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Estelle v. Smith: The Constitutional Contours of the Forensic Evaluation

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I. INTRODUCTION: *Estelle v. Smith*

In *Estelle v. Smith*,[1] the United States Supreme Court recognized for the first time that an evaluation of a criminal defendant by a mental health professional may implicate both the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to counsel. The issues raised in *Estelle* are significant not only for the legal profession but also for those in the mental health professions who perform "clinical"[2] evaluations for the criminal courts.

Estelle involved the case of Ernest Smith, who was sentenced to death by a Texas jury in 1974. Prior to trial, the judge ordered a psychiatrist, Dr. Grigson, to evaluate Smith's competency to stand trial.[3] Grigson's ninety minute interview ranged well beyond the terms of the court order, however. The doctor not only provided the court with a report on Smith's competency and an unsolicited opinion about Smith's mental state at the time of the offense,[4] but subsequently used information obtained during his interview as the basis for testimony in support of the state's case at the sentencing proceeding held after Smith's conviction for capital murder.

Texas law[5] requires a judge to impose the death penalty if the

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[1] 451 U.S. 454 (1981).

[2] Because psychologists and other nonpsychiatrists frequently are called upon to address the mental state issues discussed in this article, and increasingly are being found qualified to do so by the courts, *see* Bonnie & Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427, 457-61 (1980), the words "clinician" and "clinical" will be used throughout this article in order to avoid the impression that psychiatrists are the only mental health professionals who can offer expertise to the criminal justice system.

[3] The judge's order consisted of an "oral communication" to Grigson. 451 U.S. at 458 n.5. Although neither the defense nor the state requested the evaluation, the judge ordered it "because [he did] not intend to be a participant in a case where the defendant receive[d] the death penalty and his mental competency remain[ed] in doubt." *Id.* at 457 n.1.

[4] Grigson's report stated that Smith "is aware of the difference between right and wrong and is able to aid an attorney in his defense." *Id.* at 457.

[5] TEX. CRIM. PROC. CODE ANN. art. 37.071(e) (Vernon 1981 & Supp. 1982). In Texas, the adjudication in a capital case takes place in two phases. If the defendant is found guilty at the first phase, the same jury then decides whether the defendant should receive a life sen-

sentencing jury affirmatively answers three questions, one of which asks "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."[6] Dr. Grigson was called by the prosecution to testify on this "dangerousness" question. The doctor called Smith a "severe sociopath" who "is going to go ahead and commit other similar or same criminal acts if given the opportunity to do so" and who has "no regard for another human being's property or for their [sic] life, regardless of who it may be."[7] The rest of Grigson's testimony was similiarly damaging to Smith.[8] Since Grigson was the state's only witness at the sentencing proceeding, it is likely—and the Supreme Court's opinion appeared to assume—that his testimony heavily influenced the sentencing jury, which answered the dangerousness question, as well as the other two capital sentencing questions, in the affirmative.[9]

Neither Smith nor his attorneys were aware until the sentencing hearing itself that the results of Grigson's evaluation would be used to support the state's case at sentencing.[10] Nor did Smith's attorneys indicate at any time during the proceedings against Smith that they intended to introduce expert clinical testimony of their own at either the guilt or sentencing phases of the trial.[11] These two facts played a significant role in the Supreme Court's unanimous decision overturning Smith's sentence.

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tence or the death penalty during a separate proceeding. *Id.* art. 37.071(a).

[6] *Id.* art. 37.071(b)(2). The other two issues are: "whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result"; and (2) "if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." *Id.* art. 37.071(b)(1), (3).

[7] 451 U.S. at 459-60.

[8] Dr. Grigson also stated that Smith "will continue his previous behavior," that his sociopathic condition will "only get worse," that there "is no treatment, no medicine . . . that in any way at all modifies or changes this behavior," and that he "has no remorse or sorrow for what he has done." *Id.*

[9] *Id.* at 460-61.

[10] *Id.* at 461, 466. Grigson did not obtain permission from Smith's attorneys to examine Smith. *Id.* at 461. According to the defense counsel, the first time they learned of Grigson's "competency" examination was when one of them inadvertently discovered his written report in the court's files sometime after the selection of the jury. *Id.* at 458 n.5. The prosecution did not include Grigson on its list of witnesses for the sentencing proceeding. *Id.*

[11] *Id.* at 466.

The Supreme Court, in an opinion written by Chief Justice Burger, based its ruling on two grounds. The first ground, supported by six justices, addressed the implications of Grigson's failure to tell Smith that his statements made during the interview might be used against him at the capital sentencing proceeding. Chief Justice Burger began this part of the opinion by analyzing the Court's decision in *Miranda v. Arizona*,[12] which established that disclosures by a defendant during a custodial police interrogation are not admissible on the issue of guilt unless the defendant has been informed of his Fifth Amendment right to remain silent and then has voluntarily and intelligently waived that right.[13] Although *Miranda* focused on pretrial interrogations by law enforcement officers, the Court found its rationale applicable to the specific situation in *Estelle*. First, according to the Court, the "gravity of the decision to be made at the [death] penalty phase"[14] dictates that Fifth Amendment protection must be extended beyond the guilt stage to the capital sentencing process even though the defendant has already been convicted and thus no longer can be "incriminated" in the traditional sense.[15] Second, when the criminal defendant "neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence,"[16] as was the case in *Estelle*, it is immaterial that the "interrogation" is actually a clinical evaluation:

> When Dr. Grigson went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a post-arrest custodial setting. During the psychiatric evaluation, respondent assuredly was "faced with a phase of the adversary system" and was "not in the presence

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[12] 384 U.S. 436 (1966).

[13] *See generally* C. WHITEBREAD, CRIMINAL PROCEDURE: AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS ch. 15 (1980).

[14] 451 U.S. at 463.

[15] *Id.* Chief Justice Burger stated: "[W]e can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned." *Id.* at 462-63.

[16] *Id.* at 468.

of [a] perso[n] acting solely in his interest."[17]

Having placed Dr. Grigson's examination solidly within the purview of *Miranda,* the Court held that Dr. Grigson's failure to "warn" Smith prior to the interview rendered Smith's subsequent statements inadmissible as a basis for expert testimony. Because he had not been told the purpose of Dr. Grigson's evaluation, Smith had not voluntarily and intelligently waived his Fifth Amendment right to remain silent.[18]

The second ground for excluding Grigson's testimony, which was supported by all nine Justices, derived from the fact that Smith's attorneys were not given advance notice about the nature and the possible use of the information obtained during Grigson's interview and were therefore denied the opportunity to consult with their client about whether he should submit to the interview. In holding that this lack of notice abridged Smith's Sixth Amendment right to counsel, Chief Justice Burger first noted that the Supreme Court previously had held in *United States v. Wade*[19] that criminal defendants have the right to counsel "where counsel's absence might derogate from the accused's right to a fair trial."[20] The Chief Justice then labeled the clinical evaluation in *Estelle* a "critical stage,"[21] a phrase that has been used frequently by the Court to denote those stages of the criminal process at which the presence of counsel is required by the Sixth Amendment.[22]

Despite the Court's holding, Chief Justice Burger backed away from the full import of the critical stage analysis found in the Court's earlier decisions. In a footnote, the Chief Justice carefully reserved decision on the question of whether the Sixth Amendment accords a defendant the right to have counsel present during the evaluation itself.[23] Quoting from the Fifth Circuit Court of Ap-

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[17] *Id.* at 467 (quoting Miranda v. Arizona, 384 U.S. 436, 469 (1966)).

[18] 451 U.S. at 468-69.

[19] 388 U.S. 218 (1967).

[20] *Id.* at 226.

[21] 451 U.S. at 470.

[22] *See, e.g.,* Coleman v. Alabama, 399 U.S. 1 (1970); Mempa v. Rhay, 389 U.S. 128 (1967); Schmerber v. California, 384 U.S. 757 (1966); text accompanying notes 182-203 *infra.*

[23] 451 U.S. at 470.

peals' decision in *Estelle,* the Chief Justice noted that "an attorney present during the psychiatric interview could contribute little and might seriously disrupt the examination."[24] Thus, *Estelle* merely establishes that the period *before* a state-compelled evaluation is a "critical stage," thereby requiring the state to inform the defendant's attorney about the subject matter of the evaluation so that he can decide whether to recommend to his client that he cooperate with the psychiatrist.[25]

The explicit holding of *Estelle* is of limited applicability. The decision does not, for example, directly address the role that the Fifth and Sixth Amendments should play when the state plans to use the results of a pretrial evaluation on issues other than the defendant's future dangerousness. Nor does the decision indicate what constitutional protections, if any, are required when the defendant initiates the evaluation or when the defendant decides to introduce his own expert clinical testimony. The decision thus gives lawyers, judges, and mental health professionals little explicit guidance with respect to the impact of constitutional principles on the vast majority of clinical evaluations that are performed for the courts.

This article will attempt to define, consistent with the *Estelle* holding, the appropriate constitutional contours of the two most common evaluation contexts: assessments of competency to stand trial,[26] and "reconstructive evaluations"[27] of mental state at the

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[24] *Id.* Chief Justice Burger also declined to consider a Fifth Amendment claim basis for the right to counsel: "Because psychiatric examinations of the type at issue here are conducted after adversary proceedings have been instituted, we are not concerned in this case with the limited right to the appointment and presence of counsel recognized as a Fifth Amendment safeguard in *Miranda. Id.*

[25] *Id.*

[26] The standard for determining a defendant's competency to stand trial is discussed at note 44 *infra* and accompanying text. It has been estimated that over 25,000 competency evaluations are performed each year in the United States. E. Hartstone, in J. MONAHAN & H. STEADMAN, MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE, ch.2 (in press).

[27] The term "reconstructive evaluation" will be used in this article to refer to clinical evaluations that attempt to reconstruct the defendant's actions and thoughts at the time of the alleged offense. Such assessments usually are conducted either to determine whether the defendant was "insane" at the time of the offense or to assess whether he had the requisite mental state for the crime charged. The legal standards for making these determinations are

time of the offense. *Estelle*'s ramifications for the less frequent situations presented by pretrial evaluations in capital sentencing cases will also be explored.[28] Part II of the article will discuss the

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discussed at notes 48-49 *infra*.

[28] Although mental health professionals are frequently called upon by the legal system to perform all three types of evaluations described, a threshold question that must be addressed briefly here is whether clinicians should be involved at all in such determinations. Several commentators have argued that the opinions of mental health professionals, at least on reconstructive and predictive issues, should not be admissible because they are based on speculative theories and add little to what the fact finder, relying on common sense, can discern for himself. *See, e.g.*, J. ZISKIN, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY (2d ed. 1975); Morse, *Crazy Behavior Morals and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527 (1978); Comment, *The Psychologist as Expert Witness: Science in the Courtroom?*, 38 MD. L. REV. 539 (1979). In short, these commentators argue that such opinions should not be considered "expert" even under liberalized formulations of the expert opinion rule, *see, e.g.*, FED. R. EVID. 702 ("specialized knowledge" that "will assist the trier of fact to understand the evidence or to determine a fact in issue" may form the basis for opinion testimony by one who is appropriately qualified).

With respect to opinions about competency and reconstructive issues, such criticism seems unfounded. While it is certainly arguable that the competency inquiry does not require the participation of a mental health professional in every case, *see* Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 469 (1967), even those who advocate a lessened role for clinical opinion in the courtroom concede that clinicians are, by training, more adept than most laypersons at making the behavioral observations necessary in that context. *See, e.g.*, Morse, *supra*, at 601, 611. Mental health professionals also can provide "informed speculation" about reconstructive issues that will assist the fact finder in understanding criminal behavior. As Professor Bonnie and this author have argued elsewhere, appropriately trained clinicians who are sensitive to the limitations of their discipline can offer useful information to the fact finder making insanity and mens rea determinations. Bonnie & Slobogin, *supra* note 2.

The clinician's expertise on capital sentencing issues, and in particular the criminal's dangerousness, is much more problematic. J. MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR 41-60 (1981); Dix, *Clinical Evaluation of the "Dangerousness" of "Normal" Criminal Defendants*, 66 VA. L. REV. 523, 532-44 (1980). A strong argument can be made that, because of the unreliability of clinical, as opposed to actuarial, predictions of violence, *no* expert testimony on that issue should be admissible, especially when the consequences of a false positive finding are significant, as in capital cases. *See* Bonnie & Slobogin, *supra* note 2, at 443; Dix, *Expert Prediction Testimony in Capital Sentencing: Evidentiary and Constitutional Considerations*, 19 AMER. CRIM. L. REV. 1 (1981). Despite the problems associated with predictions of dangerousness, however, expert testimony on this issue probably will continue to be a reality for some time. The United States Supreme Court upheld the Texas death penalty statute in Jurek v. Texas, 428 U.S. 262 (1976), explicitly finding that predictions of violent behavior could form the basis for a capital sentence. It reaffirmed *Jurek* in *Estelle*, 451 U.S. at 472-73, although the Court did note that experts considered such predictions to be of low reliability. *Id.* at 472. This article will assume that the courts will continue to call for such predictions from mental health professionals in the capital sentencing context. *See* People v. Murtishaw, 29 Cal. 3d 733, 767-75, 631 P.2d 446, 466-71,

interplay in each of these areas between the defendant's right to remain silent and the state's need for clinical information. Part III will then discuss the application of Sixth Amendment principles in each evaluation context, and will address not only the presence of counsel notion raised in *Estelle,* but also whether the right to effective assistance of counsel implies a right to a confidential exploratory evaluation. Finally, Part IV offers recommendations for the proper administration of the forensic evaluation process based on the various concepts examined in the article.

II. The Fifth Amendment and Pretrial Evaluations: The Accusatorial Model and the Inquisitorial Model

The Supreme Court has called the Fifth Amendment privilege against self-incrimination the "essential mainstay" of our accusatorial system of justice.[29] The protections of the privilege are implicated whenever the government attempts to reduce its prosecutorial burden by subjecting the accused to the "cruel trilemma of self-accusation, perjury or contempt."[30] The privilege generally forbids the state from introducing into evidence (1) any self-incriminating statements by the defendant (2) that are testimonial or communicative in nature, (3) whenever those statements have been compelled by the state.[31]

There is no direct analogy to the Fifth Amendment in a purely inquisitorial scheme of justice,[32] a system in which the decisionmaker actively participates in the investigation rather than deliberating passively on evidence presented by the two opposing

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175 Cal. Rptr. 738, 758-63 (recognizing that psychiatric predictions are generally unreliable and uncertain, but also recognizing that in some situations a reliable psychiatric prediction concerning future violence may be possible; court thus refused to adopt an absolute rule barring such predictions during the penalty phase of a capital trial).

[29] Malloy v. Hogan, 378 U.S. 1, 7 (1974).

[30] Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

[31] The Supreme Court has held that the privilege against self-incrimination protects the accused "from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." Schmerber v. California, 384 U.S. 757, 761 (1966). *See generally* C. Whitebread, *supra* note 13, ch. 14.

[32] Barrett, *The Adversary System and the Ethics of Advocacy,* 37 Notre Dame Law. 479, 483 (1962).

parties.[33] Such a system, a version of which is found in many European countries,[34] views the accused "as the primary source of evidence both during the investigation and at trial."[35] It is less concerned with how information is obtained than with ensuring that every relevant source of data is utilized in the decisionmaking process.[36]

This article contends that, in the context of pretrial clinical evaluations, the traditional accusatorial model must occasionally give way to a modified "inquisitorial" approach.[37] As discussed in Sections A and B, the defendant often discloses self-incriminating, testimonial material during a clinician's pretrial evaluation. As argued in Section C, however, once the defendant's mental condition is properly raised as an issue, the Fifth Amendment should not prevent the state from compelling such evaluations so long as its use of the results is properly restricted. A "fair state-individual balance"[38] should permit the state to eschew the accusatorial mode of investigation when it can claim a legitimate need for information that is relevant to the defendant's mental condition. At the same time, even when the state can establish that a particular burden is too heavy for it to carry alone, it may not use disclosures compelled from the defendant for any purpose other than to help it bear that burden.

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[33] *See* Thibaut, Walker & Lind, *Adversary Presentation and Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386, 388 (1972). The authors note that the American criminal justice system, despite its accusatorial orientation, includes inquisitorial components. One example is the role played by grand juries. *Id.* at 388 n.7.

[34] *See generally* Ploscowe, *The Development of Present-Day Criminal Procedures in Europe and America*, 48 HARV. L. REV. 433 (1935).

[35] Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1018 (1974). Goldstein observes that in the typical inquisitorial trial "[the accused] is ordinarily called as the first witness and is questioned closely by the presiding judge about the facts of his life and his knowledge of the crime. Few rules of evidence inhibit the judge . . ." *Id.*

[36] *Id.* at 1018-19.

[37] The phrase "modified inquisitorial approach" refers to a mode of investigation that places emphasis on obtaining information from every available source, including the defendant. As such, it is merely a shorthand method for contrasting this type of investigation with the accusatorial method and it is not meant to encompass other aspects of the so-called "inquisitorial" model of justice.

[38] Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

A. *The Incrimination Doctrine:* Hoffman *and* Estelle

In *Hoffman v. United States*,[39] the Supreme Court indicated that the self-incrimination component of the Fifth Amendment privilege should be given a "liberal construction"[40] so as to include any verbal or nonverbal disclosure by the defendant that might "furnish a link in the chain of evidence needed to prosecute."[41] For most criminal offenses, the state cannot successfully prosecute a defendant without accumulating three types of facts: (1) those connecting the defendant with the physical act associated with the offense (actus reus); (2) those proving he possessed the mental state associated with the offense (mens rea); and (3) those showing the absence of a "justification" for the crime, such as self-defense, or an "excuse" for the crime, such as insanity.[42] It follows that any disclosures by a defendant that tend to provide such evidence should be viewed as incriminating if they are used against him at trial.[43]

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[39] 341 U.S. 479 (1951).

[40] *Id.* at 486.

[41] *Id.*

[42] *See generally* W. LAFAVE & SCOTT, CRIMINAL LAW 45 & n.13, 48-49 (1972). Not all of these elements are required to prosecute for "strict liability" crimes and certain other types of crimes not at issue here. *Id.* at 218-23.

[43] Some courts have attempted to distinguish between evidence that tends to prove the actus reus or mens rea and evidence that relates to sanity, implying that when disclosures made by a defendant are introduced solely to address the latter issue, they are not "incriminating" for purposes of the Fifth Amendment privilege. For example, in United States v. Albright, 388 F.2d 719 (4th Cir. 1968), the court stated:

> [T]he purpose of the [insanity] examination is not to determine whether a defendant did or did not do the criminal acts charged, but whether he possessed the requisite mental capacity to be criminally responsible therefor, if other proof establishes that he did do them. So limited, we find nothing in the examination over a defendant's objection, to violate a defendant's privilege against self-incrimination.

Id. at 725. *See also* Battie v. Estelle, 655 F.2d 692, 701 n.21 (5th Cir. 1981) ("[P]roof of insanity is not necessarily inconsistent with proof of the defendant's guilt").

Such a distinction makes no sense. Proof of the defendant's sanity, in and of itself, is an essential element of the state's case against the defendant, regardless of who bears the burden of persuasion on the issue. *See, e.g.*, Commonwealth v. Vogel, 440 Pa. 1, 2, 268 A.2d 89, 90 (1970) ("If mens rea, or intent, is an element of the crime of murder, the capacity to form that intent, *ie.*, legal sanity, must likewise be an element of the crime"). Even in states where the defendant must prove he was insane by a preponderance of the evidence, *see, e.g.*, State v. Canaday, 79 Wash. 2d 647, 488 P.2d 1064 (1971), *vacated*, 408 U.S. 940 (1972); MONT. CODE ANN. § 46-14-202 (1981), any evidence that tends to rebut his claim must be

Such disclosures could easily result from either a competency or a reconstructive assessment. A competency evaluation should focus on the defendant's present mental condition, with particular attention paid to his ability to understand the legal process and communicate with his attorney.[44] Yet the Supreme Court has intimated,[45] and several lower courts have held explicitly,[46] that an assessment of the defendant's ability to remember the time period of the alleged offense and describe it to his attorney is an important aspect of the fitness to stand trial determination. Thus, even if an evaluation is conducted solely to gauge the defendant's competency, information relevant to actus reus, mens rea, and sanity may be disclosed by the defendant.[47]

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considered incriminating because it leads toward securing a criminal conviction. As Professor McNaughton has written: "A fact tends to incriminate only [a] if its disclosure would increase the probability that the witness will be convicted of a crime, and [b] if after its disclosure the witness will be in substantial danger of conviction of the crime." McNaughton, *The Privilege Against Self-Incrimination*, 51 J. CRIMINOLOGY, CRIM. L. POLICE SCI. 138, 152 (1960). Testimony about sanity clearly meets both of these criteria.

[44] In Dusky v. United States, 362 U.S. 402 (1960), the Supreme Court held that in order to find a defendant competent to stand trial, "the test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Id.* at 402.

[45] In *Dusky* the Court preceded its enunciation of the competency test with the statement that "it is not enough for the district judge to find that 'the defendant [is] oriented to time and place and [has] *some recollection of events.*' " *Id.* at 402 (quoting the Solicitor General) (emphasis added). This statement suggests that memory of the offense is an additional element of the test.

[46] *See, e.g.*, Wieter v. Settle, 193 F. Supp. 318, 322 (W.D. Mo. 1961) (the competent accused "will be expected to tell his lawyer the circumstances, to the best of his mental ability, (whether colored or not by mental aberration) the facts surrounding him at the time and place where the law violation is alleged to have been committed"); People v. Angelillo, 105 Misc. 2d 338, 344, 432 N.Y.S.2d 127, 131 (Suffolk County Ct. 1980) ("Among the factors to be considered in determining defendant's competency is whether he has some recollection of the events involved in the crime . . . ." (citation omitted)). A majority of courts also hold, however, that amnesia for the time of the offense is not a bar to a finding of competency to stand trial. *E.g.*, Wilson v. United States, 391 F.2d 460, 463 (D.C. Cir. 1968). *See* R. ROESCH & S. GOLDING, COMPETENCY TO STAND TRIAL 36-37 (1980).

[47] Although no court has so held, it could be argued that disclosures by the defendant that support a finding of competency or incompetency are "incriminating" because either finding can lead to a curtailment of liberty. *Cf. In re* Gault, 387 U.S. 1, 49 (1967). Since this proposition, if correct, would not change the analysis of this article with respect to competency evaluations, for reasons discussed in the text accompanying notes 77-84, it will not be discussed further.

A reconstructive evaluation of the defendant's mental state at the time of the offense is even more likely to result in potentially incriminating disclosures. Such evaluations are typically sought either to ascertain whether the defendant was "insane" at the time of the offense[48] or, in states that permit evidence of so-called "diminished capacity,"[49] to determine whether his mental condition prevented him from possessing the requisite mens rea for the offense. An evaluation focusing on either question must attempt to reconstruct in detail the defendant's thoughts, feelings, and actions at the time of the offense.[50] If the defendant is to have any chance at successfully asserting an insanity defense or claiming diminished capacity by relying on clinical expertise, he probably will have to make disclosures to the evaluating clinician relevant to the actus reus, mens rea, and sanity determinations.

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[48] In 43 of the 62 federal and state jurisdictions, insanity is gauged according to either the American Law Institute/Model Penal Code test, or a standard combining the traditional M'Naghten test, with the "irresistible impulse" test. The remaining jurisdictions subscribe either to M'Naghten alone (17), or to the so-called "Durham" or "product" test (1). Two states, Montana and Idaho, have abolished the defense. *See* R. Favole, in J. MONAHAN & H. STEADMAN, MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE, ch. 9 (in press).

Both the ALI/MPC tests and the M'Naghten/irresistible impulse test depend upon an assessment of the extent to which the defendant's ability to appreciate the nature of and exert control over his actions at the time of the offense is compromised by mental disease. *See generally* G. MORRIS, THE INSANITY DEFENSE: A BLUEPRINT FOR LEGISLATIVE REFORM 11-20 (1975) for a detailed description of the various insanity tests.

[49] "Diminished capacity," or the idea that a defendant may not have possessed, or may not have had the capacity to possess, the requisite intent for the crime charged, is to be distinguished from "diminished responsibility" or "partial responsibility," phrases used to designate the concept that a person who is not criminally insane and has the mens rea for an offense may still not be fully responsible for the alleged crime because of a mental abnormality. *See* Bonnie & Slobogin, *supra* note 2, at 446, 449-51.

As of 1975, 23 states provided by statute or judicial rule that evidence of mental abnormality that was not sufficient to establish legal insanity was still admissible for the purpose of determining whether a crime was committed. *See* G. MORRIS, *supra* note 48, App. B. Many of these states, however, limit such evidence to first degree murder or specific intent crimes. *Id.* For more recent decisions requiring, on constitutional grounds, admission of clinical testimony on mens rea, *see* People v. Wetmore, 22 Cal. 3d 318, 583 P.2d 1308, 149 Cal. Rptr. 265 (1978). *See also* cases cited in note 139 *infra*.

[50] The clinician performing a reconstructive evaluation must delve into the defendant's "thoughts, feelings and actions before, during and after the time of the crime." J. MACDONALD, PSYCHIATRY AND THE CRIMINAL 47 (1958). *See also* S. HALLECK, LAW IN THE PRACTICE OF PSYCHIATRY: A HANDBOOK FOR CLINICIANS 220 (1980).

In capital cases, the possibility that a clinical evaluation will elicit "incriminating" material from the defendant is greater still, given the Supreme Court's decision in *Estelle*. Quoting from *In re Gault*,[51] the *Estelle* Court noted that "the availability of the [Fifth Amendment] 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."[52] Because Smith's statements to Dr. Grigson exposed him to the ultimate penalty of death, the Court found "no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned."[53]

Estelle has expanded the *Hoffman* rule to include not only evidence that tends to prove the defendant's guilt at trial, but also disclosures that might assist the state in obtaining a sentence of death at a post-conviction proceeding. Under the typical capital sentencing statute, a state might wish to address any number of "aggravating" or "mitigating" factors,[54] but the two issues on which the court is most likely to seek clinical expertise are the defendant's mental state at the time of the offense[55] and, as in *Es-*

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[51] 387 U.S. 1 (1967).

[52] 451 U.S. at 462 (quoting *In re* Gault, 387 U.S. 1, 49 (1967)).

[53] 451 U.S. at 462-63 (footnote omitted).

[54] State statutes governing the capital sentencing process generally provide for a separate sentencing hearing after conviction of a capital offense, at which the judge or jury must consider specified aggravating and mitigating factors before imposing sentence. *See, e.g.*, ILL. ANN. STAT. ch. 38, § 9-1 (Smith-Hurd 1979); TEX. CODE CRIM. PROC. ANN. art. 37.071(a) (Vernon 1981); WYO. STAT. § 6-4-102 (1977). Aggravating circumstances range from proof that the capital offense was "wantonly vile, horrible or inhuman," VA. CODE § 19.2-264(c) (Supp. 1981), to proof that the defendant "deliberately" caused the death of the victim. TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(1) (Vernon 1981). Typical mitigating circumstances include consideration of the defendant's age, the degree to which the victim provoked the offense, and the lack of a prior criminal history. *See, e.g.*, VA. CODE § 19.2-264.4(B) (Supp. 1981). However, the two issues that most often lead to clinical participation in capital sentencing are the defendant's mental state at the time of the offense and his dangerousness. A third issue that mental health professionals may be called upon to address—the defendant's treatability—is closely related to the dangerousness issue because it also involves a prediction of future behavior, and thus is not treated separately here.

[55] Over two-thirds of the states that have the death penalty follow the Model Penal Code's formulation in requiring the capital sentencing authority to consider as possible "mitigating" factors (1) whether the capital offense "was committed while the defendant was under the influence of extreme mental or emotional disturbance," and (2) whether, at

telle, the defendant's "future dangerousness."[56] As noted above, any competency or reconstructive evaluation, conducted in a capital case will often provide information tending to rebut a claim of mental dysfunction at the time of the offense. Both could also lead to the defendant's revelation of information tending to show his dangerousness.[57] Any presentence[58] evaluation designed to address directly these two issues obviously could produce such disclosures.

Thus, in light of *Hoffman* and *Estelle,* the potential for self-incrimination during a clinical pretrial evaluation should be evident. It is virtually certain that the defendant undergoing such an evaluation will be asked to reveal information that could be used against him at trial or in a capital sentencing proceeding.

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the time of the offense, "the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirement of the law was impaired as a result of mental disease or defect or intoxication." MODEL PENAL CODE § 210.6(b)(g) (Proposed Official Draft 1962). *See* P. LOW, J. JEFFRIES & R. BONNIE, NOTES ON DIMINISHED RESPONSIBILITY AND CAPITAL PUNISHMENT IN CRIMINAL LAW: CASES AND MATERIALS ch. VI (in press). As part of its case against the defendant in a capital sentencing proceeding, the state may wish to obtain clinical evidence tending to show that the defendant does not meet either of these tests, especially if the defendant plans to introduce his own clinical testimony suggesting that he does.

[56] A typical provision is found in TEX. CRIM. PROC. CODE ANN. art. 37.071(b)(2) (Vernon 1981), which requires the jury to decide "whether there is probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Eight states, including Texas, require the fact finder to assess, as a possible "aggravating" factor, the defendant's potential for committing violent acts in the future. Dix, *Expert Prediction Testimony in Capital Sentencing: Evidentiary and Constitutional Considerations,* 19 AM. CRIM. L. REV. 1, 4 n.21 (1981). As occurred in *Estelle,* the state may rely on clinical evidence to suggest the defendant will recidivate if not sentenced to death.

[57] According to Professor Monahan, an adequate clinical evaluation of an individual's potential for violent behavior requires the clinician to answer satisfactorily a number of questions, including: (1) What events precipitated the question of the person's potential for violence being raised, and in what context did these events take place?; (2) What is the person's history of violent behavior?; (3) What are the sources of stress in the person's current environment?; and (4) What cognitive and affective factors indicate that the person may be predisposed to cope with stress in a violent manner? J. MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR ch. 6 (1981). Information obtained during a typical competency evaluation could help to answer questions one, three, and four, and information obtained during a reconstructive evaluation could help answer all of these questions.

[58] Since virtually every death penalty statute requires that the jury which deliberates at the guilt stage must deliberate at sentencing as well, *see, e.g.,* TEX. CRIM. PROC. CODE ANN. art. 37.071(a) (Vernon 1981); VA. CODE § 19.2-264.4(D) (Supp. 1981), the presentence evaluation is likely to be pretrial as well, unless a judge is the fact finder at the sentencing proceeding.

B. *The Testimonial Nature of Clinical Data*

To implicate the Fifth Amendment, information disclosed by the defendant must be not only incriminating but also must be "of a testimonial or communicative nature."[59] As Justice Holmes wrote in *Holt v. United States*:[60]

> [T]he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof.[61]

Based on this distinction between testimonial and "real" evidence, the Supreme Court has indicated that the state may require a defendant to submit to a blood test,[62] give a writing[63] or voice exemplar,[64] stand in a line-up,[65] or try on certain articles of clothing,[66] even it these actions assist the state in convicting him.

Certain aspects of the clinical evaluation are clearly "nontestimonial" as that term has been defined by the Supreme Court. For example, part of the clinical assessment may consist of a physical examination.[67] The clinical opinion may also rely, to some extent, on the defendant's mannerisms, facial expressions, attention span, speech patterns, and other behavioral characteristics that manifest themselves during the evaluation.[68] These physical traits are analagous to writing or voice exemplars, and compelled disclosure would probably not be considered violative of the Fifth Amend-

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[59] Schmerber v. California, 384 U.S. 757, 761 (1966).

[60] 218 U.S. 245 (1910).

[61] *Id.* at 252-53.

[62] Schmerber v. California, 384 U.S. 757, 765 (1966).

[63] Gilbert v. California, 388 U.S. 263, 266-67 (1967).

[64] United States v. Wade, 388 U.S. 218, 222-23 (1967).

[65] *Id.*

[66] Holt v. United States, 218 U.S. 245, 252-53 (1910).

[67] *See* H. DAVIDSON, FORENSIC PSYCHIATRY 41-43 (1965).

[68] *Id.* at 46. *See also* Malmquist, *The Complete Psychiatric Evidence in Civil and Criminal Litigation*, in EFFECTIVE USE OF PSYCHIATRIC EVIDENCE IN CIVIL AND CRIMINAL LITIGATION 120 (1975).

ment even if they proved incriminating.[69]

The bulk of the typical clinical assessment, however, consists of verbal communication between the evaluator and the defendant.[70] Accordingly, it is likely that any evidence pertaining to actus reus, mens rea, sanity, or capital sentencing issues that is revealed by the defendant during a clinical assessment will be communicative, rather than "real" or "physical," in nature. Despite this fact, some courts have held that the defendant's disclosures during an evaluation are nontestimonial because they are not relied upon for their explicit content. Rather, the clinician uses such disclosures merely to identify certain mental characteristics of the accused.[71]

As several courts[72] and commentators[73] have pointed out, this

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[69] *See* Estelle v. Smith, 602 F.2d 694, 704 (5th Cir. 1979). *But see* Schmerber v. California, 384 U.S. 757 (1966), in which the Court noted that a polygraph test serves a dual purpose. While its main purpose is to obtain "real evidence" about a person's physical reactions, it

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

Id. at 764. The mannerisms described in the text will often be the result of conscious or unconscious responses to questions asked by the clinical interviewer.

[70] The clinical interview, which is the principle fact gathering method used by forensic clinicians, *see generally* R. SADOFF, FORENSIC PSYCHIATRY: A PRACTICAL GUIDE FOR LAWYERS AND PSYCHIATRISTS ch. 3 (1975), consists of "primarily *vocal* communication." H. SULLIVAN, THE PSYCHIATRIC EXAMINATION 4 (1954). Many forensic clinicians also rely on the results of physiological tests, some of which are dependent on verbal or written communication while others are dependent on physiological responses. *See generally* A. ANASTASI, PSYCHOLOGICAL TESTING (4th ed. 1976). To the extent that such a test falls in the first group, it should be treated in the same manner as the clinical interview for purposes of the Fifth Amendment. *See* text acompanying notes 72-74 *infra*. To the extent that it falls in the latter category, it may be exempted from Fifth Amendment analysis. *But see* note 69 *supra*.

[71] *See, e.g.*, United States v. Weiser, 428 F.2d 932, 936 (2d Cir. 1969), *cert. denied*, 402 U.S. 949 (1971); State v. Whitlow, 45 N.J. 3, 9, 210 A.2d 763, 771 (1965); Livingston v. State, 542 S.W.2d 655, 661-62 (Tex. Crim. App. 1976), *cert. denied*, 431 U.S. 933 (1977).

[72] *See, e.g.*, Thornton v. Corcoran, 407 F.2d 695, 700 (D.C. Cir. 1969) ("This argument [that the psychiatrist seeks only real evidence] can hardly do service in the context of a psychiatric examination . . . where the words of the accused are critically important in determining his mental condition."); United States v. Albright, 388 F.2d 719 (4th Cir. 1968); Lee v. County Ct., 27 N.Y.2d 432, 439, 267 N.E.2d 452, 456, 318 N.Y.S.2d 705, 710, *cert. denied*, 404 U.S. 823 (1971); Commonwealth v. Pomponi, 447 Pa. 154, 159, 284 A.2d 708, 710 (1971).

[73] *See, e.g.*, Meister, *Miranda on the Couch: An Approach to Problems of Self-Incrimi-*

view of the clinical process is naive. Even when his goal is solely to reach conclusions about the defendant's mental state, the clinician depends upon the meaning of the defendant's statements, not upon their form.[74] In *Estelle* the Supreme Court rejected the state's argument that Smith's communications to Dr. Grigson were nontestimonial in nature, citing as support a statement in the American Psychiatric Association's amicus brief that "absent a defendant's willingness to cooperate as to the verbal *content* of his communications, . . . a psychiatric examination in these circumstances would be meaningless."[75] To use the Court's wording in *Estelle,* almost every clinical evaluation relies heavily on the "substance"[76] of the defendant's statements. To exempt the defendant's verbal disclosures during a pretrial clinical evaluation from Fifth Amendment scrutiny on the ground that they are nontestimonial would be to deny the reality of the clinical endeavor.

C. *The State's Right to Compel an Evaluation and to Use Its Results*

Having established that a wide range of disclosures made by a defendant may be both potentially incriminating and testimonial in nature, the question remaining is whether the Fifth Amendment bars the state from subjecting the defendant to such evaluations. The answer to this question depends upon the type of evaluation and the state's use of the results.

1. *The Competency Evaluation*

Assume that the prosecution makes a motion to have the defendant's competency to stand trial clinically evaluated. May the defendant refuse to submit to such an evaluation on Fifth Amend-

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nation, Right to Counsel, and Miranda Warnings in Pre-Trial Psychiatric Examinations of Criminal Defendants, 11 COLUM. J.L. & SOC. PROBS. 403, 430 (1975); Note, *Requiring a Criminal Defendant to Submit to a Government Psychiatric Examination: An Invasion of the Privilege Against Self-Incrimination,* 83 HARV. L. REV. 648, 655 (1970).

[74] "Unlike most physical examinations, a mental examination leans heavily on what the patient said and what others said about him." H. DAVIDSON, *supra* note 67, at 43.

[75] 451 U.S. at 464 n.8 (quoting Brief for the American Psychiatric Association as *Amicus Curiae* at 26) (emphasis in original).

[76] 451 U.S. at 464-65.

ment grounds?

If the state's sole purpose for requesting the evaluation is to obtain information relevant to the competency determination, the answer is clear. Of the three evaluation contexts discussed in this article, the competency determination represents the furthest extreme from the pure accusatorial model. Both the standard for assessing fitness to stand trial and the procedures that have been found necessary for making that assessment reflect the law's assumption that the state is entitled to demand cooperation from the defendant in gathering information about this issue.

According to the Supreme Court's decision in *Dusky v. United States*,[77] a criminal defendant is not competent to stand trial unless, at the time of trial, " 'he has sufficient present ability to consult with his attorney with a reasonable degree of rational understanding . . . and . . . a rational as well as factual understanding of the proceedings against him.' "[78] One obvious motivation behind this test is to assure that the defendant's attorney can adequately represent his client. The test's emphasis on present rationality and orientation, however, also suggests a societal interest, independent of the defendant's, in maximizing the dignity of the criminal process. As one commentator has noted, the trial "loses its character as a reasoned interaction between an individual and his community and becomes an invective against an insensible object" when the defendant is not a conscious participant in the trial and has no understanding of why he is being prosecuted.[79] Such a proceeding would be repugnant to the moral values of our society and should not be sanctioned even if the defendant could indicate a desire to be tried.[80]

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[77] 362 U.S. 402 (1960).

[78] *Id.* (quoting the Solicitor General).

[79] Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 458 (1967). In addition, this author notes that "the societal goal of institutionalized retribution may be frustrated when the force of the state is brought to bear against one who cannot comprehend its significance." *Id.* at 458-59.

[80] Some commentators have suggested that once a sincere attempt has been made to restore the defendant to competency, both the interests of the state in confining dangerous individuals and the interests of the individual in having his guilt or innocence determined justify trying the unrestorably incompetent defendant, assuming that special procedures designed to compensate for the defendant's disability are observed. *See* Burt & Morris, *A*

The Supreme Court implicitly endorsed this view in *Pate v. Robinson,*[81] in which it held that due process demands an "adequate" procedure for determining competency whenever there is substantial evidence of the defendant's mental instability.[82] This obligation exists regardless of whether the defendant wants his competency determined. The defense attorney, the trial judge,[83] and even the prosecutor in his capacity as an officer of the court, must raise the issue when they have reason to believe that the defendant is not competent.[84]

To the extent that an "adequate" procedure for determining competency requires a clinical assessment of the defendant, the defendant can be compelled to submit to it. When the state's purpose is to arrive at an accurate assessment of the defendant's competency, its need for clinical input should supercede the defendant's right to remain silent. But suppose the prosecutor discovers that some of the disclosures made by the defendant during the competency evaluation are relevant to the actus reus or mens rea and wants to introduce them at trial. Should he be able to do so?

Estelle could be read to imply that if a defendant subjected to a competency evaluation is given "*Miranda* warnings"—to the effect that he has a right to remain silent and that if he does talk his

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Proposal for the Abolition of the Incompetency Plea, 40 U. CHI. L. REV. 66 (1972); Mental Health Law Project, *Legal Issues in State Mental Health Care: Proposals for Change —Incompetence to Stand Trial on Criminal Charges,* 2 MENTAL DISABILITY L. REP. 617, 646 (1978). No state has adopted such a proposal, however, and none are likely to do so given the Supreme Court's decisions. See notes 81-83 *infra* and accompanying text for a discussion of these decisions.

[81] 383 U.S. 375 (1966).

[82] *Id.* at 386.

[83] In Drope v. Missouri, 420 U.S. 162 (1975), the Court reiterated its holding in *Pate* and noted that the trial judge should consider "evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial" when deciding whether to initiate a competency inquiry. *Id.* at 180. "[E]ven when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." *Id.* at 181.

[84] Virtually every state permits any party to a criminal prosecution to raise the competency issue. *See, e.g.,* ARK. STAT. ANN. § 43-1301 (1977); IDAHO CODE § 18-211 (Supp. 1981); NEB. REV. STAT. § 29-1823 (1979); N.H. REV. STAT. ANN. § 135:17 (1977); VA. CODE § 19.2-169 (1975).

statements might be used against him at trial or sentencing—then he waives his Fifth Amendment protection as to any statements subsequently made by him.[85] But the *Miranda* analogy is of limited applicability in this context, even if it is assumed that a defendant of questionable mental stability can understand the implications of such warnings.[86] Unlike the defendant who is interrogated by the police, the defendant subjected to a competency assessment does not have an absolute right to remain silent. Indeed, for reasons discussed above, the state may require the defendant to reveal potentially self-incriminating material that is relevant to the competency determination. To permit the defendant to refrain from making certain disclosures on the ground that they might incriminate him would frustrate the central purpose of the state-compelled competency evaluation.

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[85] For example, this conclusion would be drawn from the following passage in *Estelle*:

> '[v]olunteered statements . . . are not barred by the Fifth Amendment' but under Miranda v. Arizona, . . . we must conclude that, when faced while in custody with a court-ordered psychiatric inquiry, respondent's statements to Dr. Grigson were not 'given freely and voluntarily without any compelling influences' and, as such, could be used as the State did at the penalty phase only if respondent had been apprised of his rights and had knowingly decided to waive them.

451 U.S. at 469 (quoting Miranda v. Arizona, 384 U.S. 436, 478 (1966)). *See* People v. Angelillo, 105 Misc. 2d 338, 432 N.Y.S.2d 127 (Suffolk County Ct. 1980), for an example of a court adopting this approach.

[86] Such an assumption ignores the reality of the situation. Given the mental instability of individuals subjected to competency evaluations, there is little doubt that the implementation of the warnings approach would give rise to numerous objections to the admission of statements made by the defendant during a pretrial evaluation, based either on his incompetence to make a voluntary admission, *cf.* Blackburn v. Alabama, 361 U.S. 199 (1960) (use of a confession obtained shortly before a determination of incompetency violates defendant's constitutional rights), or on allegations of overreaching by excessively inquisitive clinicians, *see* Leyra v. Denno, 347 U.S. 556 (1954) (use of a confession extracted by a psychiatrist after suggestive questioning, threats, and promises violates defendant's constitutional rights). *Cf.* Spano v. New York, 360 U.S. 325 (1959) (confession was not voluntary when defendant's will was overborne by official pressure).

As Justice Rehnquist noted in his concurrence in *Estelle*, a defendant subjected to a post-indictment competency evaluation will have the benefit of advice from his attorney as a result of *Estelle*, whereas such may not be the case in the typical custodial police interrogation, at least when the warnings are initially given. 451 U.S. at 475-76 (Rehnquist, J. concurring in the judgment). But even with such advice, a defendant who decides to go ahead with a competency evaluation may find it difficult, because of his mental disability, to understand or remember his attorney's suggestions about what to say and what not to say to the evaluating clinician.

Suppose, instead, that it is the defendant who requests the competency evaluation. Does he thereby "waive" his Fifth Amendment protection? Again the *Miranda* analogy does not withstand close scrutiny. A defense motion for a competency evaluation cannot be considered a "voluntary" relinquishment of a Fifth Amendment right when it is the only mechanism for obtaining an opinion about the defendant's competency. The defendant cannot, consistent with Fifth Amendment principles,[87] be forced to choose between

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[87] There are several situations in which our criminal justice system permits the state to force the defendant to choose between two unattractive options, even if one of the options is the waiver of the defendant's Fifth Amendment right to remain silent. A defendant's decision to plead guilty to a given charge, for example, is often attributable directly to the state's threat of conviction on a greater charge, yet the Supreme Court has explicitly recognized both the validity of the guilty plea, Brady v. United States, 397 U.S. 742, 752-53 (1970), and the mechanism of plea bargaining that leads to it, Santobello v. New York, 404 U.S. 257, 260 (1971). Similarly, evidence given in exchange for a grant of immunity has been called "the essence of coerced testimony" by the Court, New Jersey v. Portash, 440 U.S. 450, 459 (1979), yet the constitutionality of statutes authorizing such testimony is well established. *See, e.g.*, Kastigar v. United States, 406 U.S. 441 (1972); Counselman v. Hitchcock, 142 U.S. 547 (1892). In each of these instances, however, the state is extending a benefit to the defendant in exchange for his waiver of the Fifth Amendment right—conviction on a lesser charge in the first example, and use immunity from prosecution in the second.

The situation confronting the defendant who must choose between foregoing a pretrial clinical evaluation and taking the risk of providing the state with incriminating disclosures is more akin to that involved in Garrity v. New Jersey, 385 U.S. 493 (1967), Lefkowitz v. Turley, 414 U.S. 70 (1973), and Griffin v. California, 380 U.S. 609 (1965). In *Garrity* the Court held that statements made by police officers who were summoned to appear for questioning during an investigation of police corruption and who were told that they would be discharged if they asserted their Fifth Amendment privilege were not voluntary, and thus were obtained in violation of the Constitution. *Lefkowitz* affirmed a lower court decision that had invalidated a New York statute requiring public contractors either to waive immunity or to suffer forfeiture of existing and future state contracts for the next five years. *Griffin* held that the prosecutor may not comment on the defendant's refusal to take the stand. These cases stand for the proposition that the state may not impose a burden on the exercise of the Fifth Amendment right. While the state may offer inducements to the defendant designed to encourage him to talk, it may not penalize him for not talking. In the situation discussed in the text, the defendant who chooses to remain silent *is* so penalized, because he is denied an adequate assessment of his fitness to stand trial.

To the extent that the right to a competency evaluation is considered to be constitutionally-based, construing a defense motion to be a waiver also violates the principle of Simmons v. United States, 390 U.S. 377 (1968). *Simmons* held that evidence submitted during a suppression hearing could not be used at trial on the issue of guilt, and found it "intolerable that one constitutional right should have to be surrendered in order to support another." *Id.* at 394. *See* Collins v. Auger, 428 F. Supp. 1079, 1083 (S.D. Iowa 1977).

Of course, this problem does not arise when the defendant can afford his own clinician. The results of such an evaluation would be protected by the attorney-client privilege. *See*

obtaining an adequate evaluation and revealing information that could be used against him at trial or sentencing.

The *Miranda* warnings "approach," therefore, ultimately serves neither the interests of the state nor those of the defendant. If the competency evaluation is treated like a custodial police interrogation, the state and the defendant could be denied access to information to which they are both entitled.[88] A better method of insuring sufficient protection of the defendant's Fifth Amendment interests is to prohibit the state from using at trial or sentencing any disclosures, or opinions based on disclosures, made by the defendant during a competency evaluation. The legitimate objectives of both sides can be met if the state is limited to using the results of the competency evaluation—whether requested by the state or defense—for the purpose of addressing the competency issue. Such an approach also maximizes the information-gathering potential of the competency evaluation by assuring the defendant that his disclosures will not be used against him either to adjudicate his guilt or to determine his punishment.[89]

This approach does not conflict with *Estelle* despite that opinion's reference to *Miranda*. As the Court declared in discussing the specific situation involved in *Estelle*:

> The state trial judge, *sua sponte*, ordered a psychiatric evaluation of respondent for the limited, neutral purpose of determining his competency to stand trial . . . . [I]f the applica-

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text accompanying notes 237-53 *infra*.

[88] Presumably, if the defendant did resist answering the evaluator's questions, he could be held in contempt, but such a result would serve no useful purpose. As one district court has noted:

> The full and free disclosure of information and the patient's thinking processes, so essential to a meaningful psychiatric examination, would be frustrated if the patient were advised of his right to counsel and his right to remain silent and informed that his statements could be used against him in a criminal trial to prove his guilt.

Collins v. Auger, 428 F. Supp. 1079, 1082 (S.D. Iowa 1977).

[89] From the clinician's perspective, the more information that can be obtained from the defendant, the less chance that there will be an inaccurate opinion. *See* Bonnie & Slobogin, *supra* note 2, at 496-508. If the clinician is able to tell the defendant that what he says during the competency evaluation will be used solely to address that issue, clinical rapport should be much easier to establish and the evaluation product should be enhanced.

> tion of Dr. Grigson's findings had been confined to serving that function, no Fifth Amendment issue would have arisen.[90]

This passage and other passages in the opinion[91] suggest that the Fifth Amendment should prohibit the state from using the results of a clinical evaluation for anything other than its avowed purpose.

Whether they intend to recognize this principle or not, many states do prohibit use of competency evaluation results on the issue of "guilt,"[92] thereby presumably preventing their introduction against the defendant in any subsequent criminal trial[93] on actus reus, mens rea, or sanity issues. After *Estelle*, use of such results to support the state's case at a capital sentencing proceeding should also be proscribed.

Even this protection is not enough, however. There are other, more subtle collateral uses of disclosures made by the defendant during a competency evaluation that may be just as damaging to the defendant's Fifth Amendment interests. In particular, little attention has been given to the possibility that these disclosures may provide the state with investigative leads[94] or impeachment evidence.[95] For the same reason that the state should not be permitted to introduce at trial a "confession" made during a competency evaluation, it should not be able to use the defendant's disclosures

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[90] 451 U.S. at 465.

[91] The Court in *Estelle* stated, for example, that

> if, upon being adequately warned, respondent had indicated that he would not answer Dr. Grigson's questions, the validly ordered competency examination nevertheless could have proceeded upon the condition that the results would be applied solely for that purpose. In such circumstances, the proper conduct and use of competency and sanity examinations are not frustrated . . . .

Id. at 468.

[92] *See, e.g.*, TEX. CRIM. PROC. CODE ANN. art. 46.02(3)(g) (Vernon 1981), which provides that "[n]o statement made by a defendant during the examination or hearing on his competency to stand trial may be admitted in evidence against the defendant on the issue of guilt in any criminal proceeding." *See also* 18 U.S.C. § 4244 (1976); ARIZ. R. CRIM. PROC. 11.7(b)(2) (1973).

[93] State use of any disclosures that provide evidence implicating the defendant in criminal activity other than the alleged crime apparently is also barred.

[94] For example, the defendant might reveal the whereabouts of a murder weapon during the evaluation.

[95] *See* Berry, *Self-incrimination and the Compulsory Mental Examination: A Proposal*, 15 ARIZ. L. REV. 919, 929 (1973).

in these more indirect ways. If the defendant believes that any part of the state's case against him at trial is based on his statements made during a competency evaluation, he should be able to require the state to show that it obtained its information from independent sources.[96] Similarly, the prosecution should be barred from impeaching a defendant who has taken the stand with disclosures he made during such an evaluation.[97] In short, the state should not be able to use the defendant's disclosures during a clinical assessment of his competency for any purpose other than addressing his fitness to stand trial.[98]

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[96] The analogy would be with the procedure utilized when a defendant believes the prosecution has relied upon his immunized testimony as a means of obtaining other evidence that is subsequently used to prosecute him. In such cases, the burden is on the prosecution to show that the challenged evidence was obtained from a source independent of the immunized testimony. Kastigar v. United States, 406 U.S. 441, 460 (1971). *See also* C. WHITEBREAD, *supra* note 13, at 262.

[97] *See* United States v. Leonard, 609 F.2d 1163 (5th Cir. 1980).

Using disclosures made by the defendant during a pretrial clinical evaluation for impeachment purposes cannot be justified on the basis of the Supreme Court's ruling in Harris v. New York, 401 U.S. 222 (1971), that the state may use confessions obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966), to impeach the defendant. The *Harris* Court stipulated that before such a confession could be used in this manner, it must be ascertained whether the confession was voluntarily made. 401 U.S. at 224, 225 n.2. Disclosures made during a state compelled clinical evaluation cannot be called "voluntary" as that word is traditionally used in Fifth Amendment jurisprudence. *See* note 87 *supra*.

[98] FLA. R. CRIM. PROC. 3.211(e) (Supp. 1982) provides an example of the type of protection required:

> The information contained in any motion by the defendant for determination of competency or in any report of experts filed under this section insofar as such report related to the issue of competency to stand trial . . . and any information elicited during a hearing on competency . . . shall be used only in determining the mental competency to stand trial of the defendant . . . .

Id.

It could be argued that disclosures made by the defendant during a competency evaluation should at least be admissible on insanity or mens rea issues, if the defendant himself introduces clinical testimony on those issues. To hold otherwise would prevent the state's clinician from relying on clinical information relevant to an issue raised by the defendant merely because the evaluation in which he obtained it focused on a different issue. It would also create a practical problem because it would then be necessary to inquire into which disclosures came from which evaluation in order to decide whether they were admissible.

Permitting competency results to be used even for this limited purpose, however, could have undesirable consequences. While competency evaluations can be compelled at any time before the end of trial, (assuming there are sufficient indicia of mental abnormality, see note 83, *supra*), the state can obtain a reconstructive or capital sentencing evaluation only under certain circumstances. *See* text accompanying note 98 and notes 99-100 *infra*. Unless the

2. *Reconstructive Evaluations*

Under the foregoing analysis of the Fifth Amendment's application in the competency context, the interests of the state and the individual remain relatively fixed. Arriving at a fair state-individual balance in the reconstructive arena, however, is complicated by the fact that there are three different contexts in which the state may wish to obtain information about the defendant's mental state at the time of the offense.

The first context is when the defendant has not raised a clinically based plea and has no intention of doing so. In this situation, the state clearly has no legitimate reason for requesting a clinical assessment. As *Estelle* suggests, when the defendant has "neither initiate[d] a psychiatric evaluation nor attempt[ed] to introduce any psychiatric evidence," the accusatorial model should apply with full force.[99] Although a few jurisdictions allow the court to raise the insanity defense over the defendant's objection in limited circumstances,[100] none permit the prosecution to do so. Unlike the

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limitation in the text is imposed, state clinicians may be tempted to use a competency evaluation to obtain as much information as possible about these latter issues. That this distortion of the evaluation process actually occurs is illustrated by Dr. Grigson's use of his "competency" evaluation of Smith as a basis for opinions about Smith's sanity and dangerousness, see note 4 *supra* and accompanying text. Clinicians, acting as did Grigson, would not only be violating the terms of the court order; they would also be gathering potentially incriminating information that may come to the attention of the prosecutor in cases in which he has no legitimate use for it.

Moreover, it is unlikely that the rule in the text would deny the state important information. The state can always obtain its own reconstructive examination once the defendant gives notice that he plans to raise a clinically based defense. *See* text accompanying notes 121-32 *infra*. Nor should separating out sources of information be a problem if the defendant's attorney is permitted to be present during state-compelled evaluations, as argued in Part III. *See* text accompanying notes 180-220 *infra*.

[99] 451 U.S. at 468.

[100] While some decisions appear to allow the trial judge to force the defendant to assert an insanity defense whenever there is strong evidence supporting the defense, *see* State v. Fernald, 248 A.2d 754, 761 (Me. 1968) (trial court did not abuse discretion by refusing to permit defendant to withdraw plea of not guilty by reason of insanity); State v. Smith, 88 Wash. 2d 639, 642-43, 564 P.2d 1154, 1156 (1977) (judge had inherent power to impose insanity defense *sua sponte;* to permit conviction of legally insane defendant would have been unconstitutional). A recent and influential case, Frendak v. United States, 408 A.2d 364 (D.C. 1979), permits *sua sponte* motions over the defendant's objection only when the defendant is incapable of intelligently and voluntarily deciding to forego the defense. Under the *Frendak* test, such motions will be rare because the defendant must be competent to

decision to seek a competency determination, the selection of substantive defenses has always been the domain of the defendant, one upon which the state may not infringe.[101]

A similar analysis should govern in the second context, in which the defendant has sought clinical advice but still has not given notice that he plans to raise a clinically based defense. While the defendant here has "initiated" an evaluation, he has not yet decided to use its results at trial. Thus, the state generally can claim no legitimate need for subjecting the defendant to an evaluation by its own clinicians.[102]

There has been little dispute over the proper application of the

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stand trial before the insanity issue can even be raised and is therefore likely to be able to decide intelligently and voluntarily not to raise an insanity plea.

[101] *See, e.g.*, Faretta v. California, 422 U.S. 806, 834 (1975) (although a pro se defendant might ultimately conduct his defense to his detriment, "his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' "); North Carolina v. Alford, 400 U.S. 25 (1970) (permitting a defendant to plead guilty even though he continues to claim his innocence). Both of these decisions stress the importance of allowing the competent defendant to make decisions central to his defense. In Estelle v. Williams, 425 U.S. 501 (1976), the Court expressed a similar concern when it stated:

> Under our adversary system, once a defendant has the assistance of counsel, the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of trial judges and counsel in our legal system.

Id. at 512.

[102] The state could argue that restricting access to the defendant until it is given formal notice of the defendant's intent to pursue a clinically based defense would seriously hamper its case because such notice may not be required by state law until shortly before trial, *see, e.g.*, VA. CODE § 19.2-168 (1975) (notice of intent to present psychiatric evidence on the issue of insanity required ten days before trial), which may not take place until well after the offense. Assuming the state is permitted to use its own clinician, *see* text accompanying notes 123-31 *infra*, it may be put at a serious disadvantage when its clinician is forced to evaluate the defendant several months after the offense and the defendant's own evaluation.

One remedy for this problem would be to permit the state to conduct its own evaluation whenever the defendant seeks one, with the provision that the state would not be permitted access to the results of its evaluation until the defendant gives formal notice. A procedure which is more consistent with the defendant's right to control his own defense, is to tie the notice requirement to the date of the defendant's evaluation rather than to the date of trial. Under the latter approach, if the defendant does decide to raise a clinically based defense, his evidence will be only slightly "fresher" than the state's. If he decides to forego a defense, the state will not be prejudiced in any way, and a possible threat to the defendant's Fifth Amendment interests (premature disclosure of the evaluation's results to the prosecution) will have been avoided.

Fifth Amendment in these first two contexts. The principle controversy has centered around the appropriate role of the privilege once the defendant gives notice that he plans to raise a clinically based defense. In this third context, most courts have held that the state may require the defendant to submit to an evaluation of his mental state at the time of the offense.[103] Many commentators, on the other hand, see the state-compelled evaluation as a direct violation of the right to remain silent.[104]

The courts that have granted post-notice reconstructive evaluations over the defendant's Fifth Amendment objection rely on one of two grounds. The first is bottomed on fairness considerations. Without its own expert, these courts hold, the state cannot hope to combat the defendant's case supporting insanity. As one court suggested: "It would violate judicial common sense to permit a defendant to invoke the defense of insanity and foreclose the Government from the benefit of a mental examination to meet this issue."[105] The Supreme Court in *Estelle* appeared to endorse this view when it stated, in dicta, that the silence of a defendant who has asserted an insanity defense and introduced supporting clinical testimony "may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case."[106]

The second ground for upholding the state's right to compel a post-notice reconstructive evaluation is based on the waiver concept. Although there are several variations of the waiver doc-

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[103] *See, e.g.*, United States v. Greene, 497 F.2d 1068 (7th Cir. 1974), *cert. denied*, 420 U.S. 909 (1975); United States v. McCracken, 488 F.2d 406 (5th Cir. 1974); Winn v. United States, 270 F.2d 326 (D.C. Cir. 1959), *cert denied*, 365 U.S. 848 (1961); People v. Spencer, 60 Cal. 2d 64, 383 P.2d 134, 31 Cal. Rptr. 782 (1963), *cert. denied*, 377 U.S. 1007 (1964); State v. Whitlow, 45 N.J. 3, 210 A.2d 763 (1965).

[104] *See, e.g.*, Danforth, *Death Knell of Pre-Trial Mental Examinations? Privilege Against Self-Incrimination*, 19 RUTGERS L. REV. 489 (1965); Lefelt, *Pretrial Mental Examinations: Compelled Cooperation and the Fifth Amendment*, 10 CRIM. L. REV. 431 (1972); Meister, *supra* note 73, at 456-59; Note, *supra* note 73, at 667-71; Note, *Pre-Trial Psychiatric Examination: A Conflict With the Privilege Against Self-Incrimination?* 20 SYRACUSE L. REV. 738 (1969).

[105] Alexander v. United States, 380 F.2d 33, 39 (8th Cir. 1967). *See also* United States v. Albright, 388 F.2d 719 (4th Cir. 1968); State v. Swinburne, 324 S.W.2d 746 (Mo. 1959).

[106] 451 U.S. at 465.

trine,[107] the central idea is that, once the defendant raises a clinically based defense, he has forfeited his right to remain silent. In *Pope v. United States*,[108] for example, the court held that

> by raising the issue of insanity, by submitting to psychiatric and psychologic examination by his own examiners, and by presenting evidence as to mental incompetence from the lips of the defendant and these examiners, the defendant raised the issue for all purposes and . . . the government was appropriately granted leave to have the defendant examined by experts of its choice and to present their opinions in evidence.[109]

According to most commentators,[110] and a minority of courts,[111] neither of these grounds gives the state authority to compel a clinical evaluation. In response to the notion that fairness to the state justifies abrogation of the right to remain silent, it has been asserted that the prosecution can meet its evidentiary burden in other ways. For example, through the use of skillful cross-examination, the state can challenge the qualifications, fact-gathering techniques, and logic of the defendant's expert.[112] Lay witnesses may be called to testify about the defendant's mental condition during the time period of the offense and about his behavior in other settings.[113] Finally, the state can present expert rebuttal of the defen-

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[107] There appear to be three such theories: (1) By introducing his own expert, the defendant intentionally relinquishes his privilege against self-incrimination with respect to the issue he raises. United States v. Baird, 414 F.2d 700 (2d Cir. 1969), *cert. denied*, 396 U.S. 1005 (1970); Pope v. United States, 372 F.2d 710 (8th Cir. 1967); (2) By introducing his own expert, the defendant constructively puts himself on the stand and is therefore subject to cross-examination through the device of the clinical examination. Battie v. Estelle, 655 F.2d 692, 702 n.22 (5th Cir. 1981); (3) The assertion of the insanity defense is a privilege granted by state law, and is therefore subject to conditions that state law places on its assertion, including the condition that such assertion waives the Fifth Amendment right. Meister, *supra* note 73, at 434-35.

[108] 372 F.2d 710 (8th Cir. 1967).

[109] *Id.* at 721.

[110] *See* note 103 *supra*.

[111] People v. Coombes, 56 Cal. 2d 135, 149, 363 P.2d 4, 12, 14 Cal. Rptr. 4, 12 (1961); Johnson v. People, 172 Colo. 72, 470 P.2d 37 (1970).

[112] *See* Meister, *supra* note 73, at 425.

[113] Lay witnesses are generally allowed to testify as to their opinions about the defendant's sanity, provided they state the facts on which they formulated their opinions. *E.g.*, United States v. Milne, 487 F.2d 232 (5th Cir. 1973); United States v. Pickett, 470 F.2d 1255 (D.C. Cir. 1972). *But see* Gregory v. State, 40 Md. App. 297, 391 A.2d 437 (1978) (no lay

dant's case by using hypothetical questions.[114]

The waiver justification is viewed, "at best, [as] a legal fiction used to achieve a desired result."[115] The defendant, it is argued, cannot be said to have relinquished his right to remain silent simply by asserting a defense to which he is entitled by state or constitutional law. As one court has stated, "It is difficult to understand how a waiver could be characterized as either voluntary or intentional if automatically triggered by a defendant's assertion of the defense of insanity."[116]

The minority position plainly is correct in its assertion that mere notice of a clinically based defense does not constitute a valid waiver as that term ordinarily is defined in Fifth Amendment jurisprudence.[117] But, as Justice Black indicated in *Rogers v. United States*,[118] the Fifth Amendment can be "abate[d]" not only by a "broad construction of the doctrine of 'waiver,'" but also by a "narrow construction of the scope of the privilege."[119] If the latter occurs, waiver analysis becomes irrelevant; there is no privilege to waive. A pertinent illustration of this point is the well-established rule that the defendant who takes the stand in his own behalf must submit to questioning by the prosecution as well. The Supreme Court consistently has held that the defendant who refuses to answer questions on cross-examination after testifying on direct

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person is competent to render an opinion as to sanity).

In addition, lay evidence about the defendant's everyday behavior may produce valuable evidence. "In many cases, valid assessments of mental status may be obtained more accurately by detailed knowledge of the defendant's environment and his behavior in a variety of real-life settings than by a clinical interview." Brief for the American Psychological Association as *Amicus Curie* at 20, United States v. Byers, No. 78-1415 (D.C. Cir. Dec. 24, 1980).

[114] *See, e.g.*, Askins v. United States, 231 F.2d 741 (D.C. Cir. 1956), *cert denied*, 351 U.S. 989 (1956). *See also* Note, *supra* note 73, at 670.

[115] Note, *Pre-Trial Mental Examination and Commitment: Some Procedural Problems in the District of Columbia*, 51 GEO. L.J. 143, 149 (1962).

[116] Commonwealth v. Pomponi, 447 Pa. 154, 160, 284 A.2d 708, 711 (1971). *Accord* State v. Collins, 236 N.W.2d 376, 380 (Iowa 1975), *cert. denied*, 426 U.S. 948 (1976); Meister, *supra* note 73, at 438; Note, *supra* note 73, at 667.

[117] *See* note 87 *supra* on waiver in the competency context, which applies with equal validity to the defendant's decision to seeks a reconstructive assessment.

[118] 340 U.S. 367 (1951).

[119] *Id.* at 376 (Black, J., dissenting).

may be held in contempt.[120] To hold otherwise, stated Justice Frankfurter in *Brown v. United States*,[121]

> would make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell . . . [In such situations], [t]he interests of the other party and regard for the function of courts of justice to ascertain the truth becomes relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination.[122]

As Justice Frankfurter's language suggests, the defendant who takes the stand may be compelled to talk, not because he has "waived" his Fifth Amendment privilege, but because his direct testimony standing unchallenged would tip the state-individual balance in his favor.[123]

Similarly, as *Estelle* implies,[124] fairness considerations also should limit the scope of the Fifth Amendment in the post-notice context. The minority position misjudges the nature of the clinical inquiry when it asserts that the state can meet its evidentiary burden without an expert evaluation of its own. As suggested earlier,[125] an adequate opinion concerning the defendant's mental state at the time of the offense is not possible without the defendant's account of his thoughts, feelings, and actions at the time of the offense. Lay witnesses, if there are any, can provide valuable evidence, but their perceptions about the defendant's mental condition usually will still be secondary to the defendant's perceptions. Asking hypothetical questions can provide hypothetical answers, but not a refined picture of the defendant's psychological functioning at the time of the offense.[126] For the clinician con-

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[120] Brown v. United States, 356 U.S. 148 (1958); Fitzpatrick v. United States, 178 U.S. 304 (1900). *See also* Reagan v. United States, 157 U.S. 301, 304-05 (1895).

[121] 356 U.S. 148 (1958).

[122] *Id.* at 156.

[123] This interpretation of *Brown* has been suggested by at least one commentator. Note, *supra* note 73, at 669.

[124] *See* text accompanying note 106 *supra*.

[125] See notes 50 and 89 *supra*.

[126] Clinical testimony in response to hypothetical questions has been called "of doubt-

ducting a reconstructive evaluation, the one essential ingredient in the opinion formation process is the defendant's own interpretation of events at the time of the alleged offense.

Of course, the state is not permitted to interrogate the defendant about the actus reus merely because he is usually the best informant on that subject.[127] But proving what was going on in the defendant's mind at the time of the offense without his help is a task considerably more difficult than proving objective, external events relying on sources other than the defendant. Admittedly, proof of mens rea often depends on common sense inferences drawn from the defendant's conduct,[128] which itself can be determined from other witnesses. When the defendant raises a clinically based defense, however, he is ordinarily making claims of distorted mental functioning that are much less susceptible to assessment against common sense notions of behavior.[129] The amorphous, idiosyncratic nature of these inquiries makes the prosecution's evidence-gathering chores more difficult than in the typical case.

More significantly, once the defendant introduces clinical testimony, he is no longer assuming the neutral role he would normally take after refusing to talk. Rather, he is relating, albeit through the interpretive gloss of the expert, presumably self-serving statements about his mental condition that are completely shielded from direct investigation by the state. It will not do to say that the state can obtain sufficient information by cross-examining the defen-

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ful worth and often of dubious ethical quality." Diamond & Louisell, *The Psychiatrist as an Expert Witness: Some Ruminations and Speculations*, 63 MICH. L. REV. 1335, 1347 (1965). *See also* Bonnie & Slobogin, *supra* note 2, at 496 ("Neither the factual predicates of 'hypothetical' questions, nor observation of courtroom behavior or testimony, nor review of the interview records of other clinicians can provide an adequate clinical base for formulation of an expert opinion about a person's mental condition.")

[127] In Miranda v. Arizona, 384 U.S. 436 (1966), the Court stated:

> ['T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.

Id. at 444.

[128] It is hornbook law that a person is "presumed to intend the natural and probable consequences of his acts." W. LAFAVE & A. SCOTT, CRIMINAL LAW 202 (1972). In some states, however, this presumption is rebuttable with clinical evidence. *See* note 49 *supra*.

[129] *See* the case of Mr. Z., described in Bonnie & Slobogin, *supra* note 2, at 488-92.

dant's expert. Not even a fully qualified and rigorously ethical mental health professional can hope to convey accurately all of the nuances of the defendant's cognitive and emotional responses to the various stimuli of the evaluation. As research has shown, it is extremely difficult for any observer to report the myriad personality traits of an individual without resorting to imprecise labels and conclusions about mental state.[130] It has also been well documented that the clinician, however conscientious, will often consciously or unconsciously sift out information that does not tend to support his conclusion.[131]

Even assuming that the defendant's expert can avoid these pitfalls and objectively report the details of what he has observed,[132] the state still will be precariously dependent upon the thoroughness of his examination. Cross-examination can draw out only as much detail as the witness has to offer. Most significantly, the prosecutor's ability to challenge the defendant's veracity may be

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[130] *See, e.g.*, W. MISCHEL, PERSONALITY AND ASSESSMENT (1968), in which the author states:

> The data provided by judgments of others are restricted by the categories and the organizational limits of the judge. Constraints on the number of constructs or categories available to a perceiver may help to account for the constant coding of diffuse perceptual data into simpler forms: categorizations of events into fewer and simpler units places them within the limited scope of memory . . . . Without simplification of incoming data by assignment of labels and category codings it would be impossible to deal with the virtually endless flood of perceptions that impinge from the environment.

Id. at 54. (citation omitted).

[131] One leading study concluded that clinicians may "selectively perceiv[e] and emphasiz[e] those characteristics and attributes of their patients which are relevant to their own preconceived system of thought. As a consequence, they may be overlooking other patient characteristics which would be considered crucial by colleagues who are otherwise committed." Pasamanick, Dinitz & Lefton, *Psychiatric Orientation and Its Relation to Diagnosis and Treatment in a Mental Hospital*, 116 AM. J. PSYCHIATRY 127, 131 (1959). *See also* Dickes, Simons & Weisfogel, *Difficulties in Diagnosis Introduced by Unconscious Factors Present in the Interviewer*, 44 PSYCHIATRIC Q. 55 (1970).

Festinger's concept of "cognitive dissonance," which holds that individuals selectively avoid or devalue information that is inconsistent with their decisions and increase the weight given information that supports their decision, is also relevant in this regard. L. FESTINGER, CONFLICT, DECISION, AND DISSONANCE (1964).

[132] One possible way of accurately presenting the evaluation is by videotaping the interview and showing it to the fact finder, *see* McGill & Thrasher, *Videotapes: The Reel Thing of the Future*, TRIAL, Sept./Oct 1975, at 43, although there are problems associated with utilizing such a device. *See* Bonnie & Slobogin, *supra* note 2, at 507 n.238.

severely limited by the expert's own predilections. For example, if the prosecutor suspects that the defendant's claim of amnesia at the time of the offense is fabricated, but the defendant's clinician failed to challenge the claim adequately at the time it was made, the prosecutor effectively may be prevented from ferreting out the truth. He can suggest the clinician's incompetency by noting the failure to pursue the motivations behind the amnesia claim, but he will still be hindered substantially in his efforts to gauge the defendant's credibility about what could be the most important factual issue in the case.[133]

For these reasons, the state needs its own expert evaluation. Of course, the state's clinician is as susceptible as the defendant's expert to the perceptual and interpretive difficulties caused by the subjective nature of the clinical evaluation. But the state clinician will be able to fill factual gaps that may occur in the opposing expert's testimony and provide an alternative view of the facts that are agreed upon. Without this additional source of information, the state will be forced to depend largely upon the thoroughness, reliability, and good faith of the defendant's own expert. This puts the state at an unfair disadvantage, even in view of the Fifth Amendment's guarantees. Just as denying the prosecution an opportunity to cross-examine the defendant who has chosen to testify would be "a positive invitation to mutilate the truth,"[134] denying the state its own clinical examination of the defendant once he decides to speak through an expert on the stand would constitute a significant distortion of the principles underlying the Fifth Amendment.

a. Sanctions for Noncooperation

Assuming the state does have the right to compel a reconstructive evaluation once the defendant has raised a clinically based defense, it must have some mechanism for enforcing that right. Four different methods of sanctioning the noncooperative defendant can be envisioned:[135] (1) allowing the defendant to present his own ex-

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[133] *See* note 213 *infra* for a relevant example from a slightly different context.

[134] Brown v. United States, 356 U.S. at 156.

[135] *See generally* Meister, *supra* note 73, at 439-43 for a discussion of the various sanctions that have been imposed by the courts.

pert, but permitting the prosecution to inform the fact finder about the defendant's refusal to cooperate with the state's expert;[136] (2) allowing the defendant to present only the clinical testimony based on facts revealed to the state's expert as well;[137] (3) forbidding the defendant to present clinical testimony;[138] or (4) forbidding the defendant to present any evidence, clinical or otherwise, on insanity or diminished capacity issues.

By a process of elimination, only the third option is legally and clinically defensible. The fourth sanction is unjustifiably harsh, because it prohibits the defendant from using the testimony of lay witnesses even though the prosecution can effectively rebut such testimony without a clinical expert. Moreover, at least with respect to testimony about mens rea, it may run afoul of constitutional mandates.[139]

The second sanction is appropriately reciprocal, but is likely to be impossible to implement either clinically or legally. If, for example, the defendant refused to talk to the state's clinician about the offense, this rule would prohibit the defendant's clinician from offering any conclusions based on offense-related information obtained from the defendant. Even if the expert felt that he could ethically testify without relying on this crucial data,[140] it is doubt-

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[136] *See, e.g.*, ALASKA STAT. § 12.45.083 (1980); Lee v. County Ct., 27 N.Y.2d 432, 442-43, 267 N.E.2d 452, 457-58, 318 N.Y.S.2d 705, 713, *cert. denied*, 404 U.S. 823 (1971); State v. Huson, 73 Wash. 2d 660, 440 P.2d 192 (1968), *cert. denied*, 393 U.S. 1096 (1968).

[137] *See* State v. Obstein, 52 N.J. 526, 247 A.2d 5 (1968).

[138] *See, e.g.*, WIS. STAT. ANN. § 971-16(3) (West 1971); United States v. Handy, 454 F.2d 886 (9th Cir. 1971), *cert. denied*, 409 U.S. 846 (1972).

[139] Several courts have found that a criminal defendant has a constitutional right to present clinical evidence relevant to mens rea. Hughes v. Mathews, 576 F.2d 1250, 1255 (7th Cir.), *cert. dismissed sub nom.* Israel v. Hughes, 439 U.S. 801 (1978) (prohibiting clinical testimony on mens rea is a violation of due process because it relieves the prosecution of its duty to prove each element of the offense beyond a reasonable doubt); Commonwealth v. Walzack, 468 Pa. 210, 223, 360 A.2d 914, 920-21 (1976) (due process requires admission of defendant's proffered evidence if such evidence is both relevant and competent).

Whether the defendant has a similar constitutional right to an insanity defense is not as well established. *Compare* State v. Strasburg, 60 Wash. 106, 116-19, 110 P. 1020, 1022 (1910) (defendant is entitled by due process of law to such a defense) *with* Justice Marshall's dicta in Powell v. Texas, 392 U.S. 514, 536 (1968) (expressing concern over being "impelled into defining some sort of insanity test in constitutional terms.")

[140] *Cf.* Principle 2 of ETHICAL STANDARDS OF PSYCHOLOGISTS, (1979 Revision), which requires that psychologists "only . . . offer opinions as professionals that meet recognized

ful he would be able to so limit his testimony once in the courtroom. Assuming that he could, it is still doubtful that his testimony would make much sense to the trier of fact.

The first sanction is more attractive than the previous two because it permits the noncooperative defendant to offer his expert testimony in toto. Some commentators[141] claim that this sanction violates the Supreme Court's ruling in *Griffin v. California*[142] prohibiting prosecutorial comment on the defendant's failure to take the stand. This objection is inapposite if one accepts the premise of this article[143] that the defendant should not have a right to remain silent during a post-notice evaluation by the state.[144] The prosecutorial comment alternative is, nonetheless, still ultimately unacceptable, whether viewed from the defendant's or the state's perspective. It prejudices the defendant because it allows the prosecution to "solemnize the silence of the accused into evidence against him"[145] without offering either substantive rebuttal evidence or an explanation of why the refusal may have occurred.[146] Furthermore, it is unfair to the prosecution because it permits the defendant to present expert testimony that cannot be effectively challenged. In short, the prosecutorial comment option taints the adversary process, the primary objective of which is to air opposing viewpoints.

Only by banning the defendant's expert from the courtroom does the state impose a sanction for noncooperation that is both fair and easy to implement. Because it leaves the state and the defendant in equipoise with respect to evidence concerning the de-

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standards." It is certainly arguable that offering an opinion about an individual's mental state at the time of the offense without being able to discuss the defendant's own interpretation of that event and how it affected the professional's opinion would not meet this standard.

[141] *See* Meister, *supra* note 73, at 441.

[142] 380 U.S. 609 (1965).

[143] *See* text accompanying notes 119-24 *supra.*

[144] This analysis would also hold true if it were the state's clinician who informed the fact finder about the defendant's noncooperation. *See, e.g.*, State v. Huson, 73 Wash. 2d 660, 440 P.2d 192 (1968), *cert. denied*, 393 U.S. 1096 (1969).

[145] Griffin v. California, 380 U.S. 609, 614 (1965).

[146] For example, the defendant may have refused to cooperate because of his paranoia about state clinicians, which in itself might be indicative of insanity. *See* note 148 *infra.*

fendant's mental state at the time of the offense, it is more equitable than the first and fourth options; because it merely requires prohibiting the introduction of the defendant's clinical testimony, it is more efficient than the second alternative.

One difficulty still remaining, however, is defining which circumstances, beyond the obvious one of refusing to be physically present for the evaluation, constitutes noncooperation. In accord with the principles developed in this article, this question should be resolved by considering whether the state's evidentiary burden would be unfairly compromised by the defendant's refusal to cooperate. Clearly the state's clinician has to be relied upon as the principal arbiter on this matter; his opinion should be given substantial weight in deciding whether the sanction should be imposed.[147] Given the severity of the sanction, however, and the possibility that the defendant's behavior could be misinterpreted by the clinician,[148] the burden should be on the state to show that the defendant has in fact been noncooperative. Even if the state does meet this burden, the defendant should have an opportunity, before the sanction is imposed, to show that the state's clinician can arrive at a professionally adequate conclusion by relying on sources other than the defendant.[149]

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[147] However, there still should be a hearing at which the court conducts an independent investigation into the clinician's reasoning, and the defendant is given the opportunity to explain his alleged noncooperation.

[148] *See, e.g.*, Lee v. County Ct., 27 N.Y.2d 432, 267 N.E.2d 452, 318 N.Y.S.2d 705 (1971) (Breitel, J. dissenting in part) in which the potential for misinterpretation was aptly stated:

> The fact, amply demonstrated over the years, is that a failure of a defendant who pleads insanity . . . to co-operate most often reflects an even greater degree of insanity rather than less. He is not always controllable by his lawyer, and many a psychotic defendant, who may or may not be legally insane, refuses to be represented by a lawyer. In short, nonco-operation may be evidence of insanity.

Id. at 448-49, 267 N.E.2d at 461-62, 318 N.Y.S.2d at 719.

A defendant undergoing a clinical evaluation also may be naturally guarded or reticent, or he may be indifferent or hostile due to "being thrust into such a situation, concern about divulging intimate details, distrust of 'shrinks,' fear of being labelled 'crazy,' or simply a feeling that the entire process is pointless or 'silly.'" Bonnie & Slobogin, *supra* note 2, at 504, n.224.

[149] *See* note 112-14 *supra*.

b. Restrictions on Use

For the same reasons that the state should be prohibited from using the results of a competency evaluation at trial,[150] it should be proscribed from relying on disclosures made by the defendant during a reconstructive evaluation for any purpose other than supporting of a clinicial opinion on the defendant's mental state at the time of the offense. Accordingly, as in the competency context, use of these disclosures to aid police investigation, prove the actus reus at trial, or impeach the defendant on issues other than mental state, should be prohibited.[151] Moreover, the defendant should be able to challenge, prior to trial, any part of the state clinician's testimony that he feels is irrelevant to the issue of mental state at the time of the offense.[152]

The clear trend in both federal and state jurisdictions is to adopt these principles. For instance, the Model Penal Code formulation, which has been adopted by several states,[153] reads:

> A statement made by a person subjected to a psychiatric examination or treatment . . . shall not be admissible in evidence against him in any criminal proceeding on any issue other than that of his mental condition.[154]

Most federal courts have required similar protection for the defendant. Illustrative of this trend is the Fourth Circuit Court of Appeals' holding that "incriminating statements" made by the defendant during a pretrial evaluation "cannot be used to prove the defendant's guilt."[155]

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[150] *See* text accompanying notes 89-91 *supra*.

[151] *See* text accompanying notes 92-98 *supra*.

[152] For example, the defendant may motion to have the state clinician delete from his testimony references to specific details about his actions on the day of the alleged offense on the grounds that they are not relevant to his opinion and might improperly influence the jury on the actus reus or mens rea issues.

[153] *See, e.g.*, COLO REV. STAT. § 16-8-107 (1973); ILL. ANN. STAT. ch. 38 § 115-6 (Smith-Hurd 1977); MASS. ANN. LAWS ch. 233, § 23B (Michie/Law. Co-op 1974).

[154] MODEL PENAL CODE § 4.09 (Proposed Official Draft 1962).

[155] Gibson v. Zahradnick, 581 F.2d 75, 78-79 (4th Cir. 1978). *See also* United States v. Reifsteck, 435 F.2d 1030, 1034 n.1 (8th Cir. 1976); United States v. Alvarez, 510 F.2d 1036, 1052 (3d Cir. 1975); Collins v. Auger, 428 F. Supp. 1079 (S.D. Iowa 1977); State v. Lapham, 377 A.2d 249 (Vt. 1977).

These legislative and judicial pronouncements should prevent overt abuse of the clinical interview as a prosecutorial tool to prove the defendant's guilt. However, they probably cannot protect completely against the possibility that the fact finder will rely on information obtained during the interview, and repeated by the clinician at trial, in deciding issues unrelated to mental condition. Clinical testimony about the defendant's sanity, for instance, might be considered by the jury not only in reaching a conclusion about that issue but also in deciding whether the defendant committed the actus reus and possessed the requisite mens rea at the time of the offense.

The probability that prejudice will actually result from such testimony is remote, however, even if the defendant does not admit the actus reus. By definition, the insanity defense and testimony about diminished capacity imply that the defendant committed the physical act connected with the crime.[156] Moreover, in the typical case, the state will usually be able to present a significant amount of evidence, independent of what its clinician may disclose, that links the defendant to the act. Finally, assuming that direct and cross-examination of the defendant's own witness is thorough, it is likely that his testimony about the crime will be as revealing as that of the state's expert.

Despite the likelihood that clinical testimony will do the defendant little actual harm in this regard, the court should still be required to admonish members of the jury that they are to consider the expert's testimony only on those issues relating to the defendant's mental condition at the time of the offense.[157] While limitations upon instructions of this type are not particularly effective in preventing misapplication of the evidence,[158] they should be given

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[156] *See* notes 48-49 *supra.*

[157] "[A]ny inculpatory statements made by the defendant . . . [during the forensic evaluation] are not competent as admissions on the issue of guilt, and when introduced at the trial during the course of the doctor's testimony, the jury must be told so immediately, explicitly and unqualifiedly." State v. Whitlow, 45 N.J. 3, 21, 210 A.2d 763, 772 (1965). *Accord* Gibson v. Zahradnick, 581 F.2d 75, 79 (4th Cir. 1978).

[158] *See* Bruton v. United States, 391 U.S. 123, 135-37 (1968); Jackson v. Denno, 378 U.S. 368, 388-89 & n.15 (1964); Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson J., concurring).

to emphasize that the clinician is an expert only as to the defendant's emotional processes, and not as to his legal culpability.[159]

The procedures outlined above should provide the defendant who has raised a clinically based defense with the Fifth Amendment protection he merits while also giving the state the information that it deserves.

3. *Capital Sentencing*

Whereas the debate over the state's right to compel reconstructive evaluations has been heated, there had been little dispute, at least prior to *Estelle*, over the proposition that the accusatorial model is not compatible with the objectives of the criminal justice system during the sentencing process.[160] Now that the Supreme

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[159] One procedure that avoids the problem discussed in text, but creates a number of other problems, is to hold a bifurcated trial, the first stage of which determines guilt and the second stage of which determines whether the accused was insane at the time of the offense. In this manner, clinical testimony, at least on the issue of insanity, can be postponed until after guilt is decided. *Cf.* Wisconsin v. Sarinske, 91 Wis. 2d 14, 280 N.W.2d 725 (1979). The power of trial courts to bifurcate their proceedings may emanate from statute, *see, e.g.*, CAL. PENAL CODE § 1026 (West Supp. 1982); COLO REV. STAT. 16-8-104 (1973), or from their inherent power to control the order in which evidence and issues are presented, *see, e.g.*, United States v. Bennett, 460 F.2d 871 (D.C. Cir. 1972); Houston v. State, 602 P.2d 784 (Alaska 1979).

Bifurcation has not always proven effective, however, *see* People v. Wells, 33 Cal. 2d 330, 202 P.2d 53, *cert. denied*, 338 U.S. 836 (1949), and may pose many problems in its administration. *See generally* State v. Shaw, 106 Ariz. 103, 471 P.2d 715 (1970), *cert. denied*, 400 U.S. 1009 (1971); Louisell & Hazard, *Insanity as a Defense: The Bifurcated Trial*, 49 CAL. L. REV. 805 (1961). Moreover, to the extent that bifurcation permits the state to avoid having to prove, at the guilt stage, an element of the crime on which it has the burden of proof, it is probably unconstitutional. State v. Shaw, 106 Ariz. 103, 471 P.2d 715 (1970), *cert. denied*, 400 U.S. 1009 (1971) (bifurcation on insanity issue violated due process because it deprived the defendant of the opportunity to rebut intent, premeditation, and malice).

[160] *See, e.g.*, Hollis v. Smith, 571 F.2d 685, 691 (2d Cir. 1978); Annot, 9 A.L.R. 3d 990, 999-1001 (1966). The Supreme Court has had two opportunities to hold that the Fifth Amendment applies after conviction, but in both cases declined to do so. Roberts v. United States, 445 U.S. 552, 558-59 (1980); McNeil v. Director, Patuxent Inst., 407 U.S. 245, 250 (1972). In fact, the Court has implied that, given the broad nature of the sentencing inquiry, the sentencing authority should be hampered by as few obstacles as possible in its information-gathering chores. In United States v. Tucker, 404 U.S. 443 (1972), for instance, the Court noted that as a "general proposition" the sentencing judge "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *Id.* at 446. In United States v. Grayson, 438 U.S. 41 (1978), the Court repeated this remark, *id.* at 50, and also stated that "[t]he

Court has indicated in *Estelle* that the Fifth Amendment does apply in at least one post-conviction setting, questions may be raised about the state's right to use the results of a pretrial clinical evaluation against a defendant in other types of sentencing proceedings or about its authority to compel the defendant to undergo a presentence evaluation in a noncapital case. For present purposes, however, it is enough to note that the Supreme Court carefully limited its ruling in *Estelle* to capital sentencing cases;[161] whether the Court's reasoning can or should be so restricted remains to be seen.[162] In any event, the following discussion will be limited to the

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'parlous' effort to appraise 'character' . . . denegrates into a game of chance to the extent that a sentencing judge is deprived of relevant information concerning 'every aspect of a defendant's life.' " *Id.* at 53. *See also* Williams v. New York, 337 U.S. 241, 250 (1949). Application of the Fifth Amendment to the sentencing context would obviously run counter to these sentiments. *But see* note 162 *infra.*

[161] The *Estelle* Court noted: "Of course, we do not hold that the same Fifth Amendment concerns are necessarily presented by all types of interviews and examinations that might be ordered or relied upon to inform a sentencing determination." 451 U.S. at 469 n.13.

[162] The Court has frequently stated that death "is a different kind of punishment from any other which may be imposed in this country." Gardner v. Florida, 430 U.S. 349, 357 (1977). The Fifth Amendment holding in *Estelle* thus will probably be limited to its facts and the "ultimate penalty of death."

Logically, however, *Estelle* is based on the premise that any state attempt to force the defendant to assist the state in making its case during a sentencing proceeding will implicate the Fifth Amendment. *See* text accompanying notes 51-54 *supra.* Arguably, such a situation is presented in any sentencing case in which the court has some flexibility in imposing sentence and thus can permit negative inferences about the defendant's culpability, treatability, or dangerousness to influence the length of the sentence imposed. Particularly now that recent sentencing trends have led to the institution of systems requiring the sentencing judge to find specific aggravating factors prior to imposing a sentence beyond the presumptive one, *see generally* Lagoy, Hussey & Kramer, *A Comparative Assessment of Determinative Sentencing in the Four Pioneer States,* 24 CRIME & DELINQ. 387-400 (1978), the analogy to the typical death penalty statute, see note 54 *supra* and accompanying text, is apparent.

The Court's decision in Specht v. Patterson, 386 U.S. 605 (1967), adds further support to this argument, although the decision admittedly is subject to a number of different interpretations. *Specht* involved a defendant sentenced to an indeterminate term pursuant to a "sexual psychopath" statute, which permitted the judge to impose a sentence of from one-day to life after receiving a psychiatric report concerning the defendant. In holding that this procedure did not afford the defendant sufficient due process, the Court emphasized that the statute, which applied whenever the judge found the defendant to be dangerous, or "mentally ill" and an "habitual offender," *id.* at 607, raised a "distinct issue" involving "the making of a new charge leading to criminal punishment." *Id.* at 610. While the Court did not specifically find the Fifth Amendment to be applicable in this situation, it did hold that

capital sentencing context.

The Supreme Court's opinion in *Lockett v. Ohio*,[163] which requires "an individualized decision"[164] in every capital case, has guaranteed that the death penalty determination frequently will involve clinical testimony.[165] *Estelle*, in effect, has established that the constitutional contours of this clinical participation in capital sentencing are analogous to those required in the reconstructive context. As the Court stated in *Estelle:*

> A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding . . . . In such circumstances, . . . the State must make its case on future dangerousness in some other way.[166]

Although this language refers solely to testimony about the defendant's dangerousness, there can be no logical distinction between this type of clinical evidence and any other evidence that the state plans to use against the defendant at capital sentencing; if such testimony could lead to imposition of the "ultimate penalty of death," the Fifth Amendment is implicated.[167] Accordingly, until the defendant indicates a desire to introduce clinical evidence at a capital sentencing proceeding, the state should not be able to use any disclosures he has made in the pretrial evaluation process, nor any opinions based on those disclosures, at such a proceeding. Nor should the state be able to compel an evaluation of the defendant for the purpose of obtaining data relevant to capital sentencing issues prior to receiving "notice" from the defendant that he plans

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the defendant should have received a number of other procedural safeguards, including the right to "be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own." *Id.*

To the extent that proof of aggravating circumstances pursuant to the typical presumptive sentencing statute is analagous to proof of the "distinct issue" involved in *Specht*, it is arguable that *Specht*, and, therefore, *Estelle*, apply to the sentencing process.

[163] 438 U.S. 586 (1978).

[164] *Id.* at 605.

[165] *See* Bonnie, *Foreword: Psychiatry and the Death Penalty: Emerging Problems in Virginia*, 66 VA. L. REV. 167, 174 (1980).

[166] 451 U.S. at 470.

[167] *See* text accompanying notes 51-58 *supra*.

to introduce clinical testimony.[168]

Once the defendant does give such notice, however, "a different situation arises."[169] As *Estelle* indicates, in this circumstance the defendant should be precluded from using clinical testimony if he refuses to submit to an examination by a clinician of the state's own choosing.[170] Additionally, as in the reconstructive context, the state should be able to use at sentencing any of the defendant's pretrial evaluation disclosures that focus on an issue that he has raised through the introduction of clinical evidence.[171]

There is one scenario peculiar to the capital sentencing context that *Estelle* does not properly resolve, however. As noted earlier, the two most common issues addressed by mental health professionals in capital sentencing proceedings are the defendant's mental condition during the alleged capital offense and the defendant's future dangerousness.[172] A potential problem arises when the defendant decides to rely on clinical evidence to address the first issue but offers no evidence on the second. Suppose, for instance, that the defendant indicates an intention to present clinical testimony at a capital sentencing hearing solely to show that he was under "extreme mental or emotional stress" at the time of the offense.[173] Obviously, the state should be able to obtain its own evaluation on this issue and to introduce clinical testimony tending to rebut this claim. But may the state also submit testimony which is based on the defendant's disclosures during this or any other

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[168] *But see* note 102 *supra*.

[169] 451 U.S. at 472-73.

[170] *Id.* The Supreme Court made approving reference to that part of the Fifth Circuit Court of Appeals' opinion that "left open 'the possibility that a defendant who wishes to use psychiatric evidence in his own behalf [on the issue of future dangerousness] can be precluded from using it unless he is [also] willing to be examined by a psychiatrist nominated by the state.'" *Id.* at 466 n.10. (brackets in original).

[171] Thus, if the defendant attempts to use clinical evidence at the capital sentencing hearing to establish mitigating circumstances concerning his mental state at the time of the offense, the state should be able to use results of any reconstructive evaluation it obtained prior to trial, even if this evaluation was originally requested solely to rebut an insanity defense or diminished capacity claim.

[172] *See* text accompanying notes 55-58 *supra*.

[173] This issue is one of the mitigating factors found in most death penalty statutes. *See* note 55 *supra*.

clinical evaluation that tends to show that the defendant will be dangerous in the future? *Estelle* seems to answer this question affirmatively. At one point, the Court stated that "[a]s to the jury question on future dangerousness," if the defendant introduces any clinical evidence in mitigation, the state may use "the same type of evidence in seeking to establish a defendant's propensity to commit other violent acts."[174]

Such a result is clearly in conflict with basic Fifth Amendment principles. The death penalty statutes that address the issue properly place the burden of proving the defendant's dangerousness on the state.[175] Proof of this "fact" at a capital sentencing proceeding should be considered the functional equivalent of proof establishing the actus reus and mens rea at trial. As in the reconstructive context, the state should not be able to ease its prosecutorial burden concerning a fact that it must prove by relying on clinical testimony unless the defendant first offers clinical testimony tending to dispute that fact. When, as in this example, the defendant relies on clinical evidence to establish a mitigating circumstance rather than to disprove his dangerousness, the state must make its case on dangerousness in some other way.

Just as the state may not use clinical evidence to prove sanity and mens rea at trial unless the defendant has asserted a clinically based defense, the state may not use expert opinion to prove dangerousness unless the defendant introduces clinical testimony on that issue.[176] Only by following this procedure will the policies underlying the Fifth Amendment, which *Estelle* found applicable to capital sentencing, properly be implemented.[177]

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[174] 451 U.S. at 472-73.

[175] *See, e.g.*, IDAHO CODE § 19-2515 (b), (f)(8) (1979); WASH. REV. CODE ANN. § 9A.32.040 (Supp. 1982).

[176] In this regard it should be noted that *Estelle* explicitly held that the state can prove future dangerousness without resorting to mental health professionals. The Court's recognition that psychiatric testimony is not the sole method of proving dangerousness is reflected by its statement that "under the Texas capital sentencing procedure, the inquiry necessary for the jury's resolution of the future dangerousness issue is in no sense confined to the province of psychiatric experts." 451 U.S. at 472.

[177] As a practical matter, it is not certain that the procedure outlined in the text will protect the defendant who offers clinical testimony only on his mental condition at the time of the offense from being exposed to clinical evidence tending to show his dangerousness.

D. *Summary*

The Fifth Amendment interests of the defendant whose mental condition is at issue can be reconciled with the state's fact-gathering needs. The state should be able to compel a defendant to undergo a competency evaluation whenever necessary, and a reconstructive or capital sentencing evaluation whenever the defendant indicates an intent to introduce clinical evidence on those issues. The state's use of clinical evaluation results, however, must be restricted to the purpose of the evaluation and the defendant's own decisions concerning use of clinical testimony. Part III discusses the extent to which the Sixth Amendment provides further protection for the defendant who requires assessment by mental health professionals.

III. The Sixth Amendment and Pretrial Evaluations: Assuring the Reliability of the Clinical Opinion

The Sixth Amendment guarantees that "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[178] Initially, the Supreme Court interpreted this language to mean merely that the criminal defendant has a right to legal representation at trial,[179] but in the past fifteen years the Court has expanded the Amendment's coverage in two respects. First, the Court has held that the right to counsel adheres not only during trial but also at various other stages of the criminal process when the presence of counsel is necessary to insure that the state's methods of gathering evidence do not unfairly prejudice the defendant.[180] Second, the Court has held that in order for the constitutional guarantee to be meaningful, the assistance provided by counsel must be

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For example, the state's clinician, in the course of describing why he thinks the defendant was not disturbed at the time of the offense, could easily touch upon certain characteristics of the defendant that suggest his potential for violent behavior.

Another issue that the defendant may wish his expert to address at the capital sentencing proceeding is his prognosis for treatment. Since testimony about treatability does involve prediction of future behavior, *see* note 56 *supra*, it would seem that the state would be entitled to offer clinical testimony about dangerousness in such circumstances.

[178] U.S. Const. amend. VI.

[179] *E.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963); Johnson v. Zerbst, 304 U.S. 458 (1938).

[180] *See generally* C. Whitebread, *supra* note 13, at 519-36 and cases cited therein.

"effective."[181]

Both of these Sixth Amendment doctrines have implications for the conduct of forensic evaluations. This portion of the article will argue that a defendant is entitled to have counsel present during any state-compelled evaluation that has a substantial potential for producing unreliable results. It will also be argued that the defendant's right to effective assistance of counsel requires that he be granted an exploratory evaluation, at state expense if necessary, and that such an evaluation must be confidential in any context in which the accusatorial model, as defined in Part II, applies.

As in Part II, this article's discussion of the implications of *Estelle* for clinical evaluations will be confined to assessments of competency, reconstructive, and capital sentencing issues. While some of the principles discussed below arguably could apply to noncapital presentence evaluations, this complex topic is best deferred until the Supreme Court speaks more authoritatively on the subject.

A. *Presence of Counsel*

Over time, the Supreme Court has developed several different methods for determining whether a given stage of the criminal process requires the presence of counsel.[182] The method most frequently utilized, and the one to which the Court resorted in *Estelle*,[183] is "critical stage" analysis.[184] Using this analysis, this section first will illustrate why the right to counsel should apply to clinical evaluations and then will suggest the role counsel should play if he is present during such an assessment.

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[181] McMann v. Richardson, 397 U.S. 759 (1970).

[182] According to Whitebread, *supra* note 13, in addition to "critical stage" analysis, the Court has utilized equal protection analysis, *e.g.*, Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956), "trial-like confrontation" analysis, *e.g.*, United States v. Ash, 413 U.S. 300 (1973), and a "case-by-case" approach, *e.g.*, Gagnon v. Scarpelli, 411 U.S. 778 (1973); Betts v. Brady, 316 U.S. 455 (1942), in ruling on right to counsel issues.

[183] *See* text accompanying notes 19-25 *supra*.

[184] *See* C. WHITEBREAD, *supra* note 13, at 521.

1. *The* Wade *Test*

The critical stage concept received its most articulate enunciation in *United States v. Wade*,[185] in which the Supreme Court held that a defendant has the right to counsel during a pretrial identification lineup. In *Wade* the Court stated that the Sixth Amendment right to counsel

> requires that we scrutinize *any* pretrial confrontation of the accused to determine whether the presence of counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice.[186]

The Court then held that a defendant is entitled to counsel at a lineup because this pretrial identification device presents "grave potential for prejudice, intentional or not, . . . which may not be capable of reconstruction at trial."[187]

In *Estelle* the Court relied explicitly on *Wade* in holding that the state violated the Sixth Amendment when it failed to notify Smith's attorneys about the nature of Dr. Grigson's evaluation.[188] As noted earlier, Justice Burger carefully reserved the question of whether the Sixth Amendment requires the actual presence of counsel during the clinical evaluation, and implied that it might not.[189] A careful examination of the *Wade* test and the nature of the clinical evaluation process, however, suggests that merely providing notice to defendant's counsel does not meet the demands of

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[185] 388 U.S. 218 (1967).

[186] *Id.* at 227 (emphasis in original).

[187] *Id.* at 236.

[188] 451 U.S. at 454. The *Estelle* Court quoted the following passage from *Wade*:

> It is central to [the Sixth Amendment] principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.

Id. at 470 (quoting United States v. Wade, 388 U.S. 218, 226 (1967)).

[189] 451 U.S. at 470 & n.14.

the Sixth Amendment.

From *Wade* and other critical stage cases[190] it is possible to delineate a three-part analysis for determining when a particular confrontation requires counsel. First, the confrontation must pose potentially substantial adverse consequences for the defendant. In *Wade* the Court found that considerable risk was involved in the lineup identification process. Since a courtroom identification is often based on a pretrial lineup, "the trial which might determine the accused's fate may well be not that in the courtroom but at the pretrial confrontation."[191] Conversely, in *Gerstein v. Pugh*,[192] the Court held that a preliminary hearing to determine whether probable cause exists to detain an individual pending the next stage of the criminal process does not require counsel. Such a hearing has a "limited function" which "does not present the high probability of substantial harm identified as controlling in *Wade*."[193]

Second, to be a critical stage, the nature of the confrontation must be such that its reconstruction at trial would prove difficult. In *Wade* for instance, the Court noted that "there is serious difficulty in depicting what transpires at lineups."[194] The suspect himself will probably not be able to describe adequately the lineup procedure or detect deficiencies in it.[195] Even if he were capable of doing either, the defendant may be reluctant to take the stand for strategic reasons.[196] "Moreover, any protestations by the suspect of the fairness of the lineup at trial are likely to be in vain; the jury's

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[190] *See, e.g.*, Moore v. Illinois, 434 U.S. 220 (1977); Coleman v. Alabama, 399 U.S. 1, 7-10 (1970); Massiah v. United States, 377 U.S. 201 (1964).

[191] 388 U.S. at 235.

[192] 420 U.S. 103 (1975).

[193] *Id.* at 123.

[194] 388 U.S. at 230.

[195] The nature of the lineup is such that "neither witnesses nor lineup participants are apt to be alert for conditions prejudicial to the suspect. And if they were, it would likely be of scant benefit to the suspect since neither witnesses nor lineup participants are likely to be schooled in the detection of suggestive influences." *Id.* (footnote omitted). The Court also noted: "Improper influences may go undetected by a suspect, guilty or not, who experiences the emotional tension which we might expect in one being confronted with potential accusers." *Id.* at 230-31.

[196] The *Wade* Court noted that if the defendant had a criminal record, he might be reluctant to take the stand and be subject to the admission of such damaging material. *Id.* at 231.

choice is between the accused's unsupported version and that of the police officers present."[197]

The *Wade* Court distinguished the lineup from "various other preparatory steps, such as systematized or scientific analyzing of the accused's fingerprints, blood sample, clothing, hair, and the like."[198] In such cases, counsel is not required because

> [k]nowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts.[199]

This passage suggests a third, closely related element of critical stage analysis. To require the presence of counsel, the confrontation must not only pose a grave threat to the defendant's liberty interests and be difficult to reconstruct at trial, but must also inherently involve the risk of error. The Court in *Wade* found that the "vagaries of eyewitness identification are well-known."[200] But where the confrontation is likely to produce accurate, easily replicable results, counsel's presence is not necessary. For example, the Court has found no right to counsel when the state takes blood samples[201] or handwriting exemplars,[202] partially because of its view that these tests are objective analyses that are not subject to gross mischaracterizations.[203]

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[197] *Id.*

[198] *Id.* at 227.

[199] *Id.* at 227-28.

[200] *Id.* at 228. The Court also stated that "the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial." *Id.*

[201] Schmerber v. California, 384 U.S. 757 (1966).

[202] Gilbert v. California, 388 U.S. 263 (1967).

[203] Although unnecessary to decide the right to counsel claim in Schmerber v. California, 384 U.S. 757 (1966), the Court noted that "[e]xtraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol." *Id.* at 771. In Gilbert v. California, 388 U.S. 263 (1967), the Court noted that "[i]f, for some reason, an unrepresentative exemplar is taken, this can be brought out and cor-

Despite a majority of judicial decisions to the contrary,[204] it would appear that most clinical evaluations meet all three of these critical stage requirements. Just as a courtroom identification based on a prior identification can be dispositive of a case, clinical conclusions stemming from evaluations about the defendant's competency, mental state at the time of the offense, and dangerousness can have a significant impact on his ultimate disposition.[205] Such an impact is much more significant than that posed, for instance, by the *Gerstein* preliminary hearing.

The analogy between lineups and state-compelled clinical evaluations is even more apparent when one considers the difficulty inherent in reconstructing the evaluation context. Very often, the only observers of the assessment are the defendant and his evalu-

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rected through the adversary process at trial since the accused can make an unlimited number of additional exemplars for analysis . . . ." 388 U.S. at 267.

[204] *E.g.*, Hollis v. Smith, 571 F.2d 685 (2d Cir. 1978); United States v. Cohen, 530 F.2d 43 (5th Cir. 1976), *cert. denied*, 429 U.S. 855 (1976); United States v. Greene, 497 F.2d 1068 (7th Cir. 1974), *cert. denied*, 420 U.S. 909 (1975); United States v. Mattson, 469 F.2d 1234 (9th Cir. 1972), *cert. denied*, 410 U.S. 986 (1973); United States *ex rel.* Stukes v. Shovlin, 464 F.2d 1211 (3d Cir. 1972); Thornton v. Corcoran, 407 F.2d 695 (D.C. Cir. 1969); United States v. Albright, 388 F.2d 719 (4th Cir. 1968); Houston v. State, 602 P.2d 784 (Alaska 1979); Presnell v. State, 241 Ga. 49, 243 S.E.2d 496 (1978); People v. Larsen, 74 Ill. 2d 348, 385 N.E.2d 679 (1979); People v. Martin, 386 Mich. 407, 192 N.W.2d 215 (1971), *cert. denied*, 408 U.S. 929 (1972); State v. Whitlow, 45 N.J. 3, 210 A.2d 763 (1965); State v. Wilson, 26 Ohio App. 2d 23, 268 N.E.2d 814 (1971); Shepard v. Bowe, 250 Or. 288, 442 P.2d 238 (1968); Commonwealth v. Stukes, 435 Pa. 535, 257 A.2d 828 (1969).

[205] The opinions of clinicians often carry great weight with courts and jurors, sometimes disproportionately so. *See, e.g.*, A. MATTHEWS, MENTAL DISABILITY AND THE CRIMINAL LAW: A FIELD STUDY 122-23 (1970) (clinicians opinions on competency always accepted by court); Pfeiffer, Eisenstein, & Dabbs, *Mental Competency Evaluation for the Federal Courts*, 144 J. NERVOUS & MENTAL DISEASE 320 (1967) (unanimous court agreement with clinicians' recommendations on competency); Gray, *The Insanity Defense: Historical Development and Contemporary Relevance*, 10 AM. CRIM. L. REV. 559, 580 (1972) (uncontested testimony on insanity often determinative); Guttmacher & Weihofen, *The Psychiatrist on the Witness Stand*, 32 B.U.L. REV. 287, 313-4 (1952) (jurors rarely find contrary to the opinion of court-appointed psychiatrist). See People v. Murtishaw, 29 Cal. 3d 733, 773-74, 631 P.2d 446, 470, 175 Cal. Rptr. 738, 762 (1981), and text accompanying notes 8-9 *supra*, for examples of how clinical testimony on dangerousness can heavily influence a capital sentencing jury.

Thus, clinical opinions can have a decided impact on whether the defendant is sent to a hospital as incompetent, *see* Jackson v. Indiana, 406 U.S. 715 (1972), convicted, or given the death penalty. Of course, to the extent that there is an opposing expert, the impact of such testimony is diminished.

ator.[206] Because the defendant usually will be unfamiliar with or uneasy about the evaluation process,[207] and also may experience perceptual difficulties resulting from his mental disability, he often will be unable to give his attorney a reliable or detailed report of his interaction with the clinician. If he does decide to take the stand and contest the state's version of what transpired, his word will be pitted against that of a mental health professional.

Moreover, an accurate perception of the clinical fact-gathering and opinion formation process must depend upon more than the verbatim conversation between the evaluator and the defendant.[208] Research has indicated that clinical opinions may be influenced by the setting of the interview,[209] class and cultural differences between the clinician and the defendant,[210] the personal biases of the clinician,[211] and the values of the mental health professional gener-

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[206] *See* State v. Corbin, 15 Or. App. 536, 516 P.2d 1314 (1973); People v. Rosenthal, ___ Colo. ___, 617 P.2d 551 (1980).

[207] *See* note 148 *supra.*

[208] *See generally* Comment, *The Right to Counsel During Court-Ordered Psychiatric Examinations of Criminal Defendants,* 26 VILL. L. REV. 135, 152-58 (1980).

[209] *See* Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom,* 62 CALIF. L. REV. 693, 723 (1974) ("[C]linicians often perceive what they expect to perceive and the impact of suggestion on clinical perception may be profound."); Rosenhan, *On Being Sane in Insane Places,* 179 SCI. 250 (1973) (Twelve pseudopatients labeled schizophrenic by hospital staff, partially due to the fact they were in a hospital setting).

[210] *See generally* Allon, *Sex, Race, Socioeconomic Status, Social Mobility, and Process-Reactive Rating of Schizophrenics,* 153 J. NERVOUS & MENTAL DISEASE 343 (1971); Barnard, *Interaction Effects Among Certain Experimenter and Subject Characteristics on a Projective Test,* 32 J. CONSULTING & CLINICAL PSYCHOLOGY, 514 (1968). According to Ennis & Litwack, studies show that "[a] lower socio-economic history biased diagnosis toward greater illness and poorer prognosis . . . . [A]ccording to [other] studies . . . clinicians may be influenced to conclude that lower socio-economic individuals are . . . impulsive and therefore more prone to violence." Ennis & Litwack, *supra* note 209, at 725.

[211] As one commentator has noted:

> [O]bservations, diagnoses, or other conclusions in the context of legal decision-making will be consciously or unconsciously affected by the diagnostician's feelings about the issue in question. For instance, a hardnosed forensic psychiatrist might be expected to diagnose much malingering or benign disorder among those seeking to avoid criminal responsibility, whereas a more softhearted professional who believes that crime is a symptom of illness and that prisons are abominations might be expected to diagnose many more cases of true and severe disorder.

Morse, *supra* note 28, at 610. *See also* Diamond, *The Fallacy of the Impartial Expert,* 3 ARCHIVES CRIM. PSYCHODYNAMICS 221, 223 (1959) (witness may over-identify with the side he

ally.[212] Reconstructing at trial the impact of these variables on the relationship between the defendant and the evaluator, and on the expert's ultimate opinion, is likely to be impossible if the only observers of the evaluation are the participants themselves.[213]

If the courts could depend upon clinical evaluations to produce reliable results, the mere fact that the effect of these contextual variables might be difficult to discern at a later proceeding would not necessitate the presence of counsel. Indeed, some courts appear

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is on "totally unconscious of the innumerable subtle distortions and biases in his testimony that spring from his wish to triumph").

[212] A major bias of mental health professionals is a preference for diagnosing mental disorder. Coie, Costanzo & Cox, *Behavioral Determinants of Mental Illness Concerns: A Comparison of "Gatekeeper" Professions*, 43 J. CONSULTING & CLINICAL PSYCHOLOGY 626, 635 (1963). On the other hand, "psychiatrists as a group may have little tolerance for deviant behavior and consequently may require a high standard of community adjustment." Ennis & Litwack, *supra* note 209, at 728.

[213] The facts of United States v. Byers, No. 78-1451 (D.C. Cir. Dec. 24, 1980), illustrate the vagaries of reconstructing the clinical evaluation and why counsel must be personally cognizant of the relationship between the evaluator and the defendant.

Byers was charged with and eventually convicted of the murder of his lover of 15 years. After raising an insanity defense based on the results of a clinical evaluation performed at St. Elizabeth's Hospital in Washington, D.C., the defendant was evaluated by government-appointed clinicians at a federal hospital in Springfield, Missouri. Dr. Kunev, one of the psychiatrists who evaluated Byers at Springfield over an eight-week period, testified for the government at trial. In supporting his opinion that Byers was sane at the time of the offense, Kunev stated that while initially Byers had said he did not know why he committed the murder, when "pressed" he had indicated that at one point his wife suggested that he might have been under a "spell." Apparently inferring that Byers had leaped on this suggestion as a possible way of avoiding criminal conviction, Kunev testified that Byers was probably fabricating the paranoid delusions he claimed to have had at the time of the offense.

According to the trial judge, Kunev's recitation of Byer's conversation with his wife was "devastating" to the defendant. *Id.* slip op. at 19. The prosecutor called this testimony the "critical thing" in the case. *Id.* Yet Kunev had not included this information in his report, *id.* slip op. at 29-30, nor mentioned it to the defense attorney prior to trial. *Id.* slip op. at 18.

As Judge Bazelon noted in his dissent to the court's per curiam decision affirming the admissibility of Kunev's testimony:

> We have no record of the defendant's exact words. We know hardly anything about their context and nothing about the intention behind them. Accordingly, we have no basis upon which we can decide whether the government's exploitation of this ambiguous statement violates "our sense of fair play" which must temper the tactics of the government "in its contest with the individual" . . . .

Id. slip op. at 24 (Bazelon, J., dissenting). Judge Bazelon also noted other "significant factual issues" that were not in the record, including the nature of Dr. Kunev's interviewing technique and whether his "repeated inquiries had a coercive impact upon the defendant." *Id.* slip op. at 27 (Bazelon, J., dissenting).

to have denied a right to counsel during clinical evaluations on the ground that such assessments are not prone to the same "vagaries" that afflict eyewitness identifications.[214]

The assumption that forensic, clinical evaluations are less likely to produce suspect results is not justifiable, however. The lack of established legal and clinical standards for making such assessments,[215] together with the unavoidable pitfalls of the evaluation process described above, make an accurate decision difficult. The unreliability of clinical assessments of mental state at the time of the offense is demonstrated by the fact that mental health professionals are often pitted against one another on the issue.[216] Research suggests that even if the law were able to define clearly the mental conditions that form the basis for a claim of mitigating mental abnormality,[217] clinicians would still disagree on the extent to which a given defendant suffered from such a condition and how he was affected by it.[218] Predictive assessments, especially of a person's potential for violent behavior, are even more likely to suffer from the vagaries of the clinical process. One of the most consis-

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[214] *See, e.g.*, United States v. Baird, 414 F.2d 700, 712 (2d Cir. 1969), in which the court stated: [T]here is not . . . the widespread distrust of psychiatric examinations that there is of eye-witness identifications made under marginal circumstances of reliability . . ." *See also* United States v. Smith, 436 F.2d 787, 789-90 (5th Cir.), *cert denied*, 402 U.S. 976 (1971); United States *ex rel.* Stukes v. Shovlin, 329 F. Supp. 911, 913 (E.D. Pa. 1971).

[215] According to Professor Morse, the major cause of diagnostic unreliability is "criterion variance," or variance resulting from the imprecise nature of diagnostic categories. Morse, *supra* note 28, at 610. Undoubtedly, the lack of specific legal criteria pertaining to competency, insanity and the like, *see* notes 217 and 220 *infra*, is a major source of disagreement on those issues as well.

[216] *See generally* J. ZISKIN, *supra* note 28, ch. 8. The only study focusing directly on this issue, however, found that pairs of psychologists agreed in 32 of 33 cases as to whether the defendant was sane or insane. Stock & Poythress, Psychologists Opinions on Competency and Sanity: How Reliable? (September, 1979) (paper presented at American Psychological Association meeting in New York).

[217] One study found that "[t]here has been almost no judicial definition of mental disease in cases concerned with the McNaughton rules," although it also noted that some decisions require the disease to be "of a fixed and prolonged nature" and be related to some form of psychosis. Goldstein & Marcus, *The McNaughton Rules in the United States*, in DANIEL MCNAUGHTON: HIS TRIAL AND THE AFTERMATH 156 (D. West & A. Walk eds. 1977).

[218] *See* Morse, *supra* note 28, at 604-09. Professor Morse states: "The best evidence of the reliability of present diagnostic categories indicates that if two professionals independently diagnose a person on the basis of the same or similar data, it is rare for them to agree on the diagnosis in more than half the cases." *Id.* at 607.

tent findings in behavioral science research is that clinical predictions of recidivism cannot be made with a high degree of accuracy.[219] Even clinical conclusions about competency are suspect, partly because of professional shortcomings,[220] and partly because the criteria for making the determination are so difficult to specify.[221]

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[219] Probably the fairest summary of the literature on this topic comes from Professor Monahan:

> Outcome studies of clinical prediction with adult populations underscore the importance of past violence as a predictor of future violence, yet lead to the conclusion that psychiatrists and psychologists are accurate in no more than one out of three predictions of violent behavior over a several year period among institutionalized populations that had both committed violence in the past and were diagnosed as mentally ill.

J. MONAHAN, *supra*, note 57, at 60. *See also* H. STEADMAN, J. COCOZZA, CAREERS OF THE CRIMINALLY INSANE (1974); Kozol, Boucher & Garofalo, *The Diagnosis and Treatment of Dangerousness*, 18 CRIME & DELINQ. 371 (1972); Steadman, *A New Look at Recidivism Among Patuxent Inmates*, 5 BULL. AM. ACAD. PSYCHIATRY & L. 200 (1977). A task force of the American Psychiatric Association concluded that "the state of the art regarding predictions of violence is very unsatisfactory. The ability of psychiatrists or any other professionals to reliably predict future violence is unproved." AMERICAN PSYCHIATRIC ASSOCIATION, CLINICAL ASPECTS OF THE VIOLENT INDIVIDUAL (1974).

[220] Several studies indicate that mental health professionals tend to overpredict incompetency, based on an erroneous belief that incompetency and psychosis are synonomous. *See, e.g.*, McGarry, *Competency for Trial and Due Process Via the State Hospital*, 122 AM. J. PSYCHIATRY 623, 625 (1965). *See also* R. ROESCH & S. GOLDING, A SYSTEM ANALYSIS OF COMPETENCY TO STAND TRIAL PROCEDURES: IMPLICATIONS FOR FORENSIC SERVICES IN NORTH CAROLINA (1977). Thus, while their opinions, in statistical parlance, may be highly "reliable" (in agreement with one another), they may not be "valid" (accurate).

Other studies, using appropriately trained mental health professionals, indicate a high degree of reliability and presumably, given their training, validity. Roesch, *A Brief, Immediate Screening Interview to Determine Competency to Stand Trial: A Feasibility Study*, 5 CRIM. JUST. & BEHAV. 241 (1978) (agreement in 29 of 30 cases (96.6%) evaluated by groups of paired raters); Stock & Poythress, *supra* note 216 (agreement in 44 of 44 cases (100%) evaluated by pairs of psychologists). It cannot be assumed, however, that all mental health professionals who perform competency evaluations for the courts are appropriately trained, nor can it be assumed that the opinions of trained personnel will always be accurate, given the variableness of the competency criteria. *See* note 221, *infra*.

[221] "Because of the large number of variables, the determination of competency is context-dependent and needs to be decided on a case-by-case basis within the general framework of Dusky [v. United States, 362 U.S. 402 (1962)]." R. ROESCH & S. GOLDING, COMPETENCY TO STAND TRIAL 82 (1980). While the authors try to delineate several "functional criteria" to assist the professional in evaluating competency, they emphasize that "[i]t would be inconsistent with the thrust of our arguments if we were to supply operational definitions of *the* criteria for competency." *Id.* (emphasis in original).

Applying critical stage analysis to the clinical evaluation leads to two conclusions. First, as *Estelle* indicates, the Sixth Amendment requires the state to notify defendant's counsel about the nature of state-compelled competency, reconstructive, or capital sentencing evaluations before they take place. Second, when such evaluations occur, the defendant should be entitled to have counsel present. The questionable reliability of clinical opinion, the difficulty of reconstructing how it was formed, and the severe impact it may have on the defendant's case require counsel to have the option to monitor the clinical assessment process. Only by extending the right to counsel in this situation can the "potential for substantial prejudice" inherent in the pretrial clinical evaluation be minimized.[222]

2. *The Role of the Attorney*

If counsel is permitted to be present during state-compelled evaluations, his participation in the evaluation should be limited to observing the exchange between the defendant and the evaluator in order to understand the state's fact-gathering and opinion formation process. *Wade* allowed counsel to witness the lineup, but prohibited him from requiring the state to follow any particular lineup procedure.[223] Similarly, during a clinical evaluation, counsel should play a passive role, not an adversarial one.

It has been suggested that one function of counsel at a state-compelled evaluation should be to protect the defendant's privilege against self-incrimination.[224] Assuming, however, that the use of evaluation results are limited in the manner suggested in Part II of this article,[225] no Fifth Amendment justification exists for refraining from answering questions. Indeed, if the defendant, upon advice of counsel, does refuse to cooperate with the state's clinician, he would be risking the imposition of sanctions.[226] The only

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[222] A cogent argument could be made that the presence of counsel is also required at noncapital presentence evaluations, for reasons similar to those advanced above.

[223] 388 U.S. at 236-39; *see, e.g.*, People v. Williams, 3 Cal. 3d 853, 478 P.2d 942, 92 Cal. Rptr. 6 (1971); United States v. Eley, 286 A.2d 239, 242 n.8 (D.C. App. 1972).

[224] Meister, *supra* note 73, at 458-59.

[225] *See* text accompanying notes 88-89, 150-55, 176-77 *supra*.

[226] *See* text accompanying notes 133-49 *supra*.

situation in which counsel could justifiably intervene in the evaluation process would be if the state clinician, in an effort to obtain answers from the defendant, resorted to coercive techniques that "shock[ed] the conscience."[227]

Many courts, including the Supreme Court in *Estelle*,[228] have suggested that the presence of counsel would have a deleterious impact on the relationship betwen the clinician and the defendant.[229] Yet if counsel adopts essentially a passive role during the evaluation, he is unlikely to have a seriously disruptive effect on the clinical interview.[230] Indeed, the attorney's participation in the evaluation actually might prove to be beneficial to the fact-gathering process. The state-compelled evaluation hardly represents the traditional intimate doctor-patient dyad; in practice, the interaction between the state's evaluator and defendant is likely to be somewhat strained.[231] As one commentator has noted, "[t]he reassuring presence of counsel could do much to alleviate the accused's feelings of isolation and distrust, and in fact contribute to the effectiveness of an examination otherwise hindered by the accused's

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[227] Rochin v. California, 342 U.S. 165, 172 (1952). Although unlikely to occur, threatening the client with physical harm would be an obvious example. It is also possible that an attempt to forcibly administer "truth-seeking" drugs would be such a situation. *See* Gall, *The Case Against Narcointerrogation*, 7 J. FORENSIC SCI. 29 (1962).

In Houston v. State, 602 P.2d 784, 796 n.23 (Alaska 1979), the court found that a defendant has the right to have his attorney present during a compelled pretrial evaluation, and that the attorney should be a passive observer, but left open the possibility that coercive techniques by the evaluator might permit a more active role by counsel.

[228] 451 U.S. at 470 n.14.

[229] *See, e.g.*, Hollis v. Smith, 571 F.2d 685, 691-92 (2d Cir. 1978); Gomes v. Gaughan, 471 F.2d 794, 799 n.8 (1st Cir. 1973); United States v. Bohle, 445 F.2d 54, 67 (7th Cir. 1971); United States v. Albright, 388 F.2d 719, 726 (4th Cir. 1968).

[230] One well-known forensic psychiatrist has written: "Usually [the presence of defendant's counsel] presents no problem for the examiner, unless the attorney attempts to answer questions posed to the patient." R. SÁDOFF, *supra* note 70, at 25.

[231] The tense relationship between the defendant and the state-appointed evaluator has been characterized as follows:

> [I]t is true the pretrial psychiatric examination is of an intimate nature, but portraying the examination as involving a doctor-patient relationship, where the doctor is State-appointed and may have an enduring relationship with the State, is a bit strained. The State-appointment element casts the examination into the realm of investigative and adversary.

People v. Larsen, 74 Ill. 2d 348, 362-63, 385 N.E.2d 679, 686 (1979) (Clark, J., dissenting).

reluctance to respond freely to the psychiatrist."[232]

Nonetheless, concern over the possibility that the attorney's presence would adversely affect the evaluation process has prompted some to suggest, as a compromise measure, that the Sixth Amendment guarantee merely requires a video or audio tape recording of the evaluation.[233] In *Wade* the Court did leave open the question of whether "substitute counsel" would be sufficient when notification and presence of the suspect's own counsel could result in "prejudicial delay."[234] Although the Court was referring to human substitutes, mechanical devices that can "observe" the relevant events could conceivably fulfill the same function when there are practical difficulties in having counsel actually present during each stage of the evaluation.[235]

Unless the state can show that such prejudicial delay would result if defendant's counsel is permitted to be present during the clinical assessment, however, it should not have the power to bar him from the evaluation. Neither audio nor video tape can convey fully the previous described contextual variables at work during the evaluation.[236] Moreover, as the *Wade* Court noted, "to refuse to recognize the right to counsel for fear that counsel will obstruct the course of justice is contrary to the basic assumptions upon which this Court has operated in Sixth Amendment cases."[237] In the clinical evaluation context, this reasoning is particularly germane. Permitting the attorney to observe the evaluation will do

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[232] Comment, *Right to Counsel at the Pretrial Mental Examination of an Accused*, 118 U. PA. L. REV. 448, 456 (1970).

[233] Thornton v. Corcoran, 407 F.2d 695, 702 (D.C. Cir. 1969); United States v. Byers, No. 78-1451 (D.C. Cir. Dec. 24, 1980) (Bazelon, J., dissenting).

[234] 388 U.S. at 237.

[235] *See* United States v. Byers, No. 78-1451 (D.C. Cir. Dec. 24, 1980), in which the court describes the state clinician's evaluation of the defendant over an eight-week period in a hospital more than one thousand miles from the court of jurisdiction.

[236] It is doubtful that even a video tape could record all the nuances of the relationship between the defendant and the psychiatrist; obviously an audio tape cannot record nonverbal communication. Of course, if counsel agreed, these devices could be relied upon. *See* Houston v. State, 602 P.2d 784, 796 (Alaska 1979). Another approach that might be acceptable to the attorney is to have the defendant's clinician, rather than the attorney himself, observe the interview. Aronson, *Should the Privilege Against Self-Incrimination Apply to Compelled Psychiatric Examinations?* 26 STAN. L. REV. 55, 91 (1973).

[237] 388 U.S. at 237-38.

much to further, and little to obstruct, the fact-gathering objectives of the evaluations process.

B. *Defense-Requested Evaluations*

The Sixth Amendment not only guarantees the defendant the right to counsel at all critical stages of the criminal process, but also requires that the legal representation he receives fall "within the range of competence demanded of attorneys in criminal cases."[238] To ensure that his arguments about the past, present, or future mental state of such a defendant meet this standard, the conscientious attorney often will seek a clinical assessment and rely upon its results. This section discusses the various issues associated with such exploratory evaluations, first from the perspective of the defendant who can afford his own evaluation, and then from the indigent defendant's point of view.

1. *The Nonindigent Defendant*

The defendant with financial means can consult as many experts as his resources permit. However, unless he is able to marshal his evidence and assess its strength *before* deciding whether to disclose it to the state, he may be deterred from seeking clinical advice at all, thereby diminishing his right to effective assistance of counsel. The expert's report may contain a considerable amount of damaging information, including confessions, investigative leads, and prejudicial collateral disclosures.[239] Although this information should not be admissible (under the rules discussed in Part II) against the defendant who does not introduce clinical evidence at trial, as a practical matter it often may assist the state in preparing its case before trial. The possibility that the state will be tempted to make use of this valuable source of evidence for investigative purposes,[240] and the difficulty of ascertaining when it has in fact

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[238] McMann v. Richardson, 397 U.S. 759, 770-71 (1970).

[239] *See* text accompanying notes 44-57 *supra*.

[240] In an ideal world, the prosecution could be depended upon not to abuse such information. But, as Justice Marshall has suggested in an analogous context (prosecutorial possession of immunized testimony),

> [t]he good faith of the prosecuting authorities . . . is not a sufficient safeguard [of the defendant's Fifth Amendment rights]. For the paths of information through

done so,[241] require that the results of a clinical evaluation be withheld from the state at least until the defendant has made a reasoned choice to disclose them.

Accordingly, virtually every jurisdiction that has considered the question has held that before the defendant introduces clinical evidence, the results of an evaluation financed by the defendant are protected from state access.[242] Although these courts base their rulings on the privacy notions underlying the attorney-client privilege,[243] their reasoning is fully consonant with the Sixth Amendment considerations identified above. Relying on decisions regarding other types of consultants whose expert assistance is viewed as necessary for effective representation,[244] the courts view the clinician as an agent of the defense attorney whose pre-notice communications with the defendant and the defense attorney must be protected in order to encourage the solicitation of expert advice.[245]

> the investigative bureaucracy may well be long and winding, and even a prosecutor acting in the best of faith cannot be certain that somewhere in the depths of his investigative apparatus, often including hundreds of employees, there was not some prohibited use of the compelled testimony.

Kastigar v. United States, 406 U.S. 441, 469 (1971) (Marshall, J., dissenting).

[241] *See* Rief, *The Grand Jury Witness and Compulsory Testimony Legislation*, 10 AM. CRIM. L. REV. 829, 856-59 (1972), for a relevant discussion of the difficulties involved in showing that the prosecution obtained evidence used to prosecute a defendant from a source independent of his immunized testimony. "It is very difficult to prove that information derived from grand jury testimony by a prosecutor has been used by him against the witness, for all proof lies in the hands of the government." *Id.* at 857-58.

[242] *See, e.g.*, United States v. Alvarez, 519 F.2d 1036, 1045-47 (3d Cir. 1975); United States *ex rel.* Edney v. Smith, 425 F. Supp. 1038, 1047 (E.D.N.Y. 1976); Houston v. State, 602 P.2d 784 (Alaska 1979); People v. Lines, 13 Cal. 3d 500, 531 P.2d 793, 119 Cal. Rptr. 225 (1975); Pratt v. State, 39 Md. App. 442, 448, 387 A.2d 779, 783 (1978), *aff'd*, 284 Md. 516, 398 A.2d 421 (1979); People v. Hilliker, 29 Mich. App. 543, 547, 185 N.W.2d 831, 833 (1971); State v. Kociolek, 23 N.J. 400, 412-15, 129 A.2d 417, 423-25 (1957).

[243] The basis of the attorney-client privilege "is that a lawyer can act effectively only when he is fully advised of the facts and [that] the client's knowledge that a lawyer cannot reveal his secrets promotes full disclosure." Pratt v. State, 39 Md. App. 442, 447, 387 A.2d 779, 782 (1978).

[244] *See, e.g.*, United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961) (communications to an accountant for the purpose of obtaining legal advice protected by privilege); Lindsay v. Lipson, 367 Mich. 1, 71, 11 N.W.2d 60, 63 (1962) (communications to an interpreter when client speaks foreign language are protected by privilege).

[245] "As the assistance of a psychiatrist is essential where the criminal responsibility of a client is in question, we hold that communications made to a psychiatrist for the purpose of seeking legal advice are within the scope of attorney-client privilege." Pratt v. State, 39 Md.

The courts are also unanimous in holding that once a particular clinician is presented as an expert for the defendant, the results of his evaluation must be revealed to the state.[246] For reasons analagous to those discussed in Part II supporting the state's right to compel its own evaluation,[247] this result is also sound.

There is a split of opinion, however, as to whether the attorney-client privilege continues to protect the results of evaluations by clinicians whom the defendant has consulted but has decided *not* to use in support of a defense. Some decisions, such as *United States ex rel. Edney v. Smith*,[248] have held that the state should have access to such experts. They reason that once the issue of mental state at the time of the offense is properly raised, the state is entitled to any available facts and opinions about the defendant's mental state. Otherwise, as the *Edney* court stated, the defendant would "be permitted to suppress any unfavorable psychiatric witness whom he had retained in the first instance, under the guise of the attorney-client privilege, while he endeavors to shop around for a friendly expert, and take unfriendly experts off the market."[249]

Other decisions, such as *United States v. Alvarez*,[250] hold that the privilege should be extended to protect against the disclosure of any evaluation results that are not relied upon by the defendant. As *Alvarez* concluded, the "attorney must be free to make an informed judgment with respect to the best course for the defense without the inhibition of creating a potential government witness."[251] These courts also contend that the defendant himself is less likely to be open and candid, and thereby more likely to hin-

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App. 442, 447-48, 387 A.2d 779, 783 (1978).

[246] *See, e.g.*, United States v. Alvarez, 519 F.2d 1036, 1046 (3d Cir. 1975), and cases collected in note 242 *supra*.

[247] *See* text accompanying notes 124-33 *supra*.

[248] 425 F. Supp. 1038 (E.D.N.Y. 1976), *aff'd*, 556 F.2d 556 (2d Cir. 1977). *See also* Houston v. State, 602 P.2d 784 (Alaska 1979); Pratt v. State, 39 Md. App. 442, 387 A.2d 779 (1978), *aff'd*, 284 Md. 516, 398 A.2d 421 (1979).

[249] 425 F. Supp. at 1025.

[250] 519 F.2d 1036 (3d Cir. 1975); *see also* Houston v. State, 602 P.2d 784 (Alaska 1979); Pratt v. State, 39 Md. App. 442, 387 A.2d 779 (1978), *aff'd*, 284 Md. 516, 398 A.2d 421 (1979).

[251] 519 F.2d at 1047.

der a comprehensive assessment of his mental condition, if he knows that the state eventually may gain access to his statements whether or not he decides to rely on that particular expert.[252]

For a number of reasons, the *Edney* approach is preferable. The lawyer or defendant who understands the need for an expert's opinion will seldom be deterred from seeking or cooperating with a clinical evaluation merely because its results might be used by the state *after* the decision to raise a defense. Unfavorable testimony would occur only if the examining clinician does not support the defendant *and* the defendant is able to find another expert who does. Nor should the possibility that the state will gain access to unfavorable witnesses affect the defendant's decision to raise a colorable defense, especially because he knows that state will be able to obtain its own evaluation in any event, once notice is given.

Even if the *Edney* procedures does inhibit somewhat the exploration or assertion of potential defenses, it is still mandated by principles of fairness. For reasons similar to those advanced in Part II in support of the state's right to compel post-notice evaluations, neither the attorney-client privilege nor the Sixth Amendment right to effective assistance of counsel should deny the state the opportunity to have access to evidence on an issue that the defendant has presented to the court. Permitting the defendant to gag an expert who possesses relevant information is not consistent with the inquisitorial mode of investigation that should prevail once the defendant raises a clinically based defense.

Of course, the state is entitled to its own evaluation in this situation, but an evaluation by an expert initially retained by the defense will usually produce more accurate results. Not only is the defendant likely to be more open with such an expert,[253] but he will also be closer in time to the alleged crime, and thus generally

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[252] "[T]he inhibiting effect of a rule waiving the attorney-client privilege with respect to psychiatric consultations in all cases of an insanity defense operates not only with respect to the facts of the crime but also with respect to the defendant's mental state." *Id.*

[253] *See* note 231 *supra*. "Because the government's psychiatrist will never have an adequate guarantee of cooperation, evidence might be lost if a defense psychiatrist's testimony could not be compelled following an insanity plea." Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrist*, 66 VA. L. REV. 597, 638 (1980).

better able to remember its details.[254] Whether the evaluation is on competency, reconstructive, or capital sentencing issues, the information divulged during a defense-sponsored evaluation will probably be fresher and more comprehensive than any data the state's clinician can obtain. In short, the *Edney* approach strikes a better balance between the information gathering objectives of the state and the Sixth Amendment rights of the defendant.[255]

2. *The Indigent Defendant*

The indigent defendant, by definition, lacks the resources to hire his own expert mental health professional. There can be little dispute, however, that the Sixth Amendment entitles him to a clinical consultation, at state expense, when the defendant's mental condition is likely to become an issue requiring expert explication. As suggested earlier, the attorney's effectiveness in representing a mentally disabled client would be severely hampered without such a clinical evaluation.

Several courts have recognized this fact, usually in the context of holding that counsel's failure to seek a clinical evaluation despite evidence of mental abnormality is a denial of effective assistance.[256] While these decisions concern the reconstructive context,

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[254] Saltzburg, *supra* note 253, at 638-39. Saltzburg also notes that experience gained during one evaluation may enable the defendant to fake symptoms to a later examiner. *Id.* at 639.

[255] Even courts that follow the *Alvarez* rule adopt the approach outlined in the text when the defendant's expert relies on an uncalled expert's report. *See* Houston v. State, 602 P.2d 784, 792 (Alaska 1979), in which the court held that when the defense's expert testifies concerning another expert's report, the state is entitled to use the second expert as a witness, even though the attorney-client privilege would normally prevent the state from doing so.

One objection to permitting experts retained by the defendant to be called by the state is that the jury might give undue weight to the fact that the expert was originally retained by the defendant, "[b]ut this problem can be met by excluding information about nexus." United States *ex rel.* Edney v. Smith, 425 F. Supp. at 1053.

[256] *E.g.*, Wood v. Zahradnick, 578 F.2d 980 (4th Cir. 1978); United States v. Edwards, 488 F.2d 1154, 1163 (5th Cir. 1974) (stressing the "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel"); People v. Frierson, 25 Cal. 3d 142, 599 P.2d 587, 158 Cal. Rptr. 281 (1979). *Cf.* Springer v. Collins, 586 F.2d 329 (4th Cir. 1978), *cert. denied*, 440 U.S. 923 (1979) (no lack of effective counsel when only basis for suggesting that counsel should have considered insanity defense was the fact that counsel knew that the defendant had been using alcohol and drugs and had been using

their reasoning applies in other areas as well. Given the extreme consequences that can result from an inadequate investigation of the issues in a capital sentencing proceeding, the defense attorney representing a client who is charged with a capital offense should be able to obtain clinical advice whenever the defendant evidences signs of mental instability.[257] And, for reasons discussed in Part II, a defense attorney would clearly be remiss if he did not take steps to assess his client's competency to stand trial when there is reason to doubt the defendant's ability to cope with the legal process.[258] In none of these contexts should financial considerations prevent the defense attorney from fulfilling his constitutional obligation.

Whether they mean to recognize this principle or not, most states do in fact provide the indigent defendant with an evaluation on competency and reconstructive issues at state expense,[259] and one state also provides for state-funded presentence evaluations at the defendant's request.[260] What has not been resolved is the extent to which the indigent defendant should be able to control the selection of his evaluator and the results of his evaluation. In many states, the indigent who requests an evaluation receives one only if he is willing to be assessed by a clinician in the employ of the state.[261] Moreover, the results of this evaluation are often sent not only to the defense attorney, but to the prosecutor and to the court as well.[262]

If the indigent defendant could be guaranteed an "impartial"

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them at the time of the offense).

[257] *See* Hammett v. State, 578 S.W.2d 699 (Tex. Crim. App. 1979).

[258] *See* text accompanying notes 77-84 *supra.*

[259] In 1967, Professor Goldstein reported:

> In thirty-one states and the District of Columbia, statutes provide for court appointment of a psychiatrist in cases involving insanity and incompetency. These statutes do not turn on indigence. Their original objective was to eliminate the so-called "battle of experts" by introducing impartial experts. Nevertheless, by authorizing the appointment of a psychiatrist at government expense, they may make available a witness to the defense where there would otherwise be none.

A. GOLDSTEIN, THE INSANITY DEFENSE 131 (1967). For examples of more recent statutes, see COLO. REV. STAT § 16-8-111 (1973); NEV. REV. STAT. 178.415 (1981); S.D. CODIFIED LAWS ANN. 23A-10A-3 (1979); WYO. STAT. 7-11-303 (1977).

[260] MO. ANN. STAT. § 557.031 (Vernon 1979).

[261] A. GOLDSTEIN, *supra* note 259, at 131.

[262] *Id.* at 132.

evaluation by the state-employed clinician, then he should be satisfied with the opinion that results. But such a guarantee is not possible. Personal and professional predilections heavily influence clinical opinion.[263] While it cannot be assumed that state clinicians will find for the state merely because they are paid by it,[264] as a practical matter, they are subject to institutional pressures that make it likely they will be "prosecution-oriented,"[265] at least in borderline cases. The bias inherent in their situation is suggested by the fact that, in most states, the indigent who requests an evaluation is sent to the same expert or experts who would be conducting the examination for the prosecution had the defendant been able to afford a private clinician.[266] The state should not be allowed to force the defendant to accept such an evaluation on the ground that it is "impartial" anymore than it should be required to concede that the opinion of a private clinician offered by a nonindigent defendant is scientifically objective.

Indeed, for the same reasons the state should be allowed to obtain its own expert evaluation when the defendant raises a clinically based defense, the indigent defendant should be entitled to consult with a clinician of his choice. As Professor Goldstein has

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[263] *See* notes 209-12 *supra.*

[264] Evaluators in Missouri's forensic hospitals found 127 of the 480 defendants (26.46%) referred to them in 1978 to be criminally irresponsible. Petrila, Selle, Rouse, Evans & Moore, *The Pre-Trial Examination Process in Missouri: A Descriptive Study*, 9 BULL. AM. ACAD. PSYCHIATRY. & L. 60, 76 (1981).

[265] A study involving interviews of former members of the federal prosecutor's office in the District of Columbia and St. Elizabeth's Hospital, the District's forensic unit, found that the doctors frequently contacted the prosecutor's office, but rarely contacted the defense attorney. The study also noted that it was not uncommon "for the hospital doctors to ask the prosecutor if he would oppose a certain diagnosis: if the prosecutor indicates opposition, the questioned diagnosis may never come to light." Chernoff & Schaffer, *Defending the Mentally Ill: Ethical Quicksand*, 10 AM. CRIM L. REV. 505, 510 (1972).

Dr. Diamond has noted that "in many communities, the District Attorney has an undue influence over the courts in the selection of the panels from which the court-appointed expert is drawn," and that the selected experts tended to be "overly identified with authority, . . . a sort of watch-dog of the public morals, and motivated towards seeing that no criminal 'gets away with anything.'" Diamond, *supra* note 211, at 229.

[266] A. GOLDSTEIN, *supra* note 259, at 131. This practice also has a detrimental effect on the adversary process because it merges the expert for the clinician and the expert for the state into one person. The difficult "factual issues and normative problems calling most for expert decision by a jury" are "screened out" because, whether he finds for the defense or the prosecution, the state clinician will be unopposed and thus untested. *See id.* at 135.

stated:

> Without his own expert to aid him—before and during trial—[the indigent defendant] will have to rely entirely on challenging the professional standing of the "impartial" experts, their competence, the thoroughness of their examination, and the bona fides of their impartiality. However artfully these devices may be used, they are not as likely to assure him of an effective defense as would his own expert.[267]

Whether the indigent defendant is permitted his own independent expert, or whether he must continue to rely on a clinician chosen by the state, it is imperative that he be given control over the results of the evaluation similar to that his wealthier counterpart enjoys through assertion of the attorney-client privilege. When the fact-finding process is accusatorial in nature—as it is in the reconstructive and capital sentencing contexts before notice of a clinical "defense" is given—the state should be prevented access to, as well as use of, the results of the defendant's exploratory evaluation.[268]

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[267] *Id.* at 136. Other commentators have argued for a right to an independent evaluation, either on Sixth Amendment or equal protection grounds (given the nonindigent's ability to seek assistance from private clinicians). *See, e.g.*, Lewin, *Indigency-Informal and Formal Procedures to Provide Partisan Psychiatric Assistance to the Poor*, 52 IOWA L. REV. 453, 487 (1966); Note, *The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings*, 55 CORNELL L. REV. 632, 639-41 (1970). The courts that have considered the question have generally found to the contrary. *See, e.g.*, McGarty v. O'Brien, 188 F.2d 151, 155 (1st Cir.), *cert. denied*, 339 U.S. 966 (1950).

A difficult question that arises once it is decided that the indigent does have a right to an independent evaluation is to what extent he can "shop" for a favorable expert. One concurring opinion has held that, at least in the capital sentencing context, the defendant "must have equal access to psychological or psychiatric expert opinion testimony from some expert of his reasonable choosing, but not necessarily his first choice." Hammett v. State, 578 S.W.2d 699, 720-21 (Tex. Crim. App. 1979) (Odum, Roberts, and Phillips, JJ., concurring). To make the right to an independent evaluation meaningful, the indigent defendant should be able to exercise considerable freedom in his selection process. However, the state should be able to place certain financial and practical limits on his ability to seek clinical advice. The Constitution guarantees the indigent defendant an independent evaluation, not a favorable one.

[268] Although beyond the scope of this section, it could be argued that, given the right to counsel at sentencing, Mempa v. Rhay, 389 U.S. 128 (1967), the indigent defendant should also have a right to a presentence evaluation in noncapital cases, the results of which would be similarly protected from premature disclosure to the state.

C. *Summary*

The Sixth Amendment requires the state to give the defendant's attorney notice of all state-compelled competency, reconstructive, and capital sentencing evaluations, and permits him to be present during such evaluations. It also entitles the indigent defendant to an independent clinical consultation whenever it is necessary to insure effective legal representation. Finally, in conjunction with the Fifth Amendment, the Sixth Amendment forecloses state access to the results of an exploratory reconstructive or capital sentencing evaluation until the defendant indicates a desire to use clinical evidence to support his case.

IV. Conclusion: Toward a Fair State-Individual Balance

The rules developed in this article have already been summarized. In this section, they are reorganized to illustrate how the Fifth and Sixth Amendments apply in each of the three evaluation contexts discussed in this article.

A. *Competency Evaluations*

(1) The indigent defendant is entitled to a clinical evaluation of his competency to stand trial by a clinician of his choosing whenever his attorney avers that the defendant may be incompetent.[269] The state is entitled to the results of such an evaluation.

(2) The state may obtain an evaluation of the defendant's competency whenever there is probable cause to believe[270] he may be incompetent, provided it notifies the defendant's attorney about the evaluation and permits him to be present when it is conducted.

(3) No disclosures made by the defendant during a competency evaluation, nor any opinion based on those disclosures, may be

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[269] In this and other evaluation contexts, before the attorney's request for an evaluation of his client is granted, he should have to convince the judge that he needs a clinical assessment in order to represent his client adequately. However, the attorney should not have to make this showing at a formal hearing at which the prosecution is present; otherwise, many of the safeguards urged in this article might be worthless.

[270] The probable cause standard is consciously borrowed from Fourth Amendment jurisprudence, Brinegar v. United States, 338 U.S. 160, 175-76 (1949), in that a state compelled clinical examination is a "search and seizure" of the thoughts, feelings, and actions of the defendant's mental state.

used by the state for any purpose other than to address the issue of the defendant's competency to stand trial.

B. *Reconstructive Evaluations*

(1) The indigent defendant is entitled to a clinical evaluation of his mental state at the time of the offense by a clinician of his own choosing whenever his attorney avers that the defendant may have a clinically based defense. The state may not gain access to the results of such an evaluation unless the defendant gives notice of an intention to introduce clinical evidence at trial.

(2) Once the defendant gives such notice, the state may obtain its own evaluation of the defendant's mental state at the time of the offense,[271] provided it notifies the defendant's attorney about the evaluation and permits him to be present when it is conducted.

(3) No disclosures made by a defendant during a reconstructive evaluation, nor any opinion based on those disclosures, may be used by the state for any purpose unless the defendant gives notice of an intention to introduce clinical testimony at trial concerning his mental state at the time of the offense. If such notice is given, the disclosures and opinions may be used by the state solely to address that issue at trial.

(4) The trial jury should be instructed that testimony by a clinician during trial is to be considered only on the issue of the defendant's mental state at the time of the offense.

C. *Capital Sentencing Evaluations*

(1) The indigent defendant is entitled to a clinical evaluation focusing on capital sentencing issues by a clinician of his own choosing whenever his attorney avers that clinical information is necessary to arrive at a just sentence. The state may not gain access to the results of the evaluation unless the defendant gives notice of an intention to introduce clinical evidence at trial or sentencing.

(2) Once the defendant gives such notice, the state may obtain its own evaluation focusing on capital sentencing issues, provided it notifies the defendant's attorney about the evaluation and per-

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[271] With respect to the notice requirement in this and in the capital sentencing context, see note 102 *supra*.

mits him to be present when it is conducted.

(3) No disclosures made by a defendant during a capital sentencing evaluation, nor any opinion based on those disclosures, may be used by the state for any purpose unless the defendant gives notice of an intention to introduce clinical testimony at the capital sentencing hearing. If such notice is given, the disclosures and opinions may be used solely to address the issue raised by the defendant.[272]

(4) The sentencing jury should be instructed that testimony by a clinician during the sentencing hearing is to be considered only on the issue raised by the defendant.

In any of these contexts, once the defendant indicates an intention to introduce clinical testimony, the state may gain access to the results of any evaluations obtained by the defendant that focused on the issue raised by the defendant. Additionally, the state may use disclosures made by the defendant during such evaluations, as well as opinions based on those disclosures, to address the issue raised by the defendant.

These rather intricate rules all aim toward one simple objective: making the clinical inquiry into the defendant's mental condition as reliable as possible consistent with our adversarial system. They maximize the defendant's incentive to talk to the evaluating clinician by assuring him that his disclosures will be used solely to address his mental condition. They give the defense attorney the opportunity to make informed decisions about his client's case by providing him with confidential expert consultation, and enable him to make an effective presentation at trial by empowering him to monitor the state's opinion formation process. The state is permitted to obtain its own evaluation whenever expert analysis of the defendant's clinically based claims. Finally, the mental health professional is left to pursue his investigation unfettered by *Miranda* warnings,[273] contentious attorneys, or ethical concerns that the re-

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[272] *See* text accompanying notes 172-75 *supra*.

[273] Although warning the defendant that he has a right to reman silent is not appropriate under the rules advanced in this article, *see* notes 89, 172-77 *supra* and accompanying text, the clinician may still be ethically bound to inform the defendant how the results of the evaluation may be used. *See* American Psychological Association, *Ethical Principles of*

sults of his assessment will be misapplied.

These rules expand considerably upon the nucleus provided in *Estelle v. Smith*. They are all consistent, however, with well-established constitutional principles. Moreover, they are all essential to the integrity of the forensic clinical endeavor. For if the clinical inquiry is seriously hampered in its scope, there is no point in consulting mental health professionals in the first place.

Psychologists, 36 AM. PSYCHOLOGIST 633, 636 (1981) (requiring psychologists to "fully inform" persons they evaluate about "the purpose and nature of [the] evaluative procedure"). As a general matter, the clinician will be able to tell the defendant that his disclosures will only be used against him to address issues related to his mental condition. Additionally, in the pre-notice reconstructive and capital sentencing contexts, use of the defendant's disclosures will occur only if he and his attorney decide to introduce clinical testimony. While such "warnings" may still inhibit the clinical process, they should not be as damaging to clinical rapport as the *Miranda* litany.