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THE PRIVILEGE AGAINST SELF-INCRIMINATION IN CIVIL COMMITMENT PROCEEDINGS*

Marianne Wesson**

I. INTRODUCTION

When a state seeks the involuntary confinement of a person claimed to suffer from mental illness, it must provide that person with the opportunity to litigate the propriety of the commitment before a judge or other impartial tribunal.¹ The state must carry the burden of persuasion at the hearing² and the respondent³ is entitled to certain procedural protections, such as the right to counsel.⁴ Although the civil commitment hearing was at one time often perfunctory, it has become increasingly adversary⁵ as mental health lawyers have taken more seriously their

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1. The United States Supreme Court’s recent decision in Addington v. Texas, 441 U.S. 418 (1979), seems to imply a right to a hearing prior to an extended term of confinement for mental illness, although the decision did not address that particular question. Most courts and commentators assume that a statute authorizing confinement of an unconsenting adult for other than a brief emergency period without affording a right to hearing would be unconstitutional. See Specht v. Patterson, 386 U.S. 605 (1967); cf. Parham v. J.R., 442 U.S. 584 (1979). No state permits commitment unless a hearing is available. Note, Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1190, 1279 n.97 (1974) [hereinafter cited as Civil Commitment].


3. Throughout this article, I will refer to an individual who faces involuntary confinement for mental illness as a “respondent,” even though such a person may not become the subject of formal commitment proceedings until some time after the extent of the privilege against self-incrimination becomes an issue. I will use the terms “mental health proceeding” and “civil commitment proceeding” interchangeably.

4. Although the Court has not squarely so held in the context of civil commitment, almost all courts assume that there is a right to appointed counsel for the indigent and almost all mental health statutes so provide. See Civil Commitment, supra note 1, at 1288-91; cf. Vitek v. Jones, 100 S. Ct. 1254 (1980) (plurality opinion) (right to counsel for prisoner facing transfer to mental health institution); Specht v. Patterson, 386 U.S. 605 (1967).

advocacy role⁶ and have argued more frequently for constitutional protections analogous to those of the criminal justice system.⁷

One who attends, or reads accounts of, many civil commitment proceedings will be struck by the extent to which the evidence presented at the hearings commonly has a single source—the respondent. The state’s principal witness is almost always a psychiatrist or other mental health professional⁸ who has examined the respondent, frequently while he or she was involuntarily in the examiner’s custody.⁹ The state may also present, either directly or as a basis for the examiner’s testimony, observations of the respondent made by nursing staff, aides, clinical psychologists, and even custodial personnel. The perceptions of these individuals are often available only because the state has used its coercive powers to require the respondent to submit to observation.


8. Although it is usual for the state’s expert to be a psychiatrist, a clinical psychologist or other trained mental health professional would be permitted to testify as an expert in most jurisdictions. In this article, I have used the term psychiatrist for convenience, but non-physician professionals may and sometimes do perform the same interviewing, diagnostic and testing functions as psychiatrists.

9. Most commitment statutes provide for an initial period of detention before the commitment hearing takes place. Civil Commitment, supra note 1, at 1275. The period may be as long as 45 days, see Logan v. Arafeh, 346 F. Supp. 1265 (D. Conn. 1972), aff’d mem. sub nom. Briggs v. Arafeh, 411 U.S. 911 (1973). Some courts have found, however, that prehearing detention is permissible only for a very brief period unless the state establishes probable cause that the detained individual meets the state’s criteria for long-term involuntary confinement. See In re Barnard, 455 F.2d 1370 (D.C. Cir. 1971); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), vacated, 414 U.S. 473 (1974).
The use of respondent-generated evidence is surprising to lawyers brought up in the Anglo-American tradition, who expect that the state will not be permitted to exact one's cooperation in his or her own imprisonment—a traditional value finding constitutional expression in the fifth amendment's privilege against self-incrimination. This article is addressed to the question whether the privilege against self-incrimination ought to be available to persons facing civil commitment.

II. THE PRIVILEGE AGAINST SELF-INCrimINATION: ANALOGIES

The fifth amendment's protection against compelled self-incrimination offers the individual accused of a crime several important advantages. In the courtroom, it offers the defendant not only the option to decline to answer questions the answers to which might be incriminating,10 but also the option to decline to take the stand.11 It prohibits the prosecution from calling the jury's attention to the defendant's failure to testify, and prohibits the judge from instructing the jury that it may take account of the defendant's silence. It also forbids the jury, to the extent that its deliberations can be policed, from drawing any unfavorable inferences from that silence.12

Outside the courtroom, the privilege against self-incrimination contains several important limitations on the conduct of state agencies—usually the police—in questioning any suspect in custody. Suspects have an absolute right to remain silent, and must be informed of that right. Suspects must be told that their statements may be used against them. Any statement a suspect makes in response to interrogation before having been advised of the right to silence is inadmissible at any later judicial proceeding except for purposes of impeachment. In addition, the privilege against self-incrimination requires that suspects be informed of the right to counsel; if a suspect requests counsel, either the request must be granted or all interrogation must cease.13 Once the required advice is given, a suspect's silence in response to interrogation cannot be the basis of later comment at a trial or hearing—even for purposes of impeaching a defense

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12. Id.
or alibi later articulated.\textsuperscript{14}

In addition to the complicated network of warnings and rules that it erects for the accused criminal in pretrial stages, the privilege against self-incrimination assures that involuntary statements—statements that are the results of official coercion, force, or trickery, rather than willing acts of the accused—may not be used against the accused for any purpose.\textsuperscript{16} No amount of compliance with warnings and procedural niceties will alter this result.

The situation of one taken into custody because he is suspected of mental illness presents a stark contrast to the situation of the accused criminal. Accused criminals are not, at least in theory, taken into custody to make it convenient for the police to use them as sources of evidence. They are supposed to be detained in most cases merely for completion of appropriate charging routines and for some expeditious proceeding to assure, through the mechanism of bail, that the accused will appear for trial.\textsuperscript{19} Persons suspected of being mentally disturbed are, on the other hand, commonly confined for days or weeks for the express purpose of giving the state's experts an opportunity to "investigate" their mental states, propensities for violence, and need for treatment—precisely the characteristics that may form the basis for their eventual involuntary confinement in an institution.\textsuperscript{17}

\textsuperscript{14} Doyle v. Ohio, 426 U.S. 610 (1976).
\textsuperscript{16} See Mallory v. United States, 354 U.S. 449 (1957). Although the Mallory rule prohibiting extended pre-arraignment questioning had no constitutional dimension, it is clear that a statement taken after a prolonged and unnecessary delay between arrest and arraignment will be of questionable voluntariness because of the delay. See also Gerstein v. Pugh, 420 U.S. 103 (1975) (right to judicial determination of probable cause for restraint of liberty); Miranda v. Arizona, 384 U.S. 436 (1966); Stack v. Boyle, 342 U.S. 1 (1951) (right to bail).

An exception to the statement in text may arise with regard to lineups, fingerprinting, etc. In this regard see text accompanying notes 30-32 \textit{infra}. Another possible purpose for the pretrial detention of criminal suspects is preventive detention—restraining them from committing further crimes while awaiting trial on pending charges. See People v. Melville, 62 Misc. 2d 366, 308 N.Y.S.2d 671 (Crim. Ct. N.Y. 1970). Preventive detention is a controversial procedure, and its constitutionality has been much debated. See, e.g., Foote, \textit{The Coming Constitutional Crisis in Bail}, 113 U. Pa. L. Rev. 959 (1965); Mitchell, \textit{Bail Reform and the Constitutionality of Pretrial Detention}, 55 Va. L. Rev. 1223 (1969); Note, \textit{Preventive Detention Before Trial}, 79 Harv. L. Rev. 1489 (1966). In any event, the preventive detention rationale justifies only confinement \textit{simpliciter}; it cannot justify any attempt to use the defendant as a source of evidence during his confinement.

\textsuperscript{17} See note 9 \textit{supra}. Many commitment statutes expressly provide that the purpose of the preliminary detention period is evaluation and diagnosis. See Brakel & Rock
The mental health respondent will probably not be advised of any right to remain silent during the psychiatric examination, or that his or her statements may be the basis for involuntary commitment proceedings.18 Even if the respondent is told of the right to counsel and indicates he or she wishes to exercise that right, observation and testing will most likely continue until counsel's arrival. Should the respondent refuse to speak to the examiner, he or she still will not escape psychiatric probing. The professional will analyze the respondent's demeanor and nonverbal attitudes, as well as the specific words used to express the refusal to speak.19 Mental health professionals have been trained to overcome the reluctance of their subjects.20 Any communications eventually made will probably be the product of the interviewer's skill rather than the freely chosen disclosures of the respondent.

The mental health respondent's situation in court is less clear. Since few mental health proceedings are jury trials, the questions of comment upon and inference from a respondent's

supra note 5, at 50-51, 72-79, Table 3.2.

18. Indeed, the respondent may sometimes be advised to the contrary. Cf. Smith, Psychiatric Examinations in Federal Mental Competency Proceedings, 37 F.R.D. 171, 171-72 (1965). The Fourth Circuit held in Tippett v. Maryland, 436 F.2d 1153 (4th Cir. 1971) that the privilege against self-incrimination does not require advising the subjects of commitment proceedings that their statements may be used in such proceedings. The Supreme Court granted certiorari sub nom. Murel v. Baltimore City Crim. Ct., 404 U.S. 909 (1971), but later dismissed it as improvidently granted, 407 U.S. 355 (1972).

But see Wis. Stat. § 51.20(9) (1977) ("Prior to the examination the subject individual shall be informed that his or her statements can be used as a basis for commitment and that he or she has the right to remain silent, and that the examiner is required to make a report to the court even if the subject individual remains silent."). It may also be the practice of some mental health facilities to provide similar warnings even when not statutorily required to do so. Such warnings, even when given, may be delivered in ambiguous terms. See, e.g., Gibson v. Zahradnick, 581 F.2d 75, 78 (4th Cir. 1978) (defendant committed for restoration of competency told that he "had a right to refuse to talk" to psychiatrist but that it "would be helpful" if he would talk). They may also be dictated by nonconstitutional considerations. See Commonwealth v. Lamb, 365 Mass. 496, 311 N.E.2d 47 (1974) (patient must be warned that statutory physician-patient privilege does not apply and that the patient's statements may be used at commitment hearings).


silence have not been fully litigated. It is unlikely that an objection to an expert witness's account of the respondent's refusal to cooperate would be sustained on self-incrimination grounds. Some courts have held that there is no prohibition against the state's calling the respondent to the stand at a civil commitment proceeding, although this question is also seldom litigated.

How can these dramatic differences in the situation of the criminal defendant and the mental health respondent be explained? Two explanations are borrowed from the law's customary treatment of the criminal defendant who pleads not guilty by reason of insanity and then attempts to prevent the introduction of psychiatric testimony by invoking the fifth amendment privilege. Many courts offer such a defendant no more protection from the introduction of psychiatric testimony than they offer the mental health respondent. These courts find either that the defendant is not being asked to contribute "testimonial" evidence, and hence that the privilege has no application, or that the defendant has "waived" the privilege. Courts which would make one of these rulings in a criminal trial should have no difficulty extending that reasoning to mental health respondents. The most significant explanation, however, is the characterization of commitment proceedings as "civil" in nature and hence inappropriate forums for the invocation of protections designed for the accused criminal. The following sections examine these three explanations.


A. The Evidence Explanation: "Real" Versus "Testimonial"

1. THE CRIMINAL CONTEXT

Even in criminal cases with no insanity issue, a defendant must sometimes cooperate with the prosecution. A defendant may be compelled, for example, to submit to the extraction of a sample of blood or hair,\(^7\) to speak into a voice analysis device,\(^8\) or to exhibit his or her stature, posture, or gait to a witness or jury.\(^9\) Such examples of coerced cooperation with the prosecution are said not to violate the privilege because they call for the defendant's contribution of "real," rather than "testimonial," evidence.

Schmerber v. California\(^{29}\) is the United States Supreme Court case that most clearly articulates the real-testimonial distinction. Schmerber was convicted of drunk driving partly on the basis of an analysis of the alcohol content of a blood sample withdrawn from his body. He argued that the extraction of the blood over his objection violated his fifth and fourth amendment rights and hence that the evidence should have been excluded from his trial. The Court rejected the fifth amendment self-incrimination claim with the observation that the privilege protects an accused only from being forced to provide the state with evidence of a "testimonial or communicative nature."\(^8\) Justice Brennan's majority opinion invoked the 1910 case of Holt v. United States,\(^33\) in which the Court found no violation of the privilege in a requirement that a defendant model a blouse for witnesses. Even before Holt was decided, Wigmore had articulated the distinction. He stated the privilege was limited to "testimonial disclosures" designed to "extract from the person's own lips an admission of guilt."\(^33\)

Although Justice Brennan emphasized that the Court was not accepting the Wigmore formulation completely,\(^44\) he mentioned several other types of evidence which would lie outside the perimeters of the privilege: fingerprints, photographs, measurements, handwriting, speech, court appearances, and such

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31. Id. at 761.
32. 218 U.S. 245 (1910).
33. 8 WIGMORE, EVIDENCE § 2263 (McNaughton rev. ed. 1961).
34. 384 U.S. at 763 n.7.
physical actions as assuming a stance, walking, and gesturing. 85 Justice Brennan did single out one type of evidence that Wigmore's "own lips" test might characterize as real but that he regarded as testimonial: evidence of physical changes of a person answering questions while undergoing a polygraph or lie detector examination. 86 Despite the protestations of three dissenting Justices that the majority had given the privilege a technical, narrow interpretation, 87 the real-testimonial distinction articulated in Schmerber has become an accepted element of self-incrimination doctrine. 88

The application of the Schmerber distinction to information gleaned by a psychiatrist investigating an individual's mental state is complex. The question has most often arisen in the context of those criminal proceedings where the defendant's mental state is in issue either because the defendant put forward an insanity defense or because there is some doubt that the defendant had the necessary mens rea. Courts may take one of four alternative positions in such cases. The first view is that such evidence is always real: thus, no self-incrimination issue is presented. The second view holds that psychiatric conclusions are real: self-incrimination issues arise only when testifying psychiatrists go beyond conclusions, and relate the substance of defendant's statements. The third view allows psychiatric witnesses to state both their diagnoses and the defendant's statements as long as those statements are presented only to aid the jury in determining a defendant's mental condition. The evidence is real as to mental condition, but it is testimonial and hence inadmissible as to any other issue. A fourth position, which few courts have accepted, is that any evidence gleaned from psychiatric interviews of defendants must be testimonial. This view's lack of popularity is surprising, since each of the other three positions is seriously flawed.

a. All disclosures are "real"

Under the first view, that compelled psychiatric disclosures are always real rather than testimonial, a psychiatric expert is

35. Id. at 764.
36. Id.; see also People v. Ellis, 65 Cal. 2d 529, 421 P.2d 393, 55 Cal. Rptr. 385 (1966) (agreeing in dictum that polygraph evidence is testimonial).
37. 364 U.S. at 777 (Black, J., dissenting).
38. See Annot., 87 A.L.R.2d 370 (1963), for an exposition of the law in this area prior to the Schmerber decision.
seen as similar to a serologist who testifies concerning the alcohol content of blood drawn from a defendant, as in Schmerber. Proponents of the real characterization argue that the purpose of the interview is not to investigate the facts surrounding the crime, but to discover something about the defendant's mental condition. The interviewer is interested not in historical or other facts that the defendant may relate, but in what the defendant's perception of the facts, together with attitude and demeanor, reveals about the defendant's mental condition.

The view that compelled psychiatric disclosures are always real is plainly unsatisfactory. To hold, as one court has, that an outright confession to the commission of a crime poses no self-incrimination difficulties because it was made to a psychiatrist is to elevate form over substance.

b. Only conclusions are "real"

The second position depends upon the distinction between repetition of a defendant's statements and psychiatric conclusions based on those statements. If the state seeks repetition or summary of the statements through the testimony of the expert, the statements are characterized as testimonial and are excluded. If the psychiatrist merely relied on the statements to arrive at a diagnosis, and if that diagnosis is described without elaborating on the statements' content, then there is no self-incrimination violation because the statements are viewed as real evidence.

This position does avoid the direct use of admissions by the defendant. Nevertheless, to the extent that an examiner's access to those statements permits him to form and testify to his conclusion that a defendant had the necessary mental state, or was sane at the time of the offense, the compelled making of the statements plainly leads to self-incrimination. To rule that a psychiatrist can testify to an opinion of the defendant's sanity, on the basis of statements that the psychiatrist does not dis-

39. See note 23 supra and accompanying text.
41. Hall v. State, 209 Ark. 180, 187-88, 189 S.W.2d 917, 921 (1945) (confession made during mental exam admissible because procured pursuant to permissible purposes of exam).
42. See Berry, supra note 24, at 929-936.
43. Id. at 940-44.
close, would be analogous to holding that a police officer could testify that the officer believes a defendant to be guilty on the basis of involuntary statements the defendant made to the officer—so long as the officer did not directly quote from those statements. 44 Seen in this context, the self-incrimination violation is blatant.

That expert witnesses are allowed to testify concerning their conclusions is not decisive of the question of whether the data on which their conclusions rest are real or testimonial. The blood test results in Schmerber were not considered real only because the serologist testified to a conclusion. Rather, the blood was itself real. Surely exhibiting the blood to the jury or permitting it to make its own analysis would not have changed the blood’s character to testimonial. Conversely, the testimonial character of the readout from a lie detector would not be altered if the polygraph operator merely stated as a conclusion that the defendant was lying, without disclosing what the actual measurements of the instruments were. 45

A further difficulty created by the conclusion view is that it would make effective cross-examination impossible. A defendant’s attorney could expose the premises of an examiner’s opinion only by asking questions that would open the door to the examiner’s repetition of the defendant’s statements. The practical effect of this view would be to condition the privilege against self-incrimination on the relinquishment of a defendant’s right to cross-examine adverse witnesses. 46 Such a mutually exclusive conditioning of rights may not be unconstitutional, 47 but does suggest that the protection offered by the rule is somewhat illusory.

c. “Mental” evidence is “real”

The third position—which the second may be an unsuccessful attempt to articulate—holds that a defendant’s statements in the course of an examination are testimonial when offered to prove some non-mental element of the crime, but real when admitted regarding an issue related to the defendant’s mental con-

44. The familiar evidentiary rule against the statement of opinions or conclusions by lay witnesses would, of course, bar such testimony by a police officer in any event. The constitutional privilege against self-incrimination ought to have some independent force sufficient to achieve the same result.
45. See text accompanying notes 30-38 supra.
47. See text accompanying notes 126-34 infra.
This view does not examine whether a defendant's statements are merely being repeated or are being used in the formulation of a diagnosis. Rather, it rests on the linguistic argument that statements are testimonial only when offered to prove the truth of their contents. When a testifying psychiatrist uses and depends on a subject's statements to draw conclusions not as to truth, but rather as to mental state, the evidence is real and the privilege is not violated. The Model Penal Code, as well as statutory provisions in several states and one federal statute, adopt this mental/non-mental distinction. Of course, a statement might bear on both the commission of the criminal act and the defendant's mental condition ("I killed him because he was plotting against me."). This problem is handled in jurisdictions holding the mental view by instructions that admonish the jury to consider the statements only to the extent that they relate to the defendant's mental condition. This distinction, regarding what the statement is offered to prove, is borrowed from the law of hearsay. It emphasizes those functions of the privilege against self-incrimination that protect defendants from the temptation to commit perjury, and those that guard against the evidentiary use of unreliable statements. It has been said


49. Although it seems unlikely that a psychiatric diagnosis would ever be relevant to any element of the offense other than one related to the defendant's mental condition, the defendant's actual statements may be relevant to both issues.

50. See Berry, supra note 24, at 942.


55. In United States v. Baird, 414 F.2d 700, 707-08 (2d Cir. 1969), cert. denied, 396 U.S. 1005 (1970), the court was explicit about the relation between the non-hearsay nature of statements offered to show something other than the truth of their contents and the idea of "real" or "nontestimonial" evidence. See also State v. Whitlow, 45 N.J. 3, 25, 210 A.2d 763, 772 (1965).

that the privilege saves defendants from the "cruel trilemma" of choosing among perjury, incrimination, and contempt.\textsuperscript{57} If the statement's truth is immaterial, the argument runs, then the conflict is resolved because the speaker need not fear perjury; the materiality of a false statement is of course a necessary element of perjury, and in the interview situation the truth of the statement is immaterial. This argument seems defective for several reasons.

First, if this "trilemma" were the sole basis for the privilege against self-incrimination, the privilege would not extend to any statements made to psychiatrists, even those offered to prove that the defendant committed the criminal act charged. Statements made to examining psychiatrists ordinarily are not sworn and so could not support a perjury prosecution for a reason much more fundamental than their lack of materiality. In extending the privilege to statements made to examiners and offered to prove historic facts, the drafters of the Model Penal Code and their followers implicitly recognized that a technical application of the law of perjury should not determine the privilege's scope. This recognition is entirely sound, for it is well-established that the privilege extends to the products of police interrogation and other unsworn statements.\textsuperscript{58} Thus, the grounds for the privilege must be broader than merely protecting defendants from the temptation to commit perjury as that crime has traditionally been defined.

Second, the argument's resolution of the trilemma depends on a subject's awareness that statements are elicited for some purpose other than factual accuracy. If the subject believes the factual content relevant, and if truthful statements would in fact incriminate the subject, then the unknown circumstance that the statements are actually sought for some other purpose would not resolve the subject's mental conflict.\textsuperscript{59}

\textsuperscript{57} Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).
\textsuperscript{59} To test further the logic of the position that statements are testimonial only when offered to prove the truth of their contents, consider the case of a person who knows that there is a perjury statute that defines as a crime the making under oath of two material inconsistent statements; such a statute obviates the need for the government to prove which of the statements is false. See, e.g., 18 U.S.C. § 1623(c) (1977). Suppose that the person is then called as a witness in a judicial proceeding and asked a question that the person has already once answered under oath. The government is not interested in the truth or falsity of the second statement; it cares only whether the second statement is inconsistent with the first. Proponents of this third position must maintain that the witness has no privilege against self-incrimination related to the existence
Another argument for the third view is that the mental distinction eliminates the risk of unreliable evidence. According to this argument, statements made in psychiatric examinations are not taken to be true by examiners; rather, they are used, as are blood samples, as neutral data for scientific analysis. There should be no more danger, therefore, of a psychiatric examination producing false data than of a blood test eliciting false blood. Correspondingly, there should be no need for the protection afforded by the self-incrimination clause, at least so long as the relevance of the statements made is limited to their support of an examiner’s conclusions about a subject’s mental state.

The problem with this argument is that in many cases an examiner is interested in the objective accuracy of a subject’s statements. To the extent the examiner mistakenly relies on an inaccurate statement, the examiner’s professional opinion may be unreliable. Probably any psychiatric opinion depends in part on data whose perception does not depend on the truth of the subject’s accounts, and in part on the examiner’s conclusions concerning the objective truth about historical events or present circumstances. For example, the statement “I chopped off his head because he was turning into a snake” is one that has some clinical significance that does not depend on its truth. That the subject says the victim was turning into a snake is important; the examiner need not believe the statement in order to draw conclusions about the subject’s mental state. On the other hand, whether the subject really did chop off a person’s head is also important to the examiner. One who fantasizes or lies about such an act may be disturbed, but in a different way from one who actually commits it. Not only outright lies or misstatements, but also false implicit representations, can form an unre-
liable basis for an expert opinion. If an examiner asks a subject the month and year and the subject intentionally misstates them to create an impression of disorientation, the examiner may be misled. It is not the falseness of the answer that misleads, for the examiner knows the month and year, but the falseness of the implicit representation that the subject does not know.

Considerable evidence exists that the psychiatric examination has a tendency to elicit untrue or unreliable evidence. Textbooks on psychiatric interviewing give great attention to the many ways in which false impressions may be created. For example, a certain type of patient "may be the source of much misinformation, either because he misunderstands the context of a discussion or because, in order to be spared further effort, he may answer 'yes' to any question or, in an indiscriminating way, disagrees with everything." A different type of patient is said to "tell untruths with glibness and assurance." Other patients may not only tell explicit untruths, but may also attempt to appear either more or less disturbed than they actually are. Furthermore, many mentally disturbed persons are very suggestible, and may consciously adopt the symptoms they sense the examiner expects to find.

To these observations it may be replied that because psychiatrists are trained in the art of detecting falsehood and malinger ing, it is unlikely that a psychiatrist will arrive at an inaccurate diagnosis because of an examinee's tendencies or attempts to mislead. This response misses the point of the untrustwor

63. Davidson, supra note 19, at 39.
64. See Requiring a Criminal Defendant, supra note 56, at 658.
65. See generally the many studies cited in J. Ziskin, Coping With Psychiatric and Psychological Testimony (2d ed. 1975) at 120-28 [hereinafter cited as Ziskin].
66. This premise undoubtedly underlies the rule of evidence that permits experts to testify to opinions formed on the basis of inadmissible evidence, such as hearsay, if such evidence is commonly used by experts in that field as the basis of opinions. McCormick, Evidence § 15 (1972 ed.); Fed. R. Evid. 703. In addition, statements made to physicians in the course of medical diagnosis or treatment are treated as an exception to the hearsay rule, suggesting that the law of evidence at least does not regard such statements as untrustworthy. McCormick, Evidence § 292 (1972 ed.); Fed. R. Evid. 803(4). See generally, Note, Hearsay Bases of Psychiatric Opinion Testimony: A Critique of Federal Rule of Evidence 703, 51 S. Cal. L. Rev. 129 (1977).

Yet the hearsay exception depends upon the notion that the patient has a strong interest in making accurate statements to the examining physician, see Advisory Comm's Note, Fed. R. Evid. 803(4), an assumption that may be unwarranted in the psychiatric context. Indeed, the exception usually does not apply if the examination is conducted for
thiness concern. The privilege against self-incrimination is not threatened when the subject of a psychiatric examination attempts to and does mislead an examiner. Rather, the privilege is threatened when an examiner, because of expectations, biases, or interviewing style, provokes inaccurate or misleading responses from his subject.

Numerous experiments suggest a high likelihood that two psychiatrists who have examined the same patient will arrive at different diagnoses. These discrepancies may be attributed in part to the psychiatrists' differing evaluations of the accuracy of the patient's statements or to the impression created by the patient's answers. In one famous experiment, psychiatrists at several mental institutions—including some considered excellent—failed to detect the presence of persons who had been sent to the institutions to pose as patients; the same persons were diagnosed as schizophrenic. In a converse experiment, staff members at another institution were told of the results of the first experiment and challenged to detect pseudopatients through their own admissions process. The staff, with a high degree of confidence and accord, identified forty-one of 193 admitted patients as pseudopatients. In fact, the experimenters had purposes unrelated to the patient's desire for diagnosis and treatment. This would seem to exclude statements made in a psychiatric examination. See id. (rejecting the distinction); compare Uniform Rule of Evidence 803(4). In the absence of a hearsay exception for the patient's statements, the rule that permits testimony as to opinions based on hearsay would seem to revive the unworkable distinction, discussed above, between the statement of an opinion and the recitation of the data on which it is based.

Measured claims for the psychiatrist's skill at detecting prevarication are made in A. Guttman, supra note 40, at 360-78. Not all psychiatrists are so modest. Guttmacher reports the incident in which a psychiatrist and a psychologist declared that Whittaker Chambers, the principal witness against Alger Hiss, was a liar, on the basis of an examination of his writings and observations of his testimony. Neither had ever interviewed Chambers in a clinical setting. Id. at 364. The incident is recounted in A. Weinstein, Perjury: The Hiss-Chambers Case 485-92 (1978). See also Davidson, supra note 19, at 211-39, 253-70.

67. See Ziskin, supra note 65 (indicating that according to the most common research findings, one cannot expect to find agreement between two psychiatrists in more than about 60% of cases); Ennis & Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 Cal. L. Rev. 693, 708 (1974) (citing numerous studies concerning the unreliability of psychiatric diagnosis).

68. See note 72, infra. Dr. Bernard Diamond recounts a case in which experts disagreed about whether a criminal defendant was or was not sane. Diamond identifies the source of the inconsistency as "the question as to whether certain statements asserted by the defendant were actually delusions or whether they were true, or possible exaggerations, or perhaps even deliberate lies." Diamond, The Fallacy of the Impartial Expert, in Readings in Law and Psychiatry 145, 147 (Allen, Fenster, Rubin eds. 1968).

placed no pseudopatients in that institution.\textsuperscript{70} These experiments, and others like them, illustrate the extent to which the expectations of an examiner may influence that examiner's assessment of a particular patient. This dynamic may lead not only to the erroneous crediting of inaccurate information provided by a patient, but also to the erroneous dismissal of truthful information that does not comport with an examiner's theory or diagnosis.

To be sure, it may be objected that the privilege is not intended to protect against unreliable interpretations of data but only against the elicitation of data that is itself false or misleading.\textsuperscript{71} Studies have shown, however, that discrepancies among psychiatrists who diagnose the same patient may be largely related to the different data their varying interview techniques elicited.\textsuperscript{72} These studies suggest a pervasive problem in psychiatric examinations: data elicited from a respondent, independent of any vagaries of interpretation, may be misleading.

In theory, cross-examination could reveal false or misleading data elicited in a psychiatric interview. In practice, such misleading data cannot easily be dispelled by cross-examination of a psychiatrist. If the diagnosis is challenged, the psychiatrist may refer to the statements or events that occurred during the examination of the respondent as evidence supporting the diagnosis. A lawyer who did not attend the interview will be unlikely to be able to argue convincingly that the basis of the psychiatrist's conclusions is a misimpression or falsehood.

Nor does the availability of the respondent at trial, where in theory that respondent could correct the falsehood or misimpression, eliminate the prospect of unreliability. First, the process of misrepresentation in the psychiatric examination is often unconscious; the respondent may continue to have the same unconscious motivation to misrepresent at trial. Second, to the extent that the misimpression is a result of either implicit misrep-

\textsuperscript{70} Rosenhan, \textit{supra}, note 69, at 386.

\textsuperscript{71} See Civil Commitment, \textit{supra} note 1, at 1308 n.255.

\textsuperscript{72} Some of the most impressive such findings are reported in Masling, \textit{Role-Related Behavior of the Subject and Psychologist and Its Effects upon Psychological Data}, 14 \textit{Current Theory and Research in Motivation} 67 (1966). Many psychiatrists have made the same observation. See, e.g., Rosenzweig, Vandenberg, Moore, & Dukay, \textit{A Study of the Reliability of the Mental Status Examination}, 117 \textit{Am. J. Psych.} 1102, 1107 (1961) ("[W]hile reliability was not significantly influenced by individual bias in interpretation of concepts or by individual capacity to make observations, it was significantly influenced by individual differences in interviewing technique.") [hereinafter cited as Rosenzweig]. \textit{See also} Ziskin, \textit{supra} note 65, at 120-30.
resentations of self by the respondent, or statements which are not fully described by the examiner, the respondent and his or her lawyer may not know what corrections to make. Even if they could locate the misleading data, an attempt to re-enact the psychiatric examination by having the respondent recount dreams or take an intelligence test on the witness stand would pose obvious problems of validity and reliability. In any event, such an attempt undoubtedly would be strongly resisted by the prosecutor and judge. Finally, the correction of the misimpression by the respondent's own testimony would require that the respondent surrender the privilege not to testify at trial.  

A final objection to the mental/non-mental view is its dependence on limiting instructions to insure that statements are considered in connection only with mental and not with factual issues. The Supreme Court has rejected, in a slightly different context, the proposition that evidence inadmissible because of the privilege may be presented to the jury with a limiting instruction. In Jackson v. Denno, the Court disallowed the practice of presenting a confession to a jury together with directions that it should be considered only if the jury first found it to have been voluntary. The Court concluded that the danger that a jury would disregard the instructions was so substantial that the procedure violated a defendant's due process rights.

Four years later, in Bruton v. United States, the Court again indicated skepticism about the effectiveness of limiting instructions. In that case, the Court disapproved the trial court's ruling, which had permitted the introduction of Bruton's codefendant's confession accompanied by instructions that it was relevant only to the codefendant's, and not to Bruton's, guilt. The unrestricted admission of the confession would have violated Bruton's right to confrontation; the Court held that the cautionary instruction did not cure the violation. In both Jackson and Bruton, the Court observed that the risk of jury disregard of instructions was one of "[t]hese hazards we cannot ignore."

The limiting instructions required by the mental/non-mental theory would ask jurors to make intrinsically complex

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73. This difficulty may be avoided in jurisdictions that have bifurcated trials in which the insanity issues are tried separately from issues related to factual guilt. But see Colo. Rev. Stat. § 16-8-106(2) (1978) (defendant's testimony at sanity trial, which precedes trial for factual guilt, may be used to impeach later testimony).
76. 378 U.S. at 389; 391 U.S. at 137.
and difficult judgments in identifying the circumstances under which they may consider a defendant's statements. The hazard that these instructions would be ineffective is perhaps even greater than in the circumstances of *Jackson* or *Bruton*. Thus, *Jackson* and *Bruton* suggest that even if the Model Penal Code formulation of the extent of the privilege is otherwise correct, it is unusable in practice because of the limitations of cautionary instructions.

d. Disclosure always "testimonial"

Since the absolutist "real" view and both compromise views about the nature of psychiatric evidence are seriously objectionable, the conclusion that any use of the statements of a criminal defendant made in a psychiatric examination must be testimonial seems attractive. Moreover, considerations beyond the inadequacy of the competing positions favor this conclusion. The protection of persons from involuntary or uninformed cooperation with government psychiatrists in a criminal context is consistent with important values that underlie the privilege against self-incrimination.

The Supreme Court has acknowledged both that there are several values protected by the privilege and that none of the values is paramount to all other considerations.77 In addition to the "cruel trilemma" and "unreliable evidence" justifications, the Court has articulated the following rationales for the privilege: the "right of each individual to an enclave where he can lead a private life"; the desire to deter inhumane treatment of an accused; and the requirement that the state must carry its burden of proof without resort to evidence acquired from an accused.78

None of these policies is entitled to absolute vindication. For example, the accusatorial notion that an individual should not have to contribute anything to the state's case against that individual is clearly violated by the *Schmerber* rule requiring contribution of physical evidence. Similarly, the "inhumanity" justification has limitations. Many of the permissible procedures necessary to extract physical evidence from a suspect, for example, the unconsented removal of blood or a bullet,79 seem more

78. *See Requiring a Criminal Defendant*, supra note 56, at 655-56.
inhumane than techniques designed to elicit verbal statements, that have been found to violate the privilege. The notion of a private enclave, in which a person's thoughts and beliefs are protected from governmental probing, seems the strongest value behind the law of self-incrimination.

The Supreme Court has twice affirmed the view that the privilege against self-incrimination protects "a private inner sanctum of individual feeling and thought." Sometimes this notion is articulated as a branch of the right to privacy. Such a right is not invaded by requiring an individual to produce blood for analysis, but is violated when the individual must voice his or her thoughts. Indeed, only this view of the purpose of the privilege can fully explain the testimonial-real distinction; the idea of mental privacy lies behind Justice Brennan's comment in Schmerber that evidence of physiological changes in the subject of a polygraph examination is testimonial rather than real. The importance accorded this value is not surprising, since the idea of privacy of thought figured largely in the historic struggle to force recognition of a privilege against self-incrimination.

Compulsory pretrial psychiatric examinations in criminal cases pose significant opportunities for invasion of a defendant's feelings and beliefs. Such examinations typically include a lengthy interview between defendant and psychiatrist in which the psychiatrist seeks to overcome the defendant's reluctance to expose his or her most private thoughts and feelings. Much of a mental health professional's training in interviewing provides skills to uncover thoughts and feelings that an interviewee would

(1972).

83. See text accompanying notes 34-36 supra. Even if the verbal component of the polygraph examination were eliminated entirely, and the operator merely recorded the subject's physical responses to certain stimuli without requiring the subject to speak, the responses ought to be classed as testimonial under the privacy view because those responses reveal thoughts and feelings.
84. See L. Levy, THE ORIGINS OF THE FIFTH AMENDMENT 302-32 (1968); W. Schaefer, THE SUSPECT AND SOCIETY 72-73 (1967) ("There is no doubt the privilege played a leading role in the struggle to achieve religious and political liberty, both in England and in the American colonies.").
85. For accounts of the typical course of a psychiatric interview see Davidson, supra note 19, at 23-29; Freedman, supra note 20, at 343-53; Gerard, supra note 61, at 21-26; Meyers, supra note 19.
rather keep hidden.\textsuperscript{86} The use of such skills is reminiscent of police interrogation procedures that the Supreme Court condemned in \textit{Miranda v. Arizona}.\textsuperscript{87} In many respects the psychiatric interview is more invasive of a subject's personality than is a police interrogation, since the psychiatric examiner seeks to elicit not only a factual account of the crime, but to probe the subject's emotions, fears, dreams, and defenses.\textsuperscript{88} Few of us can contemplate the prospect of another becoming privy to all of our mental processes without a sense of great anxiety and violation. An important aspect of the constitutional right of privacy is the right to control the flow of information about one's thoughts—the right to decide what information will be shared with whom.\textsuperscript{89} We experience a sense of great violation when that right is taken away.

Another aspect of the privacy view is the fear that a psychiatric examination will in some way alter or distort a subject's mental functioning. The line between psychiatric examination and psychiatric treatment is not a bright one,\textsuperscript{90} and compelled psychiatric treatment may pose a threat of temporary or permanent alteration of one's mental functioning.\textsuperscript{91} Even when the examination confines itself strictly to diagnosis, it may be profoundly upsetting to the subject. Indeed, persons have required psychotherapy to recover from the effects of a psychiatric examination.\textsuperscript{92} This invasion of privacy is compounded if the examina-

\begin{itemize}
  \item \textsuperscript{86} A description of some such techniques appears at Meyers, supra note 19, at 439; see also Freedman, supra note 20, at 343-47.
  \item \textsuperscript{87} 384 U.S. 436, 448-55 (1966).
  \item \textsuperscript{88} See, e.g., Meyers, supra note 19.
  \item \textsuperscript{89} See Fried, Privacy, 77 Yale L.J. 475 (1968).
  \item \textsuperscript{90} See Whitehorn, supra note 62, at 121 ("It is incorrect to think that the examiner can first gather the information and then start the psychotherapy. The psychotherapy begins at the very first contact. . . .").
  \item \textsuperscript{92} See Smith, \textit{Psychiatric Examinations in Federal Mental Competency Proceed-
Civil Commitment

The administration of drugs designed to remove inhibition or disable the subject from lying.\textsuperscript{88}

These privacy aspects of the fifth amendment privilege have a distinctly first amendment cast to them.\textsuperscript{94} The fear that unwanted psychiatric intervention will alter one's mental functioning has been recognized by some courts\textsuperscript{95} as a legitimate basis for a claim that one's freedom of expression has been violated. These courts, with the support of several commentators,\textsuperscript{96} argue that a necessary prerequisite to freedom of expression is freedom of thought, or "mentation." Preventing the generation of thought is, in their view, an invasion of first amendment freedoms at least as serious as preventing the expression of a thought already formed. To the extent that therapeutic psychiatric treatment disables an unwilling subject from generating thoughts and feelings that the subject otherwise would experience, the subject's freedom of expression is limited. Even if a psychiatric interview avoids any therapeutic component, knowledge that psychiatric inquiry may be in the offing could have an inhibiting effect on freedom of thought and belief. As one writer observed:

If the right to speak and write without official restraint is guaranteed by the First Amendment, as all agree is the case, does it not follow that there is a parallel freedom not to speak and not to write? This may be described as a freedom of silence, which includes within its coverage the more specific freedom to remain silent when the price of speech may be conviction of crime.\textsuperscript{97}

This argument should not suggest that the "privacy" aspects of the privilege against self-incrimination do not have special significance in the criminal context, when an invasion of mental privacy can have disastrous consequences that are not present in other settings. To anticipate a point treated later,\textsuperscript{88} it does sug-

\textsuperscript{ings, 37 F.R.D. 171, 172 (1965).}
\textsuperscript{93} See Meyers, supra note 19, at 440.
\textsuperscript{94} See generally W. Schaefer, The Suspect and Society 71-76 (1966); McKay, supra note 82, at 212-14.
\textsuperscript{96} See, e.g., Plotkin, supra note 91, at 494; Shapiro, supra note 91; Technologies, supra note 91.
\textsuperscript{97} McKay, supra note 82, at 212.
\textsuperscript{98} See text accompanying notes 143-83 infra.
gest that the strict characterization of a proceeding as "civil" or "criminal" or something in between should not conclude the question of whether the subject of the proceeding ought to be able to resist governmental attempts to breach the "private inner sanctum" of his thoughts and feelings.

e. Summary

In summary, the use of statements made by a criminal defendant during a psychiatric examination, or the use of testimony from an examiner who forms an opinion based in part on those statements, poses real self-incrimination problems not solved by the easy characterization of the defendant's statements as real evidence. Whatever may be the case with respect to blood samples, EEG readings, and other evidence of physical functioning, diagnoses based on statements seriously invade the personal privacy of the defendant and pose a significant risk of the production of untrustworthy evidence. The real-testimonial distinction does not lie at the heart of the problem. This can clearly be seen by considering the suggestion that in any criminal case the prosecution should be permitted to subject a defendant to psychiatric examination in order to establish that the defendant had the requisite mens rea. If the information gained thereby were truly nontestimonial, there should be no objection. I doubt, however, that even the most ardent defender of compulsory examinations in insanity cases would endorse that suggestion.

99. Schmerber v. California, 384 U.S. 757 (1966), implies that tests of physical functions such as blood analysis, EEG readings, or reflex tests would not fall within the privilege if conducted independently of any verbal questioning of the defendant. There may be cases in which it is difficult to distinguish between observations that can permissibly form the basis of an expert opinion and those that, because of their self-incriminatory nature, cannot. For example, it is unclear whether a psychiatrist may testify that a conclusion of sanity was made because the defendant refused, in a coherent and steadfast manner, to talk to the psychiatrist. Such testimony might penalize the subject for exercising the right to remain silent. One important criterion might be whether the subject was advised of that right. Cf. Doyle v. Ohio, 426 U.S. 610 (1976) (prosecutor may not comment on silence of suspect who has been advised of his right to silence).

Similar problems are presented when a psychiatrist relies on information provided by custodial or nursing staff members concerning the defendant's behavior on the ward or the defendant's conversations with the staff or other patients. One important question is whether such statements are made in response to "interrogation." Cf. Kamisar, Brewer v. Williams, Massiah, and Miranda: What is Interrogation? When Does It Matter?, 67 Geo. L.J. 1 (1978). The Supreme Court has recently construed "interrogation" very narrowly. See Rhode Island v. Innis, 100 S. Ct. 1682 (1980).
2. **THE CIVIL COMMITMENT CONTEXT**

   Most reported cases that consider the applicability of the privilege against self-incrimination to psychiatric examinations have been criminal cases. The next question, postponing consideration of the claim that the privilege does not apply at all in civil cases, is whether the real-testimonial distinction might be more persuasive in the context of civil commitment proceedings.

   It may be argued that statements made by a civil commitment respondent during a psychiatric examination should be considered nontestimonial, in a way that statements made by a criminal defendant claiming insanity are not, because of the different inquiry in a commitment proceeding. In a civil commitment, one of the tasks of the examiner is to determine whether the respondent is mentally ill. Arguably, this inquiry has less relation to historical events than the inquiry in a criminal case, in which the question is whether the defendant was insane at the time the crime was committed. Since only present mental functioning is important in civil commitment, it may be argued that the examiner seeks the respondent's verbal responses only for their nontestimonial value, and has no interest in their content.

   This argument is not convincing. First, nothing in the history or rationale of the self-incrimination privilege limits its protections to accounts of historical events. If a man captured with a quantity of dynamite were interrogated, without *Miranda* warnings, concerning what he intended to do with the dynamite, his admission that he planned to use it to kill the President would be both testimonial and incriminating if introduced at his trial for attempted murder. That the statement concerned his current mental state rather than his past actions would not alter this result.

   Second, statements related to present functioning and thinking may be as unreliable as statements about the past, when elicited under coercive circumstances. If the information they elicit is misleading or incorrect, the privilege is necessary to insure against the evidentiary use of untrustworthy statements. The criteria for civil commitment typically include not only a

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100. Although mental illness is not a sufficient condition for civil commitment in most jurisdictions, it is a necessary one. See 3 MENTAL DISABILITY L. REP. 205-14 (1979).

101. See Rosenzweig, *supra* note 72. The examinations studied by Dr. Rosenzweig et al. were designed to assess present mental functioning rather than past sanity. This was also true of the Rosenhan study. See note 69 *supra*. 
diagnosis of mental illness, but also a prediction about the impact the illness is likely to have on the subject's functioning. A major question, for example, is whether the respondent is "dangerous to himself or others." In making such predictions, the examiner frequently leans heavily on the past by looking for certain predictors of criminal or violent behavior in the respondent's history. A misleading or inaccurate history given by a respondent may have a devastating impact on the examiner's accurate assessment of the respondent's potential for violence.

Most important, the privacy protected by the self-incrimination privilege is invaded even more seriously by an enforced psychiatric assessment of present mental functioning than by an investigation of past mental state. The civil commitment inquiry is both broader and deeper than the criminal inquiry. It encompasses multiple aspects of mental functioning, rather than the narrow issue of responsibility; it covers past, present, and future. Aspects of the personality that would rarely be explored in a determination of criminal insanity, for example mania or depression, are often topics of inquiry when the broader issue of mental health is in question. Requiring cooperation with an examination that has such limitless scope forces a respondent to surrender almost every scrap of mental privacy. The reliability and privacy values that the self-incrimination clause protects are, therefore, infringed at least as much by compelled cooperation in the civil commitment context as in the criminal insanity context.

B. The Waiver Explanation

1. THE CRIMINAL CONTEXT.

a. Implied waiver

A second argument against applying the privilege to the products of psychiatric examinations in criminal insanity cases relies on the notion of waiver. Two distinct waiver arguments have been proffered by courts: that of "implied," and that of "constructive," waiver. The implied waiver argument holds

103. See, e.g., Kozol, Boucher & Garofalo, The Diagnosis and Treatment of Dangerousness, 18 CRIME & DELINQUENCY 371, 384 (1972) (the most important information for the examiner attempting to diagnose dangerousness . . . the details of previous assaults committed by the respondent).
104. See id. at 385.
105. See Berry, supra note 24, at 938.
that a person who cooperates in a psychiatric examination cannot later be heard to complain that the cooperation was involuntary: by cooperating, the person has impliedly waived the privilege. This argument clearly could not justify the imposition of affirmative sanctions on an uncooperative defendant. The self-incrimination question most often arises, however, when a defendant has made revelations to a psychiatrist and then seeks to exclude the psychiatrist's testimony at trial. The implied waiver argument holds that the objection to the testimony comes too late, since the defendant has already submitted to the examination.

An implied waiver theory might have been persuasive prior to Miranda v. Arizona, but it is of little force today. Miranda, addressing the problem of custodial interrogations, erected a presumption against a finding of waiver. The case held that an in-custody suspect must be advised of the right to counsel and the right to remain silent before a waiver could be valid. Further, Miranda placed a "heavy burden" on the state to demonstrate that any waiver was knowing and intelligent, even when all of the appropriate warnings had been given.

Of course, if a psychiatric examination were viewed as other than a "custodial" interrogation, it could escape the full force of the Miranda presumption against waiver. The Miranda Court emphasized that any "significant depriv[ation]" of the liberty of a suspect rendered an interrogation "custodial." The Miranda opinion indicated that this was especially true when the circumstances of restraint or confinement created a psychological pressure for an unwilling person to talk. Although psychiatric examinations typically take place in hospitals rather than police stations, any respondent is clearly significantly deprived of liberty. Since the whole point of the examination is to interview the respondent, the physical and psychological pressures on the respondent to talk are enormous. Psychiatric examinations can-

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106. See Lefelt, Pretrial Mental Examinations: Compelled Cooperation and the Fifth Amendment, 10 Am. Crim. L. Rev. 431, 436-37 nn.34-38 & cases cited therein (1972) [hereinafter cited as Lefelt].
107. See, e.g., People v. Ditson, 57 Cal. 2d 415, 448, 369 P.2d 714, 733, 20 Cal. Rptr. 165, 184 (1962) ("[The defendant] was not compelled to submit to the psychiatric examination; he did so voluntarily.").
109. Id. at 444.
110. Id. at 475.
111. Id. at 444. See also Orozco v. Texas, 394 U.S. 324 (1969).
112. 384 U.S. at 455-58.
not therefore be viewed as other than custodial and cannot escape the *Miranda* presumption. When that presumption is used, the implied waiver argument crumbles. *Miranda* insuperably refutes the claim that the cooperative respondent in a psychiatric examination, not having been advised of the right to remain silent, can impliedly waive the privilege against self-incrimination.

b. Constructive waiver

The "constructive waiver" argument is more sophisticated. It finds a waiver of the privilege against self-incrimination, not in the initial cooperation of the defendant, but in the later plea of insanity\(^{113}\) or offer of psychiatric evidence in support of that plea.\(^{114}\) A variation of this argument would penalize a defendant who refuses to cooperate with the state's psychiatrist either by disallowing the insanity defense altogether or by refusing to permit the defendant to present expert testimony on the insanity issue.\(^{115}\)

(i) Waiver by entry of insanity plea

The argument that one who enters a plea of insanity thereby forfeits any right to silence at the ensuing psychiatric examination is grounded on a notion of fairness. At first blush, it seems unfair for a defendant to be able, as one court stated, 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."\(^{116}\) But when scrutinized, this unfairness argument is weak. A defendant is entitled in most jurisdictions to invoke a number of affirmative defenses—for example self-defense, duress, or crime prevention—disproof of which may require the state to persuade the jury that the defendant had a particular mental state. It is never suggested that fairness requires that a defendant abandon the privilege against self-incrimination with regard to these defenses.

In cases of self-defense and other affirmative defenses, the burden is commonly on the defendant to produce some evidence

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tending to establish the defense. This procedural requirement frequently does accomplish de facto a waiver of the privilege because normally the defendant must testify in order to carry his or her burden of production. Once the defendant takes the stand, the privilege against self-incrimination is waived. But waiver does not always occur and when it occurs, is not always total. The burden of producing some evidence related to self-defense, for example, often can be satisfied by the testimony of a person other than the defendant—a bystander or even the victim. Moreover, any waiver induced by assigning a burden of production to the defendant is a waiver only of the right to remain silent at trial; it confers on the prosecution no privilege to examine the defendant extrajudicially and to introduce admissions thereby obtained.

The burden-of-production point does suggest, however, a remedy for whatever unfairness might result from permitting a defendant to invoke the insanity defense and then to sit on the evidence that the state needs to refute it. Recent United States Supreme Court decisions indicate there is no constitutional obstacle to placing on a criminal defendant the burden of persuasion as to affirmative defenses. Allocating that burden to the defendant who pleads insanity avoids imposing on the state a burden that unavailability of expert evidence about the defendant's mental state would prevent it from carrying. Although the need to carry the burden of persuasion with respect to insanity may put pressure on the defendant to submit to psychiatric examination by an expert retained by the defense—whose testimony may in turn entitle the prosecution to examine the defendant—such strategic pressures have never been recognized as

117. See e.g., COLO. REV. STAT. §§ 18-1-407; 18-1-710 (1973); ILL. STAT. ANN. ch. 38, §§ 3-2; 7-14 (1975); TEX. PENAL CODE ANN. tit. 1, § 2.03; tit. 2, § 9.02 (Vernon 1974).

118. Nor can a meritorious argument be made that the insanity defense ought to be treated differently from other affirmative defenses because it calls into question the mental state of the defendant. First, the insanity defense should not be regarded as a negation of one of the mental elements of the offense, but rather as a "confession and avoidance"—an excuse extrinsic to the elements of the offense exactly like self-defense or duress. See Mullaney v. Wilbur, 421 U.S. 684, 706 (1975) (concurring opinion) ("[A] defendant who sought to establish . . . insanity, and thereby escape any punishment whatever for a heinous crime should bear the laboring oar on such an issue."). Second, regarding insanity as a negation of an element of the prosecution's case instead of as an affirmative defense would seem to heighten, rather than eliminate, the objection to use of the defendant as a source of evidence by which sanity might be established.


120. See text accompanying notes 127-33 infra.
violations of the privilege against self-incrimination. Hence an allocation of the burden of persuasion concerning insanity to the defendant in a criminal case is a constitutional method for avoiding "unfairness" to the state in such cases.

The case of Williams v. Florida is sometimes invoked to support the view that the privilege against self-incrimination is not violated when the state exacts the defendant's cooperation in a psychiatric examination as a condition of entering an insanity plea. In Williams, a defendant challenged his conviction on the ground that he had been required to disclose the identities and addresses of his alibi witnesses prior to trial, on pain of losing the opportunity to present his alibi at trial. The Court rejected his argument because the state could have achieved precisely the same advantage by other means. It may be argued that Williams establishes that the state may attach conditions to the privilege of invoking a defense, including the condition that a defendant claiming insanity cooperate with a court-ordered psychiatric examination. But the Williams decision did not go that far. The Court emphasized that there was no difference between what Williams had been required to disclose and what he conceded he would eventually have disclosed—the identity of his alibi witnesses. The requirement of advance disclosure was merely one of timing. A compelled psychiatric examination is obviously different; it might yield evidence that the defendant otherwise would never present. Moreover, although the investigation of alibi witnesses following the disclosure of their identities at trial would clearly be constitutional, requiring the defendant's submission to a psychiatric examination during trial would raise precisely the same self-incrimination difficulties that it would raise before trial.

121. See Barnes v. United States, 412 U.S. 837 (1973) (jury instruction that permits inference of knowledge from unexplained possession of stolen mail does not violate privilege against self-incrimination by pressuring defendant to testify).
123. Id. at 85-86. The prosecutor could have received a continuance after the appearance of the alibi witnesses at trial, and then used the continuance period for investigating and questioning the witnesses. Williams conceded this technique would not have violated his privilege against self-incrimination. Id.
124. Id. at 85.
125. A more meritorious argument based on the Williams case is that the state may require a defendant who plans to plead insanity to notify the prosecution both that the plea will be made, as is often required, and of the identities of expert witnesses. The prosecution might then seek to question or investigate these expert witnesses just as it did the alibi witnesses in Williams. Cf. People v. Soma, 88 Mich. App. 364, 276 N.W.2d 892 (Ct. App. 1979) (holding constitutional the Michigan requirement that defendants
(ii) Waiver by use of expert witnesses

A somewhat different argument may be made that the defendant who calls a psychiatrist as a defense witness waives the privilege against self-incrimination and must submit to examination by a government psychiatrist, at least if the defense expert bases his or her opinion on an examination of the defendant. Under this theory the waiver would be predicated not on the entry of the plea of insanity, but on the defendant’s use of the expert witness. The difficulty with this argument is that it would condition one constitutional right—the right to call witnesses on one’s own behalf—on the relinquishment of another—the privilege against self-incrimination. Nevertheless, many courts have adopted this position and there is much to be said for it.

It is permissible to condition the exercise of the right to testify in one’s own behalf on the surrender of at least some of the protections of the privilege against self-incrimination. For example, although a defendant cannot be forced to testify at a criminal trial, if a defendant does elect to take the stand, that defendant must submit to cross-examination and answer any proper question, even one whose answer might incriminate him or her. Moreover, in Harris v. New York, the Court held that extrajudicial statements elicited from a defendant in violation of Miranda may be used to impeach the defendant’s testimony at trial, so long as those statements were not the products of compulsion or coercion. These two results suggest that when the invocation of the privilege would interfere significantly with the prosecution’s opportunity to subject the defendant’s testimony at trial to cross-examination, the privilege may have to yield.

The question then arises whether an invocation of the privilege that interfered with a prosecutorial opportunity thoroughly to cross-examine other defense witnesses should be permitted. Allowing an insanity defendant’s experts to testify without giving the prosecutor an opportunity to challenge the premises of their conclusions, for example, by showing that the defendant made statements inconsistent with those premises to other experts, would create an obstacle to effective cross-examination.

pleading insanity furnish the prosecution with copies of defense psychiatrists’ reports).

127. See note 114 supra.
130. The form of cross-examination sought by the prosecutor would be that which
The question of whether a defendant’s statements taken in a manner which did not comply with the *Miranda* requirements may be used to impeach or rebut witnesses other than the defendant has received surprisingly little attention from the courts. In *State v. Davis*, the New Jersey Supreme Court held that a non-complying confession could not be used to rebut the testimony of a defense alibi witness, resting its holding squarely on *Miranda*; the United States Supreme Court denied certiorari. That ruling is a sensible limitation of the *Harris* rule that non-complying confessions may be used for impeachment. In *Harris*, the Court justified permitting such impeachment of the defendant by observing that the privilege against self-incrimination should not be converted into a license to commit perjury. No such license is created by immunizing defense witnesses other than the defendant from contradiction by the defendant’s statement. It is unlikely that perjury by the witness will be the explanation for any discrepancy between the witness’ in-court statement and the defendant’s custodial admissions. Although perjury is always a possibility, it is even more unlikely when the defense witness is an expert and the facts to which that expert testifies form the basis for the expert opinion.

On the other hand, a psychiatric expert witness is quite different from an alibi witness; the psychiatrist will be recounting or relying on statements made by the defendant. Should a defendant’s expert witness recount statements made by the defendant in an examination, it seems unfair to bar the prosecution from showing that the defendant made contradictory statements to other examiners. The prosecution would be seeking to use the inconsistent statements to question the veracity of the defendant, not of the witness. Prohibiting this use of the defendant’s statements would promote the evil that the *Harris* rationale sought to avoid: shielding possible falsehood from effective cross-examination. Even if the defendant’s psychiatrist did not repeat the defendant’s words, but based his or her conclusion on them, a prohibition against prosecutorial use of the defendant’s statements in other examinations would deprive the prosecution

McCormick characterizes as impeachment by contradiction. *McCormick, Evidence* § 47 (2d ed. 1972). The usual rule limits impeachment by contradiction by prohibiting it as to collateral matters, *id.*, but the facts that form the basis for a psychiatric opinion of sanity are unlikely to be found collateral.

132. 401 U.S. at 226.
of the means of demonstrating that the defendant lied to or misled the defendant’s own psychiatrist.\textsuperscript{133} The argument that a defendant, by presenting an expert witness, constructively waives the privilege as to inconsistent statements made in other psychiatric examinations is consistent with prior self-incrimination doctrine.\textsuperscript{134}

Finally, it is important to examine present waiver practices critically. Even if all the waiver arguments in the criminal context were persuasive, those arguments would not justify many current practices. The “implicit waiver” argument would not justify holding in contempt a defendant who entered such a plea and then refused to cooperate with the psychiatrist. It is questionable whether any of the waiver arguments would justify confining a defendant involuntarily for the purpose of an examination.\textsuperscript{135} Indeed, it is not even clear that the waiver-by-plea or waiver-by-witness arguments could support a rule barring an uncooperative defendant from pursuing an insanity plea or from calling an expert witness. In Williams, although the Court found no self-incrimination violation in the rule requiring the defendant to notify the state of the identity of alibi witnesses,\textsuperscript{136} the issue was litigated by a defendant who had complied with the notice requirement and had been subsequently convicted. The Court noted that constitutional problems of greater substance would arise in the case of one who refused to comply with the

\textsuperscript{133} The textual statement may be true only if the impeaching statements were made voluntarily. Truly involuntary statements, as distinguished from those made merely in the absence of Miranda warnings, probably cannot be introduced even for impeachment purposes. Harris v. New York, 401 U.S. at 224. Moreover, no waiver ought to be implied if the defendant’s expert witness does not examine the defendant, but instead testifies solely in response to hypothetical questions. In that situation, the expert is not recounting or relying on statements made by the defendant.

\textsuperscript{134} The rule suggested in the text was described as “plausible” recently in Smith v. Estelle, 602 F.2d 684, 705 n.15 (5th Cir. 1979), cert. granted sub nom. Estelle v. Smith, 445 U.S. 926 (1980). The court in Smith upheld a defendant’s privilege to exclude the testimony of a psychiatrist who examined him while in custody, and who later testified in support of a death penalty for the defendant. Distinguishing earlier Fifth Circuit cases such as United States v. Cohen, 530 F.2d 43 (5th Cir. 1976), which had permitted such testimony in sanity trials, the court explained that the defendants in those cases had presented their own psychiatric expert witnesses. The court continued, “we leave open the possibility that a defendant who wishes to use psychiatric evidence in his own behalf can be precluded . . . unless he is willing to be examined by a psychiatrist nominated by the state.” 602 F.2d at 705. See also Houston v. State, 602 P.2d 784 (Alaska 1979).

\textsuperscript{135} In McNeil v. Patuxent, 407 U.S. 245 (1972), the Supreme Court held unconstitutional an institution’s policy of responding to an inmate’s refusal to cooperate in a psychiatric exam with a decision to prolong confinement until the inmate did cooperate.

\textsuperscript{136} See text accompanying notes 122-23 supra.
notice requirement and consequently was barred from present-
ing witnesses at trial.\textsuperscript{137}

2. THE CIVIL COMMITMENT CONTEXT.

Waiver arguments will seldom be persuasive when the privi-
lege against self-incrimination is claimed by a respondent in a
civil commitment proceeding. The \textit{Miranda} result refutes the
claim that an accused criminal waives the privilege against self-
incrimination merely by cooperating with a psychiatric exam-
iner.\textsuperscript{138} The reasoning that led the Court to reject in \textit{Miranda}
that notion of "implicit" waiver should be equally persuasive
when applied to a person facing a psychiatric evaluation that
could lead to civil commitment.

A respondent's dilemma is acute. Family or friends may
have found the respondent too difficult to live with; a law en-
forcement official may have arrested the respondent for antiso-
cial or bizarre conduct; the respondent might have come volun-
tarily to a mental health facility only to find that he or she was
not free to leave.\textsuperscript{139} In any event, the respondent will probably
be confined to the facility pending evaluation.\textsuperscript{140} Unlike many
criminal suspects, who can usually look forward to an early re-
lease on bail even if evidence of guilt is strong, mental health
respondents are unlikely to be freed unless they can convince an
examiner they are not mentally ill. Respondents' silence will be
used against them, as they will face a significant period of incar-
ceration unless they can talk their way out. In some cases, re-
spondents will not have been warned that their statements may
be the basis on which they eventually could be committed.\textsuperscript{141}
Under such circumstances, it would be perverse to imply a
waiver of the privilege against self-incrimination from a respon-
dent's choice not to meet an examiner's overtures with stony
silence.

\begin{itemize}
\item \textsuperscript{137} 399 U.S. at 83 \textit{n}.14 ("We emphasize that this case does not involve the ques-
tion of the validity of the threatened sanction, had petitioner chosen not to comply with
the notice-of-alibi rule. Whether and to what extent a state can enforce discovery rules
against a defendant who fails to comply, by excluding relevant, probative evidence is a
question raising Sixth Amendment issues which we have no occasion to explore.").
\item \textsuperscript{138} See text accompanying notes 108-12 \textit{supra}.
\item \textsuperscript{139} See Dix, \textit{Acute Psychiatric Hospitalization of the Mentally Ill in the Me-
Professor Dix creates a typology of situations that trigger a psychiatric evaluation; the
three essential types are self-presentation, police presentation, and family presentation.
\item \textsuperscript{140} See note 9 \textit{supra} and accompanying text.
\item \textsuperscript{141} See note 18 \textit{supra} and accompanying text.
\end{itemize}
The civil commitment respondent, unlike the criminal defendant who mounts an insanity defense, has not entered any "plea" that could possibly be construed as a waiver of whatever privilege the respondent would otherwise enjoy. Nor will the respondent commonly call an expert witness. The respondent is therefore not open to the charge of having constructively "waived" the privilege. The state will have the burden of persuasion at the commitment hearing and will seldom have enough evidence to make up a case-in-chief without the testimony of the psychiatrist who conducted the official interview. In some commitment hearings the state might nevertheless succeed in carrying its initial burden without the benefit of testimony concerning the interview, for example with the evidence of family, neighbors, or police officers. In such a hearing, a waiver argument might be raised. If the respondent called an expert witness at the close of the state's case, the state could thereafter claim that it was entitled to offer evidence from the interview with its expert in rebuttal because the respondent's presentation waived the privilege against self-incrimination. Only in such cases—and they would be rare—would any of the waiver arguments justify overruling a respondent's self-incrimination claim.

C. The "Civil Proceeding" Explanation

The real-testimonial and waiver explanations are most often put forward as explanations of why a criminal defendant pleading insanity may not claim the privilege against self-incrimination as to statements made to a psychiatrist. Those explanations are sometimes borrowed as we have seen, to justify a court's refusal to recognize the privilege in civil commitment proceedings. A third explanation relies not on any analogy to the criminal process, but rather on the differences between a criminal trial and a civil commitment proceeding.

Many courts claim that the privilege against self-incrimination is unavailable in civil commitment cases because the fifth amendment provides only that no person shall be compelled in a criminal case to be a witness against himself or herself. The significance of this distinction does not lie in any inapplicability of the fifth amendment in civil proceedings; it has long been rec-

142. Regarding the admissibility and desirability of expert evidence on the issue of mental illness, see Judge Bazelon's comments in Rollerson v. United States, 343 F.2d 269, 270-71 (D.C. Cir. 1964).
143. See note 23 supra.
ognized that the privilege may be invoked in any forum if exacting an answer would subject the answerer to the risk of a criminal conviction.\textsuperscript{144} Rather, the explanation is that the privilege is available only to one who seeks by invoking it to avoid criminal conviction,\textsuperscript{146} rather than a civil judgment of commitment.

The significance of the civil-criminal distinction initially seemed to have been diminished by the case of \textit{In re Gault}.\textsuperscript{148} Gault was a juvenile facing a judicial proceeding, labeled “civil,” designed to determine whether he was a juvenile delinquent. Part of the evidence adduced at the delinquency hearing consisted of accounts of his confessions and the confessions themselves.\textsuperscript{147} Despite the state’s argument that Gault’s statements subjected him only to the risk of adjudication as a delinquent and admission to a training school,\textsuperscript{148} the Court held that the privilege prevented the use of a juvenile’s statements against the juvenile in a delinquency proceeding in the absence of clear proof that the juvenile had waived the right to remain silent.\textsuperscript{149}

Justice Fortas, in writing the Court’s opinion, explained that “the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites.”\textsuperscript{150} The opinion emphasized that because an adjudication of delinquency could lead to involuntary confinement in a state institution, juvenile proceedings “must be regarded as ‘criminal’ for purposes of the privilege against self-

\begin{itemize}
\item \textsuperscript{144} Malloy v. Hogan, 378 U.S. 1 (1963).
\item \textsuperscript{145} See, e.g., Cramer v. Tyars, 23 Cal. 3d 131, 588 P.2d 793, 151 Cal. Rptr. 653 (1979).
\item \textsuperscript{146} 387 U.S. 1 (1967).
\item \textsuperscript{147} Id. at 7.
\item \textsuperscript{148} See id. at 49.
\item \textsuperscript{149} Id. at 55. The Gault case was decided just one term after the \textit{Miranda} decision. The opinions reflected the still-lively disagreements among the Justices about the correctness and scope of \textit{Miranda}. Justice White, concurring in all but the self-incrimination portion of the majority opinion, reiterated his dissent from \textit{Miranda}. He warned that measuring Gault’s possible waiver of his privilege against self-incrimination by the exacting standards of \textit{Miranda} was inappropriate, in part because of the juvenile context and in part because Gault’s hearing predated the \textit{Miranda} decision. Perhaps in consequence of the complications of timing and the persistent division of the Court on the \textit{Miranda} question, the majority opinion was vague on the precise application of the \textit{Miranda} waiver requirements to juvenile proceedings. It conceded that there may be “special problems” with respect to the waiver of the privilege by juveniles, and that there may be some “differences in technique—but not in principle” between securing the waiver from adults on the one hand and juveniles on the other. 387 U.S. at 55.
\item \textsuperscript{150} Id. at 49.
\end{itemize}
The most important language of the *Gault* opinion confronted the traditional argument that juvenile proceedings and dispositions ought not be viewed as criminal in nature because of their benevolent intentions and their therapeutic possibilities. Justice Fortas was forthrightly skeptical about those claims. His opinion relied upon studies and reports that stressed the punitive and hostile character of the juvenile court system and institutions—sources he described as "current reappraisals of the rhetoric and realities of the handling of juvenile offenders." With respect to interrogation practices, the opinion remarked that "evidence is accumulating that confessions by juveniles do not aid in 'individualized treatment' . . . and that compelling the child to answer questions, without warning or advice as to his right to remain silent, does not serve this or any other good purpose."

The Court followed the *Gault* decision with its ruling three years later in *In re Winship.* The *Winship* opinion held that in juvenile proceedings, just as in criminal proceedings, the United States Constitution requires the state to prove its case beyond a reasonable doubt, at least if the gravamen of the delinquency charge is the commission of a specified criminal act. In

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151. *Id.* The opinion went on to remark that, in many states, adjudicated delinquents find their way into adult penal institutions through transfer procedures or initial placement. Also, some juvenile courts are authorized by statute to transfer a juvenile to criminal court. Thus, the Court reasoned that there could be no assurance that statements made by a juvenile would not in fact finally contribute to the juvenile's conviction as a criminal. Yet neither of these possibilities seemed essential to the Court's equation of juvenile proceedings to criminal trials for self-incrimination purposes. The prospect that a juvenile transferred to criminal court might suffer from the admission of an incriminating statement could be eliminated by a rule that would require the statement's exclusion in the criminal proceeding; the occasional mixing of juveniles and convicts in facilities seems irrelevant. No one would argue, for example, that an adult accused who faced at worst incarceration in a minimal security, country club like facility should therefore lose the privilege against self-incrimination. The converse proposition, that juveniles need the privilege only because of the possibility that they may be confined in unpleasant surroundings, also misses the point of the self-incrimination clause. The Court noted that "the commendable principles relating to the processing and treatment of juveniles separately from adults are in no way involved or affected by the procedural issues under discussion." *Id.* at 22.

152. *Id.* at 17-28.

153. *Id.* at 51.

154. *Id.*


156. *Id.* at 368. The limitation is significant because in some jurisdictions juveniles can be found delinquent because of conduct, like truancy, that would not be criminal if committed by an adult. Whether such charges must be proved beyond a reasonable
Winship the Court rejected for the second time the argument that juvenile proceedings are benevolent, therapeutic, and therefore civil in nature. Writing for the Court, Justice Brennan stated, “civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts.”

Gault and Winship seemed to be bellwethers of the Court’s enthusiasm for imposing all of the reforms of the due process “revolution” on juvenile courts as well as criminal courts. These cases provided encouragement to those who argued that mental health proceedings, also “civil” by label but capable of leading to involuntary confinement, should incorporate “criminal” due process safeguards. The picture was clouded, however, by the 1971 decision of McKeiver v. Pennsylvania. In McKeiver, the Court for the first time expressly refused to require that a procedural safeguard constitutionally required in criminal proceedings be afforded equally to juveniles facing delinquency adjudications. The Court had held in 1968 that the right to jury trial must be afforded in all state criminal trials for non-petty offenses. In McKeiver, however, it declined to find a similar constitutional guarantee for juveniles in delinquency proceedings. The contrast between Justice Blackmun’s plurality opinion and the opinions in Gault and Winship is striking. Although the Winship opinion cavalierly rejected the “good-faith”, “therapeutic,” “non-penal,” “flexible” claims made on behalf of the juvenile courts as a justification for decreased procedural formality, McKeiver seemed to endorse those same claims.

Justice Blackmun’s opinion rejected the equation of a juvenile proceeding to a criminal trial, stating that such an equation “chooses to ignore . . . every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates.” In response to reminders of its earlier criticism of the distance between the juvenile system’s rhetoric and its reality, Justice Blackmun replied coolly: “Of course there have been abuses. . . . We refrain from saying at this point that those abuses are of constitutional dimension. They relate to the lack of resources and of dedication rather than to inherent un-

157. Id. at 365-66.
158. 403 U.S. 528 (1971).
160. See text accompanying note 157 supra.
161. 403 U.S. at 550.
fairness." This startling reversal of direction produced chaos in the state of constitutional juvenile law. McKeiver also weakened the argument that procedural protections analogous to those of the criminal process ought to be available to mental health respondents.

Recently, the Court has spoken more directly to the issue of whether the claimed "civil" character of mental health proceedings ought to justify diluting in such proceedings the procedural formalities required in criminal trials. In Addington v. Texas, the Court faced the question of whether to impose the Winship requirement of proof beyond a reasonable doubt in state civil commitment proceedings. The Addington Court refused to require the use of the criminal burden of persuasion, but it indicated in strong dicta that the use of the ordinary civil "preponderance" standard would violate due process. Chief Justice Burger, writing for a unanimous Court, distinguished mental health proceedings from both criminal trials on the one hand and ordinary civil adjudications on the other. Observing that civil commitment entails both a loss of liberty and serious adverse social consequences for respondents, the Court concluded that the respondent cannot be expected to "share equally with society the risk of error" and that accordingly the preponderance standard is insufficient. The Court was equally emphatic, however, that the prospect of loss of liberty and social standing was not justification for imposing the criminal burden of proof beyond a reasonable doubt. In mental health proceedings, the Court announced, the state must prove its case by the intermediate standard of "clear and convincing evidence."

Despite the fact that mental health proceedings have many similarities to the delinquency proceedings in which the Gault and Winship Courts required adherence to criminal procedural standards, the Addington opinion emphasized four differences between civil commitment and criminal proceedings. First, state

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162. Id. at 547-48.
164. Id. at 427.
165. Id. at 423-27.
166. Id. at 433. The nearest historical analog to the test formulated by the Court is the "clear, unequivocal and convincing" standard that it has required in deportation hearings, see Woodby v. I.N.S., 385 U.S. 276 (1967). The Court notes in Addington, however, that the "unequivocal" requirement matches or exceeds the reasonable doubt standard. Interestingly, the Court long ago assumed that the privilege against self-incrimination would be available to a respondent-witness in a deportation proceeding. See Vajtauer v. Commissioner of Immigration, 273 U.S. 103 (1927).
power in civil commitment proceedings is not, according to the Court, "exercised in a punitive sense."\textsuperscript{167} The Court stated flatly that civil commitment proceedings can "in no sense be equated to . . . criminal prosecution[s]."\textsuperscript{168} Second, the tragedy of erroneous confinement need not be so great a concern in mental health proceedings as in criminal ones, because "layers of professional review" and the "concern of the family and friends" act as additional safeguards against the risk of erroneous confinement.\textsuperscript{169} Third, the dangers of an erroneous decision against confinement are greater in civil commitment than in criminal trials, since the release of an individual genuinely in need of treatment is injurious to that individual in a way that the acquittal of a person genuinely deserving of criminal sanctions is not. Hence, it "cannot be said . . . that it is much better for a mentally ill person to 'go free' than for a mentally normal person to be committed."\textsuperscript{170} Finally, the opinion found that the central inquiry in a mental health proceeding is quite different from the focus of the criminal or delinquency hearing. The issue in a criminal case is whether the accused committed the criminal act. The question in a commitment proceeding is, on the other hand, a more delicate investigation of whether the respondent is mentally ill and a danger to self or others—an investigation, according to the Court, that depends not on facts, but on "the meaning of the facts."\textsuperscript{171}

The Court's reasoning in the \textit{Addington} decision is less than compelling. Its first observation, that commitment has no "punitive" aspect, seems both naive and irrelevant. Empirical evidence has indicated that commitment frequently follows an encounter with law enforcement officials and is viewed by them as simply an alternative disposition to jailing or some more conventional "criminal" sanction.\textsuperscript{172} The rehabilitative, deterrent, and incapacitative justifications for the imposition of criminal punishment overlap the most significant reasons for civil commitment. Even if commitment is less "punitive" than criminal im-

\textsuperscript{167} 441 U.S. at 428.  
\textsuperscript{168} Id.  
\textsuperscript{169} Id. at 428-29.  
\textsuperscript{170} Id. at 429.  
\textsuperscript{171} Id. (emphasis added).  
\textsuperscript{172} See, e.g., Dix, \textit{supra} note 139, at 504-09. Among Professor Dix's findings is the statistic that in St. Louis the police, with or without the cooperation of the subject's family, participated in over 60% of all involuntary admissions to an acute psychiatric facility. \textit{Id.} at 503. See also Bittner, \textit{Police Discretion in Emergency Apprehension of Mentally Ill Persons}, 14 Soc. PRoB. 278 (1966).
prisonment because it is thought not to involve the retributive motive, that distinction certainly cannot serve to justify different treatment between mental health respondents and accused juvenile delinquents. Each faces involuntary confinement "for his own good," rather than for some explicitly vengeful purpose. Yet the reality is that mental patients, no less than juvenile delinquents, may experience their confinement as a deeply punishing period and may in fact be the victims of harsh or cruel treatment.\footnote{See Hearings on the Civil Rights of Institutionalized Persons, Subcomm. on the Constitution, Senate Comm. on the Judiciary, 95th Cong., 1st Sess. (June 17, 22, 23, 30, and July 1, 1977) at 8-18 (Testimony of Drew S. Days, III), 52-70 (testimony of Geraldo Rivera) (book entered as exhibit), 74-75 (testimony of Dr. Michael Wilkins), 75-77 (testimony of Bernard Carabello), 129-77 (testimony of Wendell Rawls, Jr. & Acel Moore), 372-80 (testimony of Dr. James Clements); B. Ennis, Prisoners of Psychiatry (1972); E. Goffman, Asylums (1961) [hereinafter cited as Goffman]; R. Perucci, Circle of Madness: On Being Insane and Institutionalized in America (1974); C. Steir, Blue Jolts: True Stories From the Cuckoo's Nest (1978). See also the Frederick Wiseman film "Titicut Follies" for a shocking documentary on conditions in a Bridgewater, Massachusetts institution for the criminally insane.}

Second, the Court’s argument that layers of professional review and the concern of family and friends lessen the opportunity for serious errors in favor of commitment is similarly at odds with the evidence. Studies indicate that the decision to go forward with commitment proceedings is often made at a time when little information is available, and is seldom reviewed thereafter.\footnote{See Dix, supra note 139, at 502-37. Professor Dix reports that in the facility he studied, the initial admission decision was made after about four minutes of observation and examination. Although the decision was supposed to be reviewed at a later "staffing," Dix reports that he observed no case in which the staffing resulted in a reversal of the admission decision. Id. at 521, 534. See also Mechanic, Some Factors in Identifying and Defining Mental Illness, 46 Mental Hygiene 66, 69 (1962) ("The layman usually assumes that his conception of 'mental illness' is not the important definition since the psychiatrist is the expert and presumably makes the final decision. On the contrary, community persons are brought to the hospital on the basis of lay definitions, and once they arrive, their appearance alone is usually regarded as sufficient evidence of, 'illness'.")}

Psychiatric intervention is for them a way of dealing with a complex social situation not susceptible of other solutions. Many studies suggest that an individual in a social network who becomes identified by others as "sick" is not necessarily the individual most in need of psychiatric services.\footnote{See id. at 504 Table 1; Slovenko, supra note 7, at 13 (70% of all petitioners in mental health cases are family members).}

These two factors in combination suggest that the probability of
committing a person who ought not be committed is at least as
great as the probability of an erroneous criminal conviction, bur-
dens of proof being equal. To increase the differential risks by
imposing a lower standard of proof in commitment cases seems
perverse.

The Court's third distinction—that the hazards that attend
erroneous release of a confined person are so great that it is bet-
ter to confine an inappropriate subject than to release a needy
one—suffers like its first distinction from the flaw that it cannot
be used to differentiate juvenile offenders from mentally ill per-
sons. This treatment premise underlies both juvenile and mental
health confinement, however, it is not suggested that the plight
of the juvenile who needs treatment but does not receive it is so
tragic that we ought to relax the burden of proof in juvenile pro-
ceedings.¹⁷⁷ Moreover, there is a significant risk that the invol-
untary confinement of an alleged mentally ill person for whom
confinement is inappropriate will result in serious harm to that
person.¹⁷⁸ Conversely, studies show that there is a large, or at
least moderate, rate of spontaneous remission among the men-
tally ill.¹⁷⁹ Such remissions decrease the prospect of harm to
those who avoid commitment because of an excessively stringent
standard of proof. The disturbed person who is not institutional-
ized may agree to accept psychiatric services on an out-patient
basis; such a treatment plan is the therapy of choice in many
cases.¹⁸⁰ For these reasons, the Court's conclusion that over-in-
stitutionalization is preferable to under-institutionalization
seems unexamined at best. This expressed preference may, how-
ever, be the most important clue to the Court's attitude toward

¹⁷⁷. Although other guarantees, such as trial by jury, may be subordinated to the
therapeutic purposes of the juvenile court, see text accompanying notes 158-62 supra,
the Court held in Winship that burden-of-proof issues were not properly weighed against
beneficent purposes.

¹⁷⁸. See generally Goffman, supra note 173; Chambers, Alternatives to Civil
Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives, 70
Mich. L. Rev. 1107, 1127-33 (1972); Rosenhan, supra note 69.

¹⁷⁹. In a 1952 study, H. Eysenck concluded after reviewing much research that
mental patients receiving little or no treatment were quite as likely to recover as patients
undergoing extensive treatment. Eysenck, The Effects of Psychotherapy: An Evaluation,
16 J. Consult. Psych. 319 (1952). Eysenck's study has been criticized, but even his crit-
ics concede a substantial incidence of spontaneous remission. See Langley, Machotka, &
Flomenhaft, Avoiding Mental Hospital Admission: A Follow-Up Study, 127 Am. J.
Psych. 1391 (1971).

¹⁸⁰. See Freedman, supra note 20, at 475 ("There is also good evidence that, for a
substantial number of cases [of schizophrenias], day care or home care is a practical and
effective alternative to hospital care").
the mental health system provided by the Addington opinion. 181

Even less satisfactory is the Court’s final explanation, that the non-factual, interpretive focus of the commitment hearing justifies abandoning the requirement of proof beyond a reasonable doubt. Criminal trials do not, as the Court suggested, revolve exclusively around the question: “Did the accused commit the acts he is said to have committed?” Acts are only one element of a crime; with few exceptions they must be accompanied by some mental correlate—such as intention, knowledge, or recklessness—in order to render the actor a criminal. 182 Determining whether the requisite mental state was present requires—no less than does the determination of whether a person is mentally ill—interpretation, inference, and to a certain degree, speculation. Many criminal verdicts turn upon the jury’s view of such questions as the “reasonableness” of the defendant’s conduct or perceptions 183—surely matters more of interpretation and judgment than of strict fact-finding.

The most credible explanation for the Court’s willingness to accept less proof in mental health proceedings is the fear, expressed in Addington, that the requirement of proof beyond a reasonable doubt could not be met in the vast majority of commitment proceedings. The Court observed that, “[t]he subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations.” 184 The Court evidently feared that because of these uncertainties, imposing a reasonable doubt requirement would allow many patients needing treatment to avoid that treatment. 185 Addington signaled the Court’s unwillingness to risk that result. 186

181. See notes 184-86 infra and accompanying text.
183. See, e.g., MODEL PENAL CODE §§ 210.4, 2.02(2)(d).
184. 441 U.S. at 430.
185. Id.
186. In a decision released shortly after Addington, the Court again expressed confidence in the judgment of medical professionals, and fear that adversary-like protections in a mental health context would make the rehabilitative process more difficult. In Parham v. J.R., 442 U.S. 584 (1979), Chief Justice Burger rejected the plaintiffs’ claim that children who are admitted to mental institutions at the request of their parents should enjoy the procedural protections, such as hearings before an impartial tribunal, that have long been available to adults. The Chief Justice said “[w]hat is best for a child is an individual medical decision that must be left to the judgment of physicians in each case,” id. at 608, and that “there is a serious risk that an adversary confrontation will adversely affect the ability of the parents to assist the child while in the hospital.” Id. at
In summary, the United States Supreme Court has in recent cases, rejected the position that constitutional procedural formalities are required only in criminal cases. It has not, however, embraced the polar position that any proceeding that might result in a loss of liberty requires the same safeguards as those provided in criminal cases. Moreover, after strong initial skepticism about enforced therapy, the Court lately has turned a more sympathetic ear toward proponents of therapy. The Court clearly views the danger that those who need treatment may not be treated as at least as significant as the converse danger of confinement of those for whom confinement is unnecessary. Each of these attitudes may influence the Court's eventual view of the applicability of the self-incrimination clause in mental health proceedings.

The outcome in a pending case may shortly reveal more about the Court's willingness to recognize a privilege against self-incrimination in proceedings other than criminal trials. Smith v. Estelle, in which certiorari has been granted, concerns the applicability of the privilege at the sentencing stage of a criminal proceeding. The defendant in Smith had cooperated in an interview with a court-appointed psychiatrist at a time when his competency to stand trial was in question. Found competent, Smith went to trial on a capital charge and was convicted. At the penalty stage of the trial, the jury was asked to determine, inter alia, whether Smith was likely to commit criminal acts of violence that would constitute a continuing threat to society. The psychiatrist who had conducted the competency examination testified that in his opinion Smith was a dangerous

610. The Court also feared that imposing procedural formalities would deter parents from seeking hospitalization for their children. Id. at 620. Although generalizing from two decisions is risky, one cannot escape the impression that the Court has begun to choose sides, after remaining neutral for quite a while, between the "civil libertarian" and the "therapeutic state" factions of the debate over civil commitment.

Unlike Addington, Parham, drew three dissents. The dissenters argued that children might well require more procedural protection than adults, since "[t]he consequences of an erroneous commitment decision are more tragic where children are involved", and "the chances of an erroneous commitment decision are particularly great where children are involved." Id. at 627-29. See also Vitek v. Jones, 445 U.S. 480 (1980)(plurality opinion)(notice, hearing, counsel, and opportunity for cross-examination must be afforded prisoner facing transfer to a mental health institution).


189. 602 F.2d at 696.
The jury then answered the question in the affirmative, resulting in the imposition of the death penalty. In a subsequent habeas corpus proceeding, the Fifth Circuit held that because Smith had not been warned of a right to remain silent when confronted by the psychiatrist's probings, his privilege against self-incrimination was violated by the use of the psychiatrist's testimony at the sentencing hearing.191

One of the questions posed by this result is whether the privilege should be available at all in the sentencing stage—as distinct from the guilt-or-innocence stage—of a criminal trial. The Court has held that sentencing should not normally be regarded as a “criminal” proceeding for purposes of some constitutional protections, including the right to confront and cross-examine witnesses,192 and the right to trial by jury.193 On the other hand, the Court has found that the due process clause requires that certain sentencing decisions be made only after a hearing in which certain procedural protections are afforded the defendant.194 An affirmance of the Fifth Circuit's decision in Smith might indicate the Court's continued commitment to the position taken in In re Gault that the privilege against self-incrimination, or a generalized due process version of it, must be available to the individual who seeks by invoking the privilege to avoid a serious penalty other than criminal conviction.195 Such a

190. Id. at 697-98.
191. Id. at 708.
193. Proffitt v. Florida, 428 U.S. 242 (1976) (“This Court . . . has never suggested that jury sentencing is constitutionally required.” Id. at 252).
194. See, e.g., Gardner v. Florida, 430 U.S. 349 (1977) (convicted defendant facing death penalty entitled to access to presentence report); Specht v. Patterson, 386 U.S. 605 (1967) (convicted defendant facing enhancement of sentence under special sex offender statute must be afforded right to counsel).
195. On the other hand, affirmation could have alternative explanations that imply no view on the issue of the privilege against self-incrimination in civil commitment. It may be that the Court believes that death penalty cases are sui generis; if so, no conclusions may be drawn regarding the application of the doctrines enunciated in such cases to other situations. Compare Williams v. New York, 337 U.S. 241 (1949) (no constitutional right to access to presentence reports) with Gardner v. Florida, 430 U.S. 349 (1977) (rule of Williams does not apply in death penalty cases). Or the Court might recognize the privilege in sentencing contexts but refuse to extend its reasoning to the more “therapeutic” mental health setting. See text accompanying notes 143-81 supra. Finally, the Court might affirm Smith on the basis of agreement with the Fifth Circuit's independent alternative holding that the prosecutors unfairly surprised Smith's attorneys by failing, in violation of a pretrial order, to disclose their intention to call the psychiatrist at the sentencing hearing. See 602 F.2d at 699-703.

In a recent Supreme Court decision, the dissenting opinion of Mr. Justice Marshall
holding would make more likely the Court's eventual recognition of a privilege against self-incrimination for mental health respondents.

III. The Contours of the Privilege in Civil Commitment

I have argued that of the three explanations most often given for the law's failure to afford a privilege against self-incrimination to mental health respondents—the real-testimonial explanation, the waiver explanation, and the civil proceeding explanation—the first two are unsatisfactory. Those two explanations are often misused in the context of criminal insanity proceedings, and provide even less justification for disregarding the privilege in civil commitment cases. The third explanation, which argues that the privilege does not apply to a noncriminal proceeding like civil commitment, is lent surface plausibility by the Court's refusal in *Addington* to equate civil commitment to criminal conviction for burden-of-persuasion purposes.

Yet *Addington* should not be read as a proclamation that none of the procedural protections fashioned for criminal trials need be observed in civil commitment. The Court's tone in *Addington* is a pragmatic one; it does not intend to require any procedure that would interfere significantly with the therapeutic aims of the mental health system. On the other hand, the Court evidently is willing to require certain quasi-criminal protections, for example the requirement of proof by clear and convincing evidence articulated in *Addington*, as a matter of due process. The guiding principle seems to be ensuring the maximum procedural protections for the subjects of civil commitment to the degree those protections are consistent with the therapeutic goals of the mental health system. Hence any inquiry into the extent to which the privilege against self-incrimination should be respected in civil commitment proceedings must take into account the workings and goals of the commitment system and the degree of interference that recognition of the privilege would impose.

I will propose that a privilege against self-incrimination,
similar but not identical to the privilege recognized in criminal settings, be afforded to civil commitment respondents. Further, I will argue that affording such a privilege will not significantly hamper, and may even further, achievement of the therapeutic goals of civil commitment.

A. Temporary Detention

Civil commitment is most often initiated because an individual's erratic behavior has come to the attention of mental health or law enforcement authorities or, less frequently, a court. A decision in favor of indeterminate or relatively lengthy commitment is nearly always preceded by a brief period of temporary detention designed to accomplish both crisis intervention and evaluation. It is during this initial period that most of the issues addressed in this article arise in practice. To the extent that this brief period of interference in an individual's life successfully resolves an immediate crisis—and certainly a substantial number of such interventions do lead to some resolution that makes further involuntary proceedings unnecessary—requiring an elaborate system of warnings seems formalistic. More important, requiring Miranda-type warnings might contribute to the creation of an adversary atmosphere that would discourage the subject and therapist from finding a mutually acceptable solution to the crisis. For these reasons it seems misguided to require, as do some courts and some statutes, that as a matter of due process every temporary detention must be accompanied by such warnings.

A better solution is to distinguish, for purposes of the privilege, between the two somewhat antagonistic purposes of the temporary detention period: crisis resolution and evaluation for possible commitment. On the one hand, requiring an examiner to warn all respondents that anything they say may be used in

196. See Dix, supra note 139, at 503-14.
197. See note 17 supra.
198. See Brakel & Rock, supra note 5, at 47 ("[M]any if not most patients can be effectively treated and even released in a relatively short period of time. Thus temporary involuntary hospitalization may be all that is necessary to treat the patient successfully or at least prepare him to elect to continue treatment as a voluntary patient.").
201. See note 18 supra.
evidence at a commitment hearing might interfere with a noncoercive resolution of the immediate crisis. On the other hand, basic fairness requires such warnings when it is true that a respondent's statements may be so used. It is no solution to pretend that these antagonistic elements are not present. Instead, what is needed is a period during which it can truthfully be represented to a respondent that none of the respondent's statements will be used in a commitment proceeding.

Subject to fourth amendment concerns about probable cause, it seems reasonable to permit mental health authorities to detain a person for a very brief period—a maximum of forty-eight hours, for instance—as a method of crisis intervention. Just as it is tolerable to use arrest and brief detention in the criminal justice system for the resolution of such crises as domestic assault and disorderly conduct, it should be tolerable to put the mental health system to the same use. A person behaving in a bizarre or threatening, as opposed to an eccentric, manner, poses a hazard to the peace of the community, and conceivably to himself or herself. Our respect for individual freedom need not preclude us from intervention. The offensive aspects of the mental health system arise when an individual is tricked or coerced into cooperating in a procedure that may culminate in lengthy imprisonment.

Unlike the accused criminal, the person suspected of being


203. This article does not consider the value objections to the use of the mental health system as a social control agent analogous to the justice system. It can be argued, however, that there should be significant differences between the two systems and that it is not tolerable to put the mental health laws to the same social control uses to which society puts the criminal laws. See Dershowitz, Psychiatry in The Legal Process: "A Knife that Cuts Both Ways", in A. Sutherland, THE PATH OF THE LAW FROM 1967, at 71-83 (1968); Livermore, Malmquist & Meehl, On the Justifications for Civil Commitment, 117 U. Pa. L. Rev. 75, 78-79 (1968). Nevertheless, regardless of any philosophical objections, society does put the mental health system and the justice system to similar behavior control uses. My proposal neither depends on nor requires the abandonment of this practice.

204. There are, of course, theorists who reject both the parens patriae and the police power justifications for civil commitment. The best-known is Dr. Thomas Szasz, whose considerable writings characterize institutional psychiatry as a means of repressing political or cultural nonconformists. See, e.g., T. SZASZ, LAW, LIBERTY & PSYCHIATRY (1963); T. SZASZ, THE MYTH OF MENTAL ILLNESS (1961). Other criticisms of involuntary psychiatric treatment are found in N. KITTRIE, THE RIGHT TO BE DIFFERENT (1971); R.D. LAING, THE POLITICS OF EXPERIENCE (1967). One certainly need not accept the abolitionist views of these critics in order to accept my proposal; indeed, they would probably regard my proposal as an insufficient curb of the powers of the mental health system. See text accompanying notes 215-23 infra.
mentally ill does not enjoy a right to bail; this dissimilarity exac-
erbates the self-incrimination dilemma. But rather than mim-
icking the criminal justice system by coupling a right to bail
with a right to other procedural cautions and rights during the
initial detention period, the mental health system can formulate
a more appropriate solution to the self-incrimination problem. I
propose a solution which has two aspects. First, no statements
made by a respondent during the initial detention period shall
be admissible in a subsequent proceeding for involuntary hospi-
talization. Second, the initial detention period shall not exceed
forty-eight hours, a period which seems a reasonable duration
for the resolution of an immediate crisis.

Prohibiting the use of a respondent’s early statements is
both broader and narrower than the criminal exclusionary rule.
The prohibition is broader because it does not permit a waiver
of the right to remain silent at the time the statement is made.
This rule renders Miranda-type warnings as unnecessary as they
are inappropriate. At the same time, the prohibition is narrower
than an accused criminal’s privilege; it does not imply that an
examiner who questions an individual without a waiver has vio-
lated any constitutional rights. The questioning and the state-
ment are perfectly appropriate, but they may only be used for
危机 intervention and for therapeutic purposes. Any subsequent
attempt to introduce the statements or an examiner’s opinion
based on them at an involuntary commitment proceeding would
run afoul of the rule.

Under this proposed rule, many cases will be resolved, as
they are now, during the initial detention period. An examiner
and respondent frequently negotiate a mutually acceptable plan
of therapy. In fact, such nonadversarial solutions may increase
under this rule because the examiner will be able to encourage
the trust and the confidences of a respondent with truthful as-
surances that the respondent’s statements will remain
confidential.

205. *See text accompanying note 140 supra.*

206. This limitation would preclude a suit for damages against the professional
who questions a respondent without administering warnings. *See Bivens v. Six Unknown*
Federal Narcotics Agents, 403 U.S. 388 (1971) (recognizing a damage remedy for viola-
tions of the right to be free from unreasonable searches and seizures).

207. *See note 198 supra.*

208. This system would also remove any need for the presence of lawyers at initial
psychiatric interviews, a presence that is anathema to mental health professionals. A
number of courts have stated that the presence of a lawyer at a psychiatric interview
interferes with the diagnostic and therapeutic process. *See United States v. Bohle, 445*
After the initial temporary detention period elapses, if the examiner has failed to persuade the respondent to enter therapy voluntarily and believes that involuntary commitment proceedings are necessary, the process clearly will have become adversarial. At this point, it is appropriate to require many of the same protections for the respondent that are afforded to a criminal defendant. In particular, it is not tolerable to confine the respondent simply as a technique for allowing the state to build a case for commitment. Continued confinement pending a judicial commitment proceeding should be permitted only under the circumstances that would justify denial of bail in the criminal system: lack of any technique for otherwise assuring the respondent’s appearance at the hearing or as the necessary means of insuring that the respondent will not commit an overt act endangering self or others in the interim.209

At the expiration of the preliminary temporary detention period, the state should be required to provide counsel for every person for whom longer commitment is contemplated. I propose, in addition, that no further psychiatric interviewing or questioning be permitted until the respondent actually has spoken to counsel.210 If the respondent thereafter agrees to further psychiatric diagnostic procedures and counsel concurs, a presumptively...


209. But see note 16 supra, second paragraph.

210. Miranda and many subsequent cases have recognized the intimate connection between the right to counsel and the privilege against self-incrimination. In addition, United States v. Wade, 388 U.S. 218, 227 (1967), recognized the constitutional magnitude of the right to counsel at a “critical confrontation”, the outcome of which might greatly affect a criminal defendant’s chances to prevail at trial. Accord, Brewer v. Williams, 430 U.S. 387, 398 (1977).

In part on the basis of Miranda, the Fifth Circuit held in Smith v. Estelle, 602 F.2d 694, 709 (5th Cir. 1979), cert. granted sub nom. Estelle v. Smith, 445 U.S. 926 (1980), that a criminal defendant facing a psychiatric examination has a right to counsel. The court did not require the presence of counsel at the interview, but said that the defendant was entitled to counsel’s assistance in deciding whether to submit to the interview. 602 F.2d at 708-09 (“This is a vitally important decision . . . . It is a difficult decision even for an attorney; it requires a knowledge of what other evidence is available, of the particular psychiatrist’s biases and predilections, [and] of possible alternative strategies. . . .”). Although the Smith decision may have depended, in part, on the circumstance that Smith was facing the death penalty and the psychiatrist’s later testimony was critical to the sentencing decision, id. at 697-98, the Court’s language suggests a broader rule. See note 134 supra and accompanying text. But see Larsen v. Illinois, 74 Ill. 2d 348, 385 N.E.2d 679, cert. denied, 444 U.S. 908 (no right to counsel at pretrial psychiatric examination).
valid waiver will have taken place. Statements and diagnoses thus obtained may be admitted into evidence without violation of the privilege against self-incrimination.  \textsuperscript{211} If the respondent refuses diagnostic or treatment procedures after consulting with counsel, such procedures should be prohibited. Should the respondent agree to such procedures but counsel object, the mental health professionals should be allowed to proceed, but with the understanding that a court might later find the respondent's "waiver" invalid because of lack of capacity. In brief, there should be a presumption in favor of the validity of a waiver when given with concurrence of counsel, but a presumption against validity if counsel objected.

The \textit{Miranda} opinion declared a strong presumption against waiver of the privilege by a suspected criminal; surely an even stronger presumption should be found for mental health respondents. A respondent in a commitment proceeding is significantly more likely than an accused criminal to be suffering from some disorientation or thought disturbance that makes it difficult to understand the dangers of cooperation. In addition, a respondent may be faced with a practical "Catch-22." A respondent may believe, correctly in many cases, that the only hope of release lies in talking to an examiner until the examiner is persuaded the respondent is not mentally ill. This strategy is likely to provide the examiner with the very evidence needed to conclude the respondent is indeed mentally ill.

Requiring the presence of a lawyer before a valid waiver may be made eliminates the necessity for examiners to attempt to "warn" respondents of their rights in the way that police officers "warn" their suspects. Eliminating this requirement during the temporary detention period should be welcome to those mental health professionals who have inveighed against procedural requirements they view as inconsistent with the relationship they strive to establish with their patients. \textsuperscript{212} Mental health professionals may equally resent what they consider the untimely

\textsuperscript{211} It may be difficult for a psychiatrist who evaluates and treats a respondent both during and after the crisis-intervention period to separate the impressions received and opinions formed during the initial period from those received and formed later (after the respondent waives the privilege against self-incrimination). It may be that the only solution to this practical difficulty that fully protects the confidentiality of the respondent's earlier statements is a functional separation between those professionals who deal with the respondent during the initial period and those who evaluate the respondent later.

\textsuperscript{212} See, e.g., Treffert, \textit{Dying With Their Rights On}, 130 Am. J. Psychiat. 1041 (1973) (letter to the editor); Slovenko, supra note 7. See also note 182 supra.
appearance of the lawyer at the end of the period,\textsuperscript{218} but it is less clear that this resentment is justified. Requiring the psychiatrist to behave as a police officer requires a distortion of the helping role for which psychiatrists are trained. Subjecting the psychiatrist’s advice and influence to legal scrutiny does not require any professional role distortion. Moreover, the participation of the lawyer in the therapeutic process, once it has become in fact adversarial, is necessary to the protection of the rights of the respondent and appropriate to a process that may culminate in involuntary confinement.\textsuperscript{214}

\textit{B. The Commitment Hearing}

At the commitment hearing, not all aspects of the self-incrimination rights of a respondent need be as elaborate as the corresponding rights of an accused in a criminal trial. For example, the rule in criminal trials that the pre-trial silence of an accused may not be the subject of comment grew out of due process notions. It is unfair to advise an accused that silence will incur no penalty and then to penalize that silence by comment at trial.\textsuperscript{215} Since under my proposal no such representation is made to the mental health respondent, there is no due process objection to testimony that recounts the respondent’s refusal to cooperate with an examiner.\textsuperscript{216}

Whether the state should be permitted to call a respondent to the stand in a commitment hearing is a more difficult question. On the one hand, it is clear that a state’s attorney handling the commitment has a strong interest in exhibiting the respondent to the jury. This interest is akin to the interest of a criminal prosecutor who wants the jury to see, for example, how closely a defendant resembles a photograph taken of the perpetrator at the scene of the crime. That is, the state’s attorney wants the fact finder to observe the respondent’s nonverbal or nontestimonial behavior, such as how the respondent sits,

\textsuperscript{213} See Rapaport, \textit{supra} note 199.
\textsuperscript{214} It is already a universal practice to afford a mental health respondent a right to counsel at the commitment hearing, see notes 4 and 6 \textit{supra}. Hence mental health professionals already have accommodated themselves to the notion that lawyers have an important role in the obviously adversary stages of the commitment process. My proposal advocates only that the right to counsel attach at an earlier stage than trial, as it does in the criminal context. See note 210 \textit{supra}.
\textsuperscript{216} In any event, such an account is unlikely to make much of an impression on a fact finder. The inference of mental illness or dangerousness from silence is much less strong than the inference of criminal guilt from silence.
Civil Commitment

moves, speaks, and gestures. Such a use of the respondent is consistent with the Schmerber limitation of the privilege to "testimonial" evidence. On the other hand, testifying in court is by definition a testimonial contribution from the respondent. The task of limiting, by objections and other trial techniques, the respondent's performance on the stand to the exhibition of nontestimonial characteristics would seem to be impossible.

In summary, the hearing should be structured to protect the respondent's privilege to refuse to testify. This need not be onerous to the state, which can arrange for the factfinder's observation of the nontestimonial characteristics of the respondent.

The privilege against self-incrimination that I urge the courts to recognize will not destroy the civil commitment system. As I have argued, it may increase the number of consensual resolutions of mental health matters. It will not prevent the commitment of persons whose behavior is so overtly disturbed that no psychiatric interview evidence is necessary to enable a court to make a conscientious finding that the standards for commitment have been met by clear and convincing evidence.

217. See notes 30-38 supra and accompanying text.

218. Perhaps the varying interests could be accommodated merely by arranging the hearing room so that the fact finder has a clear view of the respondent and can observe his or her reactions to the hearing but cannot overhear any comments made by the respondent.

It should be forbidden as it is in criminal trials for the state's attorney to comment on, or for the judge to instruct on, the respondent's decision not to testify at trial. On the other hand, perhaps the respondent's attempts to hide a physical characteristic, such as trembling hands, should be a legitimate subject for prosecutorial comment. But cf. Walker v. Butterworth, 599 F.2d 1074 (1st Cir. 1979), in which the court voided, on self-incrimination grounds, the conviction of a defendant who had been required at his trial to conform to a Massachusetts rule on peremptory challenges. The Massachusetts rule requires defendants in murder cases to exercise their peremptory challenges personally, by identifying verbally the jurors whom they wish stricken. The defendant had entered a plea of insanity, and the prosecutor argued at closing that the defendant's participation in the challenge ritual was evidence of his rationality. Although agreeing that not all forced utterances violate the privilege, the court held that this cooperation was testimonial, because it revealed something about the defendant's mental processes to the jurors. Moreover, the court said, the implicit communication of rationality might well be misleading because the defendant was acting under compulsion; and "prohibiting the inherent unreliability of forced communication is an important policy reflected in the privilege against self-incrimination." Id. at 1082 n.9.

219. An important issue not addressed here concerns the propriety of medicating the respondent so that he or she presents a different aspect at the hearing than when unmedicated. A similar issue is presented in some criminal cases, see Winick, Psychotropic Medication and Competence to Stand Trial, 1977 AM. B. FOUNDATION RES. J. 769.

220. See text accompanying note 198 supra.

221. See text accompanying note 142 supra.

On the other hand, there will probably be some persons who could be committed with the aid of psychiatric testimony, but who will refuse to cooperate and may escape commitment under the scheme I have proposed. The social cost of this result will not necessarily be great; persons whose underlying disturbance can only be discovered by psychiatric examination are unlikely to be those most in need of psychiatric attention or those who pose the greatest danger to their communities.  

IV. CONCLUSION

A. The Explanations

Few courts have been receptive to the argument that a respondent facing civil commitment should be afforded protection from the evidentiary use of his own statements or testimony derived from a psychiatric examination. Some courts have explained their reluctance to apply the privilege against self-incrimination on the ground that the evidence contributed by the respondent is not testimonial. I have argued that this explanation overlooks important values, principally reliability and mental privacy, that the privilege was fashioned to protect. Other courts hold that waiver is the explanation for the respondent's inability to invoke the exclusionary rule to exclude the psychiatric testimony; but that explanation is seriously flawed unless the respondent initiates a "battle of the experts" by presenting psychiatric testimony. The third explanation, and the one that commands the most respect, is that criminal procedural protections—such as the privilege against self-incrimination—have no application in civil proceedings like mental health hearings. This explanation, however, ignores the extent to which the United States Supreme Court has recognized that protections analogous to those afforded the criminal accused may be necessary in civil proceedings that may result in loss of liberty. I have proposed a constellation of rules for the protection of the self-incrimination privilege of mental health respondents that is consistent with the civil and therapeutic nature of such proceedings and yet preserves the rights of respondents to privacy and

223. The unreliability of psychiatric diagnosis is discussed in Ziskin, supra note 65, at 120-28; and Ennis & Litwack, supra note 67. See also Amicus Curiae Brief for American Psychiatric Association, at 10-11, Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979), cert. granted sub nom. Estelle v. Smith, 445 U.S. 926 (1980) (predictions of dangerousness do "not involve medical analysis" and are "not within the realm of established psychiatric expertise").
to the exclusion of unreliable evidence.

B. The Proposal

Short-term detention of those for whom there is probable cause to believe that the criteria for civil commitment are satisfied should be permissible, and there should be no prohibition against the questioning or examination of candidates for commitment during the short-term detention period. Moreover, there should be no requirement that Miranda-like warnings be administered during this period. Many crises may be resolved during this period in a manner acceptable to both the respondent and the responsible mental health professional. If no such resolution is possible, the respondent should be afforded counsel, and should rebuttably be presumed to be incapable of making a valid waiver of the privilege against self-incrimination in the absence of his counsel's advice and concurrence. Finally, the respondent should be privileged to decline to testify at the commitment hearing.

It may be objected that the proposal outlined here permits too much psychiatric inquiry, and that the protections afforded to criminal suspects, including early Miranda-type warnings, should be required. Any proposed constitutional reform, however, that severely interferes with the formation of a nonadversarial therapeutic relationship between a possibly disturbed person and a professional mental health worker seems doomed to judicial rejection. The Court's recent inclination to accept the therapeutic claims of mental health institutions, coupled with its economy-minded enthusiasm for measures that reduce the need for judicial resolution of disputes,224 militate against any such reform.

It is true that prospects for psychiatric invasion of privacy are greater in this proposed scheme than they would be were the adversary relationship officially established at once, by requiring that prospective respondents be warned immediately concerning the adversary nature of eventual proceedings. For some, the fact that respondents may be tricked, lulled, or persuaded to cooperate with a psychiatric inquiry into their mental processes, despite the fact that evidence gained thereby will not be admissible at a later hearing, establishes the potential for intolerable

224. See, e.g., Brady v. United States, 397 U.S. 742 (1970). The Court held plea-bargaining for lower sentences constitutional and observed that "with the avoidance of trial, scarce judicial and prosecutorial resources are conserved." Id. at 752.
invasions of privacy. This potential is troubling, but a rule treating any therapeutic contact as though it were a custodial interrogation would go too far, for it would prohibit a prison chaplain from offering counselling to a convict, a school psychologist from calling a student in for a conference, and a mental health worker from engaging in therapy with a voluntary patient, in the absence of some kind of warning about the subject's right to remain silent. Those cases ought to be distinguished because cooperation there poses no risk of eventual or prolonged confinement.

The privacy justification for recognizing a right to refuse to cooperate in a psychiatric inquiry is heightened when the prospect of a term of involuntary confinement looms and the results of the inquiry may make that confinement more likely. Another way of expressing this notion is that the privilege against self-incrimination has certain right-to-privacy characteristics, but it draws independent strength from its place in the constellation of rights enjoyed by those whose freedom the state seeks to take away. Therefore, the privilege against self-incrimination should be observed in civil commitment proceedings because a refusal to recognize it impairs individual interests in both privacy and liberty.

Of course, it might be objected that such recognition impermissibly interferes with the proper performance of the state's duty to treat its mentally ill citizens. This proposal, however, gives mental health professionals a significant opportunity to try to persuade a person facing involuntary commitment to submit voluntarily to some sort of treatment plan. This opportunity is greater than any existing previously because examiners may truthfully assure respondents during the initial temporary detention period that they seek only to work out an acceptable voluntary plan; examiners need not devote any energy or thought to building a case against a respondent. Only when efforts at a mutually acceptable solution fail, and the process does turn truly adversary, would the law begin to interfere with the ideal therapeutic progress of the case.

Precisely at this point, of course, the objections of psychiatric professionals begin. Mental health workers do not want lawyers injected into the commitment process. Yet those professionals must recognize that by creating the machinery for civil

225. My proposal would, of course, not countenance the imposition of sanctions on a noncooperating subject in any of the described situations.
commitment, the law does something extraordinary. It gives mental health professionals a power they would not otherwise enjoy, the power to treat nonconsenting individuals. Since it is the law that confers this enormous power, mental health professionals cannot becomingly protest that the "legal" aspects of the procedure have become onerous. The fact is that mental health professionals do seek a resolution antagonistic to a respondent's expressed desires when those professionals seek involuntary commitment. The law merely recognizes this when it offers respondents the privilege of refusing to cooperate in their own confinement, however therapeutic that confinement is intended or ultimately may prove to be. Prison has sometimes been therapeutic; so has juvenile reform school. The state must, however, make its way through proceedings designed to relegate individuals to those places without the involuntary or unwitting testimonial assistance of the individuals themselves. Those facing involuntary confinement for mental illness are entitled to at least as much protection.