent cases.[60]

Historically, two main doctrines have been relied upon by appellate courts and legislatures to justify the use of admissions made during the mental examination. The first might be called the theory of "implied waiver." This involves an appellate court frankly conceding that the self-incrimination privilege applies in the examination situation but simultaneously finding that the defendant's cooperation with the examiner constituted a waiver of his right. In the words of one court, the waiver theory rationale is: "To assert his constitutional rights all that is required is for . . . [the defendant] to stand mute."[61]

Thirty years ago, this approach could accurately have been called the majority rule on the admissions issue. But the reasoning behind the implied waiver theory is rather simplistic, and has been eroded by more recent Supreme Court decisions. No court which adopted the theory ever insisted on a showing that the defendant had been informed of his self-incrimination rights, nor did the fact that defense counsel, if any, was not notified of the examination alter the outcome.[62]

Of course, the implied waiver approach is completely inapplicable to cases in which the defendant refuses to cooperate from the outset. Even in the paradigm case, however, the tightening of federal standards for a valid waiver of a constitutional right and their application to the states[63] have made it quite clear that this theory rests on shaky constitutional ground indeed. Mere cooperation is no longer sufficient ground for a finding of waiver. Rather, there must be a knowing, intelligent and voluntary relinquishment of the right to remain silent. Furthermore, since the defendant "has been deprived of his freedom in a significant way,"[64] the mental examination situation is certainly a form of "custodial interrogation" subject to extensive fifth amendment protections. *Miranda* was quite explicit as to where the burden of proof lies—"the prosecution may not use statements, whether exculpating or

60. *See* text accompanying notes 61-79 *infra*.
61. 114 Cal. App. 522, 530, 300 P. 84, 87 (1931).
62. People v. Ditson, 57 Cal. 2d 415, 448, 369 P.2d 714, 733, 20 Cal. Rptr. 165, 184 (1962); People v. DiPiazza, 24 N.Y.2d 342, 352, 248 N.E.2d 412, 418, 300 N.Y.S.2d 545, 553 (1969); Commonwealth v. Musto, 348 Pa. 300, 306, 35 A.2d 307, 311 (1943); State v. White, 113 Wash. 416, 194 P. 390 (1920); State v. Spangler, 92 Wash. 636, 639, 159 P. 810, 811 (1916).
63. *See, e.g.*, Boykin v. Alabama, 395 U.S. 238 (1969); Johnson v. Zerbst, 304 U.S. 458 (1938).
64. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

inculpating, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[65] Consequently, any confessions or admissions obtained from the defendant during the examination must be deemed to have been obtained illegally, and hence will be inadmissible as evidence, at least in the state's case-in-chief.[66] The problem of "knowing, intelligent and voluntary" waiver is doubly acute in relation to the mentally disturbed offender,[67] for even if the defendant were properly informed of his rights, his competence to waive them might still be in doubt.[68] In short, the implied waiver theory is no longer tenable.

The second doctrine justifying the use of admissions is based on a reclassification of the statements—from admissions to "verbal acts." Under this theory, the examining expert is permitted to relate statements not for their testimonial value (that is, to prove the truth of their contents) but as evidence to substantiate his conclusions about the defendant's mental condition. Since there is a recognized exception to the fifth amendment for such "nontestimonial" evidence procured from the defendant,[69] the waiver problem does not arise. The earliest cases in which objection was taken to the compulsory mental examination were resolved by means of this analogy to physical examinations or inspections. Thus, the Nevada supreme court, in disposing of the issue

65. *Id.* If an appointed examiner is permitted to communicate the statements of the defendant to the jury or the prosecutor, he becomes a de facto police agent, regardless of what postgraduate degrees he may possess or the reasons for his appointment. The situation is identical with that of a New York case, in which the police introduced a psychiatrist into the defendant's cell for the sole purpose of obtaining a confession from him. People v. Leyra, 302 N.Y. 353, 362-65, 98 N.E.2d 553, 558-60, 151 N.Y.S.2d 658 (1951), *aff'd in relevant part sub nom.*, Leyra v. Denno, 347 U.S. 556 (1954).

Thus, notwithstanding the other functions it may perform, permitting the use of the defendant's statements in evidence transforms the examination into a police interrogation. If so, the defendant is entitled to the full protections he would enjoy during any other form of custodial interrogation. As the California supreme court has said, "If the defendant's statements to the psychiatrist may be introduced at . . . trial, defendant's need of counsel is as acute during the psychiatric interview as during the police interrogation." *In re* Spencer, 63 Cal. 2d 400, 410-11, 406 P.2d 33, 40, 31 Cal. Rptr. 753, 760 (1960) (speaking of the right to counsel at mental examinations).

66. *Cf.* Harris v. New York, 401 U.S. 222 (1971).

67. Appellate courts of two jurisdictions have attempted to solve the problem by requiring the *Miranda* advisement before the commencement of the examination. Commonwealth v. Pompomi, 447 Pa. 154, 284 A.2d 708 (1972); State v. Anderson, 8 Wash. App. 782, 509 P.2d 80 (1973). However, this solution may cause more problems than it solves. First, in many cases, the simple giving of the advisement may utterly distort the defendant's reaction, and even endanger later therapeutic programs. Second, when the defendant waives his rights, the problem of the possibly incompetent waiver presents itself. Third, when the defendant asserts his rights, either to silence or the presence of counsel, the purposes of the examination would be utterly frustrated—the trial court might just as well save the expense of the examiner's fee. Thus, the imposition of the *Miranda* advisement in this context seems an exercise in futility.

68. Pate v. Robinson, 383 U.S. 375, 384 (1966); Johnson v. Zerbst, 304 U.S. 458, 462-65 (1938).

69. *E.g.*, Schmerber v. California, 384 U.S. 757, 761-65 (1966).

in the oft-cited case of *State v. Petty*,[70] analogized the situation to an earlier case in which a defendant had been compelled to exhibit his arm to the jury.[71] This approach was in accordance with turn of the century theories of mental illness, which emphasized the similarity of mental diseases to neurologic disorders and maintained that organic causes were equally at the root of both.[72] Considered in this way, the defendant's communciations at an examination become a type of physical exhibit unprotected by the fifth amendment. Thus, in *State v. Genna*,[73] decided 17 years after *State v. Petty*, the Louisiana supreme court could hold, "We fail to see wherein the accused was forced to give evidence against himself. He was forced to do nothing. He was looked at and spoken to; but even a cat may look at a queen. . . ."[74]

It was thus an easy conceptual step for courts which began with the implicit analogy of the mental examination to a simple physiological investigation to treat all the defendant's statements as symptomatic, in the same way as a high fever or a blood analysis, and to deny the applicability of the self-incrimination privilege in such matters.[75] Following this reasoning to its inevitable conclusion, an Arkansas court in 1945 held admissible a confession obtained during a mental examination because the confession was procured pursuant to the legitimate purposes of the examination.[76]

Such holdings may at first appear to be the *reductio ad absurdum* of the verbal acts approach. But the doctrine is capable of rehabilitation, for in some ways the defendant's admissions in the privacy of the examination room are only verbal acts. The psychiatrist who cajoles a defendant into discussing his criminal activity with him is in theory only marginally interested in the question of legal guilt; his primary concern is the light which may be shed on the defendant's mental condition. The statement "I killed X because he was plotting against me" may equally be evidence to a jury of the defendant's guilt and to a psychiatrist of a paranoid psychosis. The relevant criterion is neither the form of the statement nor its content. Rather, it is the *use* made of it in a particular legal context.

70. 32 Nev. 384, 388-89, 108 P. 934, 935-36 (1910).
71. State v. Ah Chuey, 14 Nev. 79 (1879).
72. Diamond & Louisell, *supra* note 9, at 1338-39. Neurology was already a highly developed science in the nineteenth century, and it was thought that a similar development of psychiatry was only a matter of time.
73. 163 La. 701, 112 So. 655, *cert. denied*, 275 U.S. 522 (1927).
74. *Id.* at 714, 112 So. at 660.
75. The thesis is that such conversations with and statements by the defendant, whether or not they relate to the crime itself, are verbal acts—circumstantial evidence for or against the claim of insanity. They do not come in as evidence of the truth of the facts asserted, but rather, and only, as part of the means employed by the doctor in testing the accused's rationality, mental organization, and coherence. State v. Whitlow, 45 N.J. 13, 19, 210 A.2d 763, 771 (1965).
76. Hall v. State, 209 Ark. 180, 187-88, 189 S.W.2d 917, 921 (1945).

Thus the verbal acts approach to the admission problem is by no means inherently absurd—nor is it moribund. In fact, it is embodied in the most significant modern legislative response to the fifth amendment mental examination dilemma: section 4.09 of the *Model Penal Code*[77] and its statutory offspring. The fundamental premise of these enactments is that the different evidentiary uses of a defendant's statements are separable. They do not attempt to deny the inherent testimonial significance of admissions but nonetheless permit their recital by the examiner to support his opinion of the defendant's state of mind, with safeguards to prevent the jury using their content in an impermissible way. In other words, the *Model Penal Code* treats such statements as either verbal acts or admissions, depending on their purported use at trial. The most common protection is a requirement that the court give limiting instructions whenever any potentially damaging statements are recited by the expert.[78]

Nevertheless, the *Model Penal Code* provision must be rejected as patently unrealistic. As the Supreme Court has noted, the use for which a statement is nominally admitted may be much different than the use to which a jury actually puts it.[79] Clearly, no matter what the announced purpose, the admission of such statements has an inherently

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77. *See* text & notes 50-52 *supra*.

78. The verbal acts approach in this form has not had tremendous appeal to modern appellate courts, but it does have its adherents. The most significant example is State v. Whitlow, 45 N.J. 13, 210 A.2d 763 (1965), in which the New Jersey supreme court said:

> The difficult question is whether inculpatory statements or confessions of the accused respecting the crime charged, made during the psychiatric interview and examination may be introduced into evidence. Where it appears at trial that the conversations with the doctors were necessary to enable them to force an opinion either as to mental capacity to stand trial (where it is in issue) or to commit the crime, such statements or confessions are admissible. *Their function or probative force, however, is limited to the sanity issue and may not be used as substantive evidence of guilt.*

Id. at 16, 210 A.2d at 770. (emphasis added); *accord*, Pope v. United States, 372 F.2d 710, 720-21 (8th Cir. 1967), *vacated for resentencing per curiam*, 392 U.S. 651 (1968); People v. Modesto, 59 Cal. 2d 722, 732-33, 382 P.2d 33, 39-40, 31 Cal. Rptr. 225, 231-32 (1963); State v. Krauser, 315 Ill. 485, 506-07, 146 N.E. 593, 601 (1925).

More cogent was the novel adoption of the doctrine by the court of appeals in United States v. Baird, 414 F.2d 700 (2d Cir. 1969), formulating an interesting estoppel theory to justify the admissibility of the defendant's admissions:

> Appellant took full advantage of the theory of admissibility which treated his out-of-court statements as real evidence rather than as hearsay; in effect, he asked the trial court to hold that there was no communicative aspect to his evidence, outside its use as a basis for the opinion of the alienists. The same theory and rule of evidence should be available to the Government . . . . [A] defendant who raises a defense based on criminal responsibility is estopped from making an effective objection to the Government's proceeding in this fashion when he, himself, has relied upon the same evidence-admissibility theory . . . .

Id. at 709. This approach is obviously only applicable to select cases, where the defendant had employed experts of his own who had recited his out-of-court statements while testifying.

79. Shepard v. United States, 290 U.S. 96, 104 (1933); *cf.* Waldron v. Waldron, 156 U.S. 361, 379-80 (1895).

incriminating effect. This can only be defended if a jury will follow instructions to disregard the testimonial significance of the statement when they consider the issue of guilt. The practical insignificance of such limiting instructions has been repeatedly reiterated by the Supreme Court in recent years.[80] Justice Jackson summarized it well: "The naive assumption that prejudicial effects can be overcome by instructions to the jury all practicing lawyers know to be an unmitigated fiction."[81]

Consider the implications of the analogous situation in *Jackson v. Denno*,[82] in which the Supreme Court invalidated a New York criminal procedure which required a jury to consider the voluntariness of the defendant's confession simultaneously with his guilt, on the ground that it "pose[d] substantial threats to the defendant's constitutional rights to have an involuntary confession entirely disregarded . . . ."[83] The mental diffraction required of the jurors by the *Model Penal Code* procedure is even more pronounced. They are not instructed merely to decide on the admissibility of certain evidence and then to consider or disregard it; rather, they must give due weight to the statement relative to one issue, and utterly disregard it in relation to the other. In the words of Justice Cardozo, "Discrimination so subtle is a feat beyond ordinary minds."[84] In sum, there is no constitutional or practical justification for the use, at a trial of guilt, of admissions that result from the compelled cooperation of a defendant at a mental examination.

2. *Impeachment.* In the event he chooses to take the stand in his defense, the defendant may be damaged by the use of statements made during the mental examination as impeachment material. The use of this evidence cannot be justified on the basis of the verbal acts theory, since the explicit purpose of its introduction is inconsistency with the defendant's testimony at trial.[85] Nevertheless, in the only reported case where the issue has been raised, the doctrine of implied waiver was invoked to sustain the admission of the defendant's prior inconsistent statements.[86] For the reasons previously enumerated, this

80. *E.g.*, Bruton v. United States, 391 U.S. 123 (1968); Jackson v. Denno, 378 U.S. 368, 388-89 (1964).

81. Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (citation omitted). *But see* Harris v. New York, 401 U.S. 222 (1971) (allowing an illegally obtained confession to be admitted to impeach the defendant's testimony).

82. 378 U.S. 368 (1964).

83. *Id.* at 389.

84. Shepard v. United States, 290 U.S. 96, 104 (1933).

85. *See, e.g.*, CAL. EVID. CODE §§ 235, 768-70 (West 1966); PROPOSED FED. R. EVID. 801(d)(1). *See also* 3A J. WIGMORE, EVIDENCE § 1017 (J. Chadborn ed. 1970).

86. People v. Combes, 56 Cal. 2d 135, 149-50, 363 P.2d 4, 12, 14 Cal. Rptr. 4, 12 (1961). There is some doubt whether the *Combes* precedent is still good law in California after *In re* Spencer, 63 Cal. 2d 400, 406 P.2d 33, 46 Cal. Rptr. 753 (1965). However, it still serves to illustrate a potential use of statements that is quite feasible in other jurisdictions.

analysis is illfounded.[87]

There is little statutory protection in any state against the use of statements for impeachment. Although section 4.09 of the *Model Penal Code* forbids the use of statements "on any issue other than that of mental condition,"[88] most of the variants enacted in the United States contain a slightly different formula: "shall not be admissible *on the issue of guilt.*" This presumably legitimizes the use of a defendant's statements for impeachment purposes.[89] Similarly, at least one court which recognized the unconstitutionality of the use of defendant's admissions against him to prove a prima facie case explicitly authorized the use of any statements against him if he took the witness stand.[90]

Furthermore, it appears that the Supreme Court's decision in *Harris v. New York*[91] may sanction the admission of such impeachment material. In *Harris* the Court held that statements made in violation of the self-incrimination protections of *Miranda v. Arizona*[92] were admissible as impeachment material.[93] This approach could arguably justify the admission of statements made during the mental examination in the event that the defendant makes inconsistent statements at trial.

Notwithstanding such legal justifications for their admissibility, at the practical level the exploitation of such statements can only have a deleterious impact on the mental examination process. Since the Court in *Harris* did not deny the illegality of the means by which the statements were obtained, any competent defense attorney would advise his client to refrain from discussing the crime with the examiner or even to demand that counsel be present. This would have the effect of negating the personal interview, the most useful means of obtaining the information necessary for a sound professional judgment of mental capacity.[94] Thus, though their admission may be constitutionally permissible, allowing the use in evidence of statements to impeach the defendant or his witnesses can only frustrate the purpose of the mental examination.

3. *Fruits of Incriminating Statements and Implication in Unrelated Crimes.* The third and fourth ways in which a defendant's con-

87. *See* text & notes 61-65 *supra.*
88. MODEL PENAL CODE § 4.09 (Proposed Official Draft, 1962).
89. Only New York and Vermont prohibit the use of a defendant's statements to impeach. N.Y. CODE CRIM. PRO. § 730.20(b) (McKinney Supp. 1971); VT. STAT. ANN. tit. 13, § 4823(c) (Supp. 1973); *see* note 50 *supra.* In Illinois, the statements of a defendant made at an incompetency examination are admissible to impeach, but those uttered at an insanity examination are not. *Compare* ILL. ANN. STAT. ch. 38, § 1005-2 (Smith-Hurd Supp. 1973) *with id.*, §§ 115-16 (Smith-Hurd Supp. 1973).
90. Parkin v. State, 238 So. 2d 817, 820 (Fla. 1970), *cert. denied,* 401 U.S. 974 (1971).
91. 401 U.S. 222 (1971).
92. 384 U.S. 436 (1966).
93. 401 U.S. at 226.
94. See text & notes 42-43 *supra.*

duct at a mental examination may incriminate him are by providing the prosecution with new evidentiary material in the pending case, or by implicating himself in other, unrelated crimes. While these possibilities may not be too important as a practical matter, they are of immense theoretical significance. A properly counseled defendant could utilize the self-incrimination privilege based on these grounds to block any attempt by the examiner to explore his psychological history.[95]

It is difficult to overcome this obstacle. It would be a practical impossibility for a court to review the defendant's evaluation of the danger of incrimination, since in such intimate biographical matters it could never be "perfectly clear from a careful consideration of all the circumstances in the case, that the witness is mistaken and that his answer cannot possibly have such tendency to incriminate."[96] Thus, it is quite feasible for a defendant to decline to respond to any inquiry of the examiner on self-incrimination grounds—unless he is granted some sort of protection against subsequent prosecution for the offenses which will thereby be revealed. Only Missouri and Arizona provide the defendant with the necessary immunity.[97] No appellate court has had occasion to wrestle with this problem.

4. *Conclusion.* As the foregoing discussion demonstrates, the use of statements obtained at the compulsory mental examination is a flagrant violation of the defendant's right against forced self-incrimination. This is particularly true of direct admissions used to establish the state's case against the defendant, for their use cannot be justified constitutionally by either the implied waiver or verbal acts theory. The use of statements as impeachment material may be permissible, but its impact can only be negative, for it would hinder the development of the personal interview. Finally, the defendant may be subjected to the use of his statements as leads for incriminating evidence or as grounds for additional criminal charges. Neither of these results can pass constitutional scrutiny.

Use of the Expert's Opinion to Establish the Capacity for Mens Rea

The second major way in which a defendant may be incriminated by a mental examination is by the opinion of the expert. In any case where the defendant's mental condition at the time of the crime is dis-

95. *See* 8 J. WIGMORE, EVIDENCE §§ 2254-2260 (J. McNaughton ed. 1961) (listing the types of facts a witness is privileged to conceal); *id.* at § 2252(c) ("The protection under all clauses extends to all manner of proceedings in which testimony is legally compellable . . . .").

96. Hoffman v. United States, 341 U.S. 479, 488 (1951), *quoting* Temple v. Commonwealth, 75 Va. 892 (1881).

97. MO. ANN. STAT. §§ 552.020(9), 552.030(5) (Supp. 1973); ARIZ R. CRIM. P. 11.7(b)(2); *see* text accompanying note 139 *infra.*

puted, a determination by the expert that the defendant was sane can be decisive evidence of guilt. This is true even though the expert does not repeat any statements which directly incriminate the defendant in the offense of which he is charged. This specific opinion evidence would not be available to the prosecution if the defendant were not compelled to participate in the mental examination.

A finding that the report of the expert, standing alone, is violative of the self-incrimination privilege would, of course, render the compulsory mental examination useless. The defendant could not be compelled to cooperate with the examination. This, then, poses the central dilemma: if the expert's report cannot withstand constitutional scrutiny, the entire mental examination is unconstitutional. While some may applaud this result, it can only retard the recognition of modern psychiatric theories by the criminal law[98] and hinder the defendant's right to assert the insanity defense.[99]

Discussion of this second mode of incrimination must begin with a vital distinction: examinations which are restricted to a determination of a defendant's competency to stand trial cannot be said to incriminate him. A finding of incompetency is only an adjudication of status, neither incriminating nor exculpatory per se.[100] Incompetency is not a defense to a criminal charge; it merely works a delay in the start of trial.[101] It is the settled rule that the self-incrimination privilege does not apply in such proceedings.[102] For this reason, the discussion of the incriminating effect of the expert's opinion is limited to that situation where the disputed issue is the defendant's mental condition at the time of the offense. Appellate courts have responded to attacks on the mental examination centered on this mode of incrimination with three different theories: implied waiver, constructive waiver and the physical exhibit analogy.

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98. *See* text accompanying notes 6-10 *supra.*

99. See text accompanying note 13 *supra.*

100. Jackson v. Indiana, 406 U.S. 715, 739 (1972); *see* People v. English, 31 Ill. 2d 301, 201 N.E.2d 455 (1964) (on the inherently noncriminal nature of proceedings to determine mental status after Robinson v. California, 370 U.S. 660 (1962)); *cf.* 8 J. WIGMORE, EVIDENCE § 2257 (J. McNaughton ed. 1961).

101. *See* cases collected at 8 J. WIGMORE, EVIDENCE § 2257 (J. McNaughton ed. 1961).

102. Hunt v. State, 248 Ala. 217, 27 So. 2d 186 (1946); State v. Whitlow, 45 N.J. 3, 210 A.2d 763 (1965); People v. McKinney, 62 Misc. 2d 957, 310 N.Y.S.2d 518 (1970); State v. Myers, 6 Wash. App. 557, 494 P.2d 1015 (1972). One commentator has suggested that competency examinations could be termed incriminating since an adjudication often results in a penal-like incarceration. Note, *supra* note10, at 661-69. But this argument is misconceptualized when made on self-incrimination grounds. The defendant's complaint is actually one of due process—against the state's impermissible *use* of the incompetency finding, rather than the finding itself. Also, the author fails to consider the situation in which the defendant attempts to use incompetency as a shield against prosecution.

1. *Implied Waiver.* First, the same theory of implied waiver advanced to justify the use of the defendant's statements as evidence has been employed in this context. It fails for precisely the same reasons noted above—no court has insisted upon adequate standards to insure a knowing and intelligent waiver of the defendant's rights.[103]

2. *Constructive Waiver.* The second approach that has been taken to the problem is no more viable: a "constructive waiver" theory. According to this view, a defendant who raises an insanity defense thereby simultaneously waives his self-incrimination privilege with respect to that issue. This approach has a great deal of superficial appeal. Since shortly after the turn of the century, a number of courts have noted the apparent incongruity of permitting the defendant to raise the issue of his mental condition and then to foreclose any investigation by assertion of the privilege. Thus, the Utah supreme court voiced sentiments in 1922 that have been continually echoed by appellate courts since then:

> It certainly would be strange doctrine to permit one charged with a public offense to put in issue his want of mental capacity to commit the offense, and in order to make his plea of want of capacity invulnerable, prevent all inquiry into his mental state or condition.[104]

Some modern courts have applied a more refined version of this reasoning, constructing the waiver from the defendant's use of expert testimony rather than from the mere raising of the defense itself:

> We therefore specifically hold that by raising the issue of insanity, by submitting to the psychiatric and psychologic examination by his own examiners and by presenting evidence as to mental incompetency from the lips of the defendant and those examiners, the defense raised that issue for all purposes and that the government was appropriately granted leave to have the defendant examined by experts of its choice and to present their opinions in evidence.[105]

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103. See text accompanying notes 61-68 *supra.* The *Miranda* holding is not directly in point here, since the admissibility of the defendant's statements is not under consideration. However, the Supreme Court has made it clear that it is the state's duty to demonstrate adequate protection of any fundamental right, especially the right against compelled self-incrimination. *See, e.g.,* Boykin v. Alabama, 395 U.S. 238 (1968).

104. State v. Cerar, 60 Utah 208, 220, 207 P. 597, 602 (1922); *accord,* United States v. Bohle, 445 F.2d 54, 67 (7th Cir. 1971); United States v. Albright, 388 F.2d 719, 724 (4th Cir. 1968); Commonwealth v. DiStasio, 294 Mass. 273, 283-84, 1 N.E.2d 189, 195 (1936); State v. Whitlow, 45 N.J. 3, 11, 210 A.2d 763, 767 (1965); Lee v. County Court, 27 N.Y.2d 432, 440, 267 N.E.2d 452, 456, 318 N.Y.S.2d 705, 711, *cert. denied,* 404 U.S. 823 (1971).

105. Pope v. United States, 372 F.2d 710, 721 (8th Cir. 1967). *See also* State v. Obstein, 52 N.J. 516, 528-29, 247 A.2d 5, 18 (1968).

In *State v. Whitlow,* the constructive waiver approach was transformed into a straightforward balancing test: "To allow the accused to obtain his own expert, and a private and unlimited conference with him and evamination by him, to plead insanity, and then put forward the privilege against self-incrimination to frustrate like efforts by the prosecution is to balance the competing interests unfairly and disproprotionately against the government."[106] The underlying rationale of all versions of the constructive waiver theory is the same; it would seem to be the simple logic of the adversary system that one party should not have both an unrestricted right to raise an issue and total control over the sources of evidence concerning it.

The defendant may well occupy this enviable position, however. The procedural niceties involved in pleading the insanity defense,[107] the fact that the defendant is universally presumed sane at the outset and must either raise a reasonable doubt about his sanity or prove himself by a preponderance of the evidence,[108] should not be permitted to obscure the fundamental issue involved—that a type of *mens rea* is an essential element of nearly all crimes.

The insanity defense is thus not a largess or privilege granted by the state; rather it is the embodiment of the defendant's basic right to present evidence and have the finder of fact determine his guilt of every element of the offense.[109] Thus, to deny evidence of incapacity to entertain *mens rea* would be a denial of due process. Moreover, it is an axiom of constitutional law that the assertion of a right cannot be conditioned on the abandonmont of any other right, especially not another constitutional right.[110] It is difficult, therefore, to see how any waiver of the self-incrimination privilege could constitutionally be construed either from the raising of the insanity defense or the calling of expert witnesses on that issue.

Approaching the problem from the other side, even if it is assumed the insanity defense could be relegated to the status of privilege, it would be unconstitutional to compel a waiver of the right against self-incrimination by the threat of withholding the insanity plea or some related right such as that of presenting evidence in support of the insanity plea.[111] Conditioning the availability of a potentially

106. 45 N.J. 3, 11, 210 A.2d 763, 767 (1965).
107. *E.g.,* CAL. PENAL CODE § 1016 (West 1970).
108. A. GOLDSTEIN, *supra* note 7, at 111.
109. *See* cases cited at note 14 *supra.*
110. *See, e.g.,* Sherbert v. Verner, 374 U.S. 398, 404 1963). *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439 (1968).
111. *E.g.,* Simmons v. United States, 390 U.S. 377, 392-94 (1968) (criminal procedures which created a tension between basic rights held constitutionally intolerable).

exonerating defense to a criminal charge involves a far more impressive sanction than the loss of other privileges such as the withholding of tax benefits;[112] or a discharge from state employment.[113] Even in its most Frankfurterian moments, the Supreme Court has never condoned a balancing approach with respect to the right against self-incrimination or any other basic rights in the criminal justice process.[114]

Thus, as attractive as the constructive waiver theory seems for a simple appraisal of the adversary system, it is not in accord with the letter or the spirit of the American constitutional tradition. It too must be rejected as inadequate.

3. *The Physical Exhibition Analogy.* Last, it has been argued that the admission of the expert's opinion based on compulsory mental examination can be justified by analogy to physical exhibitions of the defendant, in that the aim of the examination is merely to show forth an obscure part of the body—*viz.*, the brain or mind. Most of the recent commentary on the mental examination has given this approach short shrift, treating the argument as if it were patently absurd. Nonetheless, it is my contention that the physical exhibition analogy is the *only* viable constitutional approach to the problem.

The argument is premised on the basic distinction noted in the introduction between the evidentiary material which the examination is intended to discover, and that which is discovered incidentally to the true purpose. The defendant undergoes an interview by the psychiatrist, during which he makes statements concerning himself and the offense. In the first part of this article, the possible rationalization for the use of this material as "verbal acts" was thoroughly discredited. But the problem noted there was *not* that such statements are not verbal acts in the sense of indicia of the defendant's state of mind. It was, rather, that they were also of such inherent testimonial content as to make their admission into evidence unavoidably damaging.

It follows that, if the defendant could be adequately immunized

112. Spevack v. Klein, 385 U.S. 511 (1967).
113. Garrity v. New Jersey, 385 U.S. 493 (1967).
114. Note, for example, Justice Harlan's summary of the Supreme Court's traditional approaches to state interest-fifth amendment conflicts in California v. Byers, 402 U.S. 424, 435-53 (1971) (Harlan, J., concurring in the result). Nor is this analysis altered by the Court's recent affirmation of the constitutionality of compulsory criminal discovery by the state in Williams v. Florida, 399 U.S. 378 (1970) (upholding a Florida criminal rule requiring defendant to disclose before trial the witnesses he intends to call in support of alibi or insanity defenses). That decision was bottomed on two grounds—first, the notion that the discovery requirement was not a true abridgement of the right to silence, since it merely shifted the time at which the defendant had to make his inevitable election between silence and active defense, *id.* at 81, 85; second, the reciprocity built into the Florida rule which required the state to disclose to the defendant any witnesses it intended to call to rebut the insanity or alibi defense, *id.* at 82 n.11. There is no shifting of an inevitable election in the mental examination case, nor can the state offer any reciprocal disclosure of similar significance in return.

against all testimonial uses of his statements, they would be reduced in law and in fact to verbal acts—communications whose content is irrelevant to the case-in-chief, but which reveal a state of mind, a personality. The expert's evaluation would be based solely on a type of "real, physical" evidence. The correct constitutional analogy for the expert's opinion under these circumstances would be the physical examination or exhibit—long a recognized exception to the scope of the fifth amendment.

There is a surprising amount of support for this theory in mainline Supreme Court precedent. The distinction between nontestimonial and testimonial evidence was first emphasized in *Holt v. United States*.[115] In that case, the defendant had been directed by police to wear a blouse in the presence of eyewitnesses. At trial, a witness related the identification. The defendant objected that this testimony violated his right against self-incrimination, but the Supreme Court thought otherwise: "[T]he prohibition of compelling a man. . . to be a witness against himself," wrote Justice Holmes, "is a prohibition of the use of physical or moral compulsion to extort *communications* from him, not an exclusion of his body from evidence."[116] Thus, early in the development of procedural due process it was settled that the fifth amendment did not apply to the admission of non-communicative evidence. In *United States v. Wade*,[117] the Court came to a similar conclusion while upholding the constitutionality of a lineup procedure, specifically noting that it did not involve any compulsion to disclose testimonial evidence.[118]

But by far the most significant case to the present argument is *Schmerber v. California*,[119] where Justice Brennan, writing for the majority, made a highly useful reference to lie detector tests:

> The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications or testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it.
>
> Although we agree that this distinction is a helpful framework for analysis, we are not to be understood to agree with past applications of it in all instances. There will be many cases in which such a distinction is not readily drawn. Some tests seemingly directed to obtain 'physical evidence,' for example, lie detector tests measuring changes in body function during interrogation, may

115. 218 U.S. 245 (1910).
116. *Id.* at 252-53 (emphasis added).
117. 388 U.S. 218 (1967).
118. *Id.* at 222.
119. 384 U.S. 757 (1966).

> actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment.[120]

The mental examination, however, is the converse of the lie detector. Though the method is interrogative, and the raw data are the defendant's possibly incriminating statements, the results are non-testimonial. As Judge Bazelon put it in *Rollerson v. United States*,[121] the expert's opinion is but "an explanation of personality and inferences about how such a personality would react in certain situations."[122]

Finally, it is useful at this point to contrast the analysis outlined above with waiver theories in general. Only by using the physical exhibit approach can the crucial distinction between the incidental material and the expert's opinion be properly conceptualized. A jurist who approaches the problem with a waiver analysis must necessarily concentrate on the propriety of waiver; once its competency is established, it applies equally to *both* kinds of evidence. In terms of simple fairness, this can produce grossly distasteful results.

Two arguments in opposition to this position can be gleaned from the other writers on these problems. First, some commentators have objected that the examination has an inherent testimonial aspect, since the expert's opinion in the large majority of cases will be the result of extensive and intimate conversations with the defendant, often concerning the crime itself.[123] This argument, however, rests on the facile but erroneous assumption that a defendant's statements are susceptible to some absolute characterization. It ignores the ordinary rule of evidence (and of linguistic philosophy in general) that the only relevant criterion of the "type" of evidence involved is the use made of it. Undeniably, the examination procedure compels the defendant to make communications in the ordinary sense of the word—but in the legal sense only if such communications are introduced at trial. If the defendant has been successfully protected from all possible harmful uses of his utterances, they are in fact verbal acts, regardless of content—they are useful to the expert in assessing the defendant's mental condition, but legally meaningless as to the issue of guilt.[124] If they are used only by the examiner for his limited purposes, such state-

120. *Id.* at 764.
121. 343 F.2d 269 (D.C. Cir. 1964).
122. *Id.* at 274. *See also* Nunez, *supra* note 1, at 857-58.
123. *See, e.g.*, Thornton v. Corcoran, 407 F.2d 695, 700 (D.C. Cir. 1969); Lefelt, *supra* note 1, at 452-54; Note, *Pre-Trial Mental Examination and Commitment; Some Procedural Problems in the District of Columbia*, 51 GEO. L.J. 143, 151 (1963).
124. *Cf.* United States v. Bohle, 445 F.2d 54, 66-67 (7th Cir. 1971).

ments are better compared to responses made to the Rorschach inkblot test than to legal admissions.

Second, the relevance of *Schmerber* to the mental examination problem has been denied by at least one court and several writers on other grounds. In *Lee v. County Court,* the New York Court of Appeals stated:

> It is our view . . . that these examinations do not readily fit into the *Schmerber* dichotomy. In formulating an opinion on a defendant's mental capacity, the physicians must draw from both physical and verbal responses. Inasmuch as these responses are relevant on a material element of the crime, *mens rea,* we are unable to analogize them to the mere exhibition of one's body.[125]

Similarly, more than one commentator has stressed that a "psychiatric examination necessitates an inquiry into both the defendant's cognitive and volitional faculties—something far different from asking the defendant to put on a coat or hat or submit to a physical examination."[126]

But this argument seems to be based on a major unstated premise —the notion that psychological phenomena are essentially different in kind than physical events and warrant special protection under the fifth amendment. This proposition is much more viable in metaphysics than in law. While it would add little to rehash the perennial conflict over the difference between mind and matter, the absolute medieval distinction between weak flesh and willing spirit has been steadily eroded in this century in both philosophical and psychological theory.[127] More practically, a compelling legal argument against that position can be made on the commonplace ground of consistency. Whatever the actual relation of consciousness to physical action may prove to be, the common law for the present insists on its own fictions—in particular, that there exists an identifiable discrete inner component of a criminal offense, the *mens rea.* This component is distinct in kind but is, according to the premise of the law, as susceptible to accurate determination as the outer element, the *actus reus.* The degree of culpability of the offender, which until recently could be the difference between life and death,[128] turns on nice distinctions between the types of intent with which the defendant contemplated his act—as if such things could be measured with calibrated instruments. Both the *M'Naghten* and *Durham*[129] insanity tests require similarly subtle determinations.

125. 27 N.Y.2d 432, 439, 267 N.E.2d 452, 456, 318 N.Y.S.2d 705, 710, *cert. denied,* 404 U.S. 823 (1971).
126. *See* Note, *supra* note 123, at 151.
127. *See, e.g.,* G. RYLE, THE CONCEPT OF MIND (1949); L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G. Anscombe transl. 1951).
128. *Cf.* Furman v. Georgia, 408 U.S. 238 (1972).
129. *See* notes 13-14 *supra.*

If a defendant can be forced to yield fingerprints or a blood sample to prove the *actus reus,* it is consistent to demand that he submit to a mental examination if it is used solely to prove or disprove the element of *mens rea.*

And to whose benefit does such consistency accrue? The *mens rea* concept can evoke an enormous variety of responses; it can be a hackneyed element of the proof to which only occasional theoretical lip service is paid, or the vehicle for a more sympathetic treatment of the mentally disturbed offender.[130] The notion of legal insanity can be grounded on the most primitive understanding of mental illness or more enlightened theories developed in this century; constitutional theory does not compel either one. It must not be forgotten that the widespread use of appointed experts is a direct response to acceptance of more subtle concepts of mental disturbance—and this is intended primarily to benefit the mentally diseased offender. Most writers who have examined the present handling of the criminally charged accused have called for more, not less, reliance on psychiatric expertise.[131] It is hard to conceive how this would be possible within the context of our adversary system unless both contestants have access to such assistance. This is hardly consonant with an extension of the fifth amendment into this area.

4. *Conclusion.* The effects of the use of the defendant's communications are distinguishable from the general incriminating effect inherent in the examination. The latter can be justified constitutionally; the former cannot. The ideal solution to the incrimination problem would, therefore, be to immunize the defendant against all adverse uses of statements taken at the examination, thus restricting its function to its original purpose—the determination of the defendant's mental condition.

A PROPOSAL

It is easier to set forth the preceding analysis than to make concrete suggestions for the solution of the problems it raises. Several of the more obvious solutions must be rejected as too simplistic. First, restricting the examiner's power to inquire into the defendant's reaction to the offense and the prior criminal activity in which the defendant may have been involved would be a case of overkill. The personal interview is the examiner's most effective tool; limiting its use in this manner would destroy the efficacy of the examination. Moreover, the

130. *See, e.g.,* Diamond, *supra* note 7, at 66-73.
131. *See, e.g.,* A. GOLDSTEIN, *supra* note 7, at 122-40; Diamond & Lolisell, *supra* note 9, at 1340.

implementation of such a remedy would be difficult. Is the examiner to be supervised during the examination by the defendant's counsel? If not, how can the defendant's rights be enforced, or to state the problem alternatively, when and how can a waiver be presumed? Viewed in this way, it is apparent that this approach necessarily involves the use of *Miranda*-like procedures. This would probably produce highly unsatisfactory results.

Second, an absolute prohibition of the use of the defendant's statements at trial is also a blunderbuss approach.[132] Expert evidence is uniquely valuable to ascertain and prove the existence of mental illness. But the crux is the subsequent value judgment required by law—whether a particular mental disease, once its existence is established, is of sufficient severity to exculpate a defendant from criminal responsibility. This is a question of general community morality, upon which a bricklayer's opinion is as valuable, if not more so, than a mental expert's. The absolute barring of the defendant's statements would result in an increased transfer of the jury function to the expert, who alone would evaluate the medical and moral facts, then "report" his decision to the court and jury. This would not be a desirable situation for either jurists or experts.

Finally, some courts and legislatures have attempted to resolve this and related issues by ordering bifurcated trials of criminal offenses when the insanity defense is raised;[133] the issue of guilt is tried at one stage followed by a proceeding to determine the defendant's sanity. While this may be effective relative to these incrimination problems, it causes severe problems in connection with the insanity defense in general—problems beyond the scope of this paper, but well documented elsewhere.[134]

Thus, it appears impossible to formulate any simple solution to the incrimination problems inherent in the compulsory mental examination. A more satisfactory proposal to meet the problem has recently been promulgated by the Supreme Court of Arizona as part of the new *Arizona Rules of Criminal Procedure.* Basically, it consists of an at-

132. This solution was formerly in effect in Arizona. ARIZ. REV. STAT. ANN. § 13-1621.01(K) (Supp. 1972-73), *repealed,* ARIZ. R. CRIM. P. 11.

133. *See* CAL. PENAL CODE § 1026 (West 1970); TEX. CODE CRIM. PRO. ANN. art. 46.02, § 1 (Supp. 1972-73). Arizona's bifurcated trial system has been declared unconstitutional. State *ex rel.* Berger v. Superior Court, 106 Ariz. 368, 476 P.2d 666 (1970); State v. Shaw, 106 Ariz. 103, 471 P.2d 715 (1970), *cert. denied,* 400 U.S. 1009 (1971). At least two courts have ordered de facto bifurcation on their own motion using their common law control of the sequence of submission of issues to the jury. United States v. Bennett, 460 F.2d 822 (D.C. Cir. 1972); State *ex rel.* LaFollette v. Raskin, 34 Wis. 2d 607, 150 N.W.2d 318 (1967).

134. *See, e.g.,* Louisell & Hazard, *Insanity as a Defense: The Bifurcated Trial,* 49 CALIF. L. REV. 805 (1961).

tempt to provide the defendant with appropriate immunity against all harmful uses of his statements, while stopping short of a blanket interdiction against their use at trial. Such an attempt is necessarily complex, but then these are complex problems.

The relevant sections of the Arizona rules are as follows:

RULE 11.3 APPOINTMENT OF EXPERTS

. . . .

e. EXPERTS' REPORTS

(1) Any expert appointed by the court shall submit to the clerk of the court his opinion of the defendant's competency to stand trial . . . .

. . . .

(3) In addition, at the request of the court or of any party, with the consent of the defendant, the expert shall report on:

(i) The mental status of the defendant at the time of the offense;

(ii) If the expert determines that the defendant suffered at that time from a mental disease or defect, the relation of such disease or defect to the alleged offense.

RULE 11.4 DISCLOSURE OF MENTAL HEALTH EVIDENCE

a. REPORTS OF APPOINTED EXPERTS. The reports of experts appointed pursuant to Rule 11.3 shall be made available to all parties, except that any statement or summary of the defendant's statements concerning the offense charged shall be made available to the defendant.

. . . .

RULE 11.7 PRIVILEGE

a. GENERAL RESTRICTION. No evidence of any kind obtained under these provisions shall be admissible at any proceeding to determine guilt or innocence unless the defendant presents evidence intended to rebut the presumption of sanity.

b. PRIVILEGED STATEMENTS OF DEFENDANT

(1) No statement of the defendant obtained under these provisions, or evidence resulting therefrom, concerning the events which form the basis of the charges against him shall be admissible at the trial of guilt or innocence, or at any subsequent proceeding to determine guilt or innocence, without his consent.

> (2) No statement of the defendant or evidence resulting therefrom obtained under these provisions, concerning any other events or transactions, shall be admissible at any proceeding to determine his guilt or innocence of criminal charges based on such events or transactions.[135]

The privilege provided by the rule is many faceted. First, relative to the admission/confession problem, Rule 11.7(b)(1) privileges *absolutely* any statements made by the defendant during the course of the examination which concern the transaction from which the criminal charges stem. This privilege is not to be deemed waived by the defendant's taking the witness stand; his affirmative consent to the use of admissions must be obtained. As originally proposed,[136] Rule 11.3(e) would have required the examiner to make a summary of any statements by the defendant concerning the alleged crime, to be made available only to the defense. While Rule 11.3 as finally promulgated does not require such a report, a defense lawyer obviously would be well advised to request one to preserve his client's rights. Whether the court-appointd expert *must* make such a report upon demand by the defense is unclear from the rule. At any rate, the language of Rule 11.4(e) clearly permits the report, and the supreme court's comment specifies that it is to "be given *only* to the defendant."[137] Thus the defendant is effectively protected from the consequences of any admissions he might make at the examination, both at trial and as sources of evidence for other charges. The expert's hands, however, remain untied—his power to conduct the examination in what he deems the most productive manner remains unlimited.

Relative to statements other than admissions, Rule 11.7(a) restricts the admissibility of evidence obtained at the examination to trials in which the defendant presents an insanity defense. Thus, no statements of any kind made by the defendant during the examination may be used against him when he takes the witness stand, unless the mental condition issue has been raised. If that is at issue, then any of his

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135. ARIZ. R. CRIM. P. 11.3, 11.4, 11.7.

136. ARIZONA STATE BAR COMMITTEE ON CRIMINAL LAW, ARIZONA PROPOSED RULES OF CRIMINAL PROCEDURE 11.3(e) (1972). The purpose of the report was "to protect the defendant's right to object at trial to incriminating statements made to the mental expert." *Id.* at Rule 11.3(e), Comment.

Access to this summary was to be limited to the defendant and his lawyer for two reasons:

> First, the summary has no independent evidentiary value to the defense; it is only included in the report to enable defense counsel to exercise his Rule 11.7 privileges intelligently. Second, its disclosure to the prosecutor would raise serious "poisoned fruit" problems—the defendant could attempt to exclude any evidence obtained after the disclosure of the report on the ground that it was the product of compelled statements contained in it.

Id. at Rule 11.4(a), Comment.

137. ARIZ. R. CRIM. P. 11.4(a), Comment (emphasis added).

statements can be admitted except the class of admissions barred under Rule 11.7(b)(1). In such cases, whatever limited use other statements may have as impeachment material is outweighed by their value as evidence of the defendant's mental condition. Even in this situation, however, admissions are still deemed to be too potentially prejudicial to be admissible. This treatment of admissions, is in direct contrast to the *Model Penal Code* position discussed earlier.[138]

Finally Rule 11.7(b)(2) prohibits the use of any statement of the defendant, or any evidence resulting therefrom, which relates to any other criminal transaction.[139] This section, however, would not prevent the state from prosecuting a defendant on the basis of evidence obtained from an investigation already in progress at the time the defendant implicated himself, or in some other neutral way not connected with the mental examination.

The expert's position under the Arizona rules can be summarized thus. He may testify fully and completely at any competency hearing, making use of any data in his possession to substantiate his conclusions. At a trial of innocence or guilt, he may only testify if the issue of the defendant's mental condition is properly raised. If he does testify, he may buttress his evaluation of the defendant's mental condition by the recital of any statements or other evidence procured at the examination except admissions about the crime itself. In this way, the defendant is freed from all testimonially incriminating effects of the examination. The expert's report, then, becomes no more than a "mind-print", as it were, to re-mint the phrase which makes the analogy to the taking of real evidence more vivid.

It must be conceded that the new Arizona rules are not the optimum

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138. See text & notes 77-84, 88-90 *supra.*

139. The "use and derivative use" immunity granted to the defendant reflects the reasoning of the Supreme Court's latest holding on the subject, Kastigar v. United States, 406 U.S. 441 (1972), rejecting in part the older holding of Counselman v. Hitchcock, 142 U.S. 547 (1892), which required that full transactional immunity be provided before testimony could be compelled. However, the scope of the "use-derivative use" immunity is not small; in the words of Justice Powell, writing for the *Kastigar* majority,

> This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead,' and also barring the use of any evidence obtained by focusing investigation on a witness as the result of his compelled disclosures.
>
> A person accorded this immunity . . . , and subsequently prosecuted, is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities. As stated in Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 n.18 (1964)]:
>
> 'Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.'

406 U.S. at 460 (footnote omitted).

solution. Their complexity demands a great deal of attention from lawyers to issues and procedures which will be encountered quite infrequently in their practice. Thus it is quite possible the complex immunities of the rule will not function effectively at the practical level. Expert testimony, for example, might remain as conclusory as at present, since the expert is forbidden to relate the direct admissions of the defendant, which will often be the most significant data at his disposal. The ideal solution relative to the problems discussed perhaps requires some sort of bifurcation.

But until the conceptual difficulties that attend the bifurcated procedure are resolved, the new Arizona rules stand as the most comprehensive attempt yet to mediate between the Scylla of self-incrimination and the Charybdis of mental condition determinations made in comparative ignorance. If the tension between the self-incrimination privilege and the police objectives of the mental examination is too great to be utterly eliminated, it has at least been considerably lessened.

CONCLUSION

The constitutionality of the compulsory mental examination can only be properly assessed after the different incriminating effects of statements and the expert's opinion itself have been distinguished. It is then apparent that if the defendant is completely protected against all adverse uses of his statements, the expert's opinion is stripped of testimonial content and fits logically within the "real evidence" exception to the self-incrimination privilege. Thus, criticism of the examination procedure on the self-incrimination ground has been too broadly based.[140]

Finally, this article stands for one additional fundamental point. The interests of defendants as a class are not necessarily furthered by the blind extension of procedural rights. When a writer begins to speculate on a new extension of the concepts of due process or self-incrimination to the mental examination area, it is easy for him, in the rigorous development of the legal theory, to lose sight of the fact that all legal problems take place in a social milieu which consists of other

140. This article is not intended to be a general brief in support of the compulsory mental examination as currently practiced, but only defend the procedure from attacks on the self-incrimination ground. In recent years, there has also been a commendable trend toward attacking these examinations on due process grounds, basically on the notion that determinations about mental condition must be made on the basis of less haphazard information than the mental examination supplies in practice. Superficially, this mode of attack resembles the fifth amendment arguments we have considered, in that both are aimed at impending state attempts to railroad a mentally disturbed offender by means of a bureaucratic mental health apparatus. But in terms of basic policy of the criminal law vis-à-vis the mentally disturbed offender, they are polar trends and should be recognized as such.

elements besides those of a legal nature. Thus, if the input of expert evidence about defendant's mental condition is lessened, one can expect less readiness from courts and legislatures to experiment with new and different procedures and standards.[141] The fifth amendment may be gloriously vindicated—but at what real social cost?

141. The experience of Colorado in this regard may be taken as typical—after the landmark decision of the Colorado supreme court in 1963 holding that a defendant could not be deprived of the insanity defense for refusing to be mentally examined, French v. District Court, 153 Colo. 10, 384 P.2d 268 (1963), *see* Danforth, *supra* note 1, the immediate reaction of the legislature was to shift the burden of proof on the defense from the state to the defendant. COLO. REV. STAT. ANN. § 39-8-1 (1963). The Colorado supreme court subsequently declared the attempted change unconstitutional. People *ex rel.* Juhan v. District Court, 165 Colo. 253, 439 P.2d 741 (1968).