CONSTITUTIONAL LAW—PRIVILEGE AGAINST SELF-INCRIMINATION DOES NOT PREVENT COMPULSORY MENTAL EXAMINATION IN CRIMINAL SEXUAL PSYCHOPATHY PROCEEDING—*State ex rel. Haskett v. Marion County Criminal Court, 234 N.E.2d 636 (Sup. Ct. Ind., 1968)*—Indiana statutes for the determination and commitment of criminal sexual psychopaths[1] provide that an alleged psychopathic person is required, under penalty of contempt of court, to answer questions propounded in a mental examination by appointed physicians.[2] After Haskett was charged with the criminal offense of 'peeping in house,' proceedings were begun under the statute to have him determined to be a criminal sexual psychopath. Such determination would operate as a bar to further prosecution of the criminal charge.[3] Haskett brought an original action in the Indiana Supreme Court to compel the lower court to strike its order requiring him "to answer all questions put to him by physicians and each of them pursuant to statute," contending that the statute and the order violated his privilege against self-incrimination.[4] He apparently did not argue that disclosures compelled in the mental examination might be used in any criminal prosecution. As the court noted, the Indiana statute provides that the report of the examining physicians "shall not be considered to be competent evidence in any other proceeding filed against the accused except the hearing . . . into the alleged psychopathy of the accused."[5] The order to answer questions was apparently challenged as compelling disclosure of information that could be used against the petitioner in the psychopathy hearing itself. The Indiana Supreme Court held the privilege was not violated.

The court relied heavily on *People v. English*,[6] which involved a similar order under the Illinois Sexually Dangerous Persons Act.[7] Since the Illinois Act provides for involuntary commitment, the *English* court said, some of the procedural safeguards applicable in a criminal proceeding will apply in proceedings under the Act. For example, the defendant has the right to confront the witnesses against him. Nonetheless, "[s]ince no criminal liability is attached to the status of a sexually dangerous person, the evil at which the privilege is aimed is not present when the compelled examination shows no more than the existence or nonexistence of this status."[8] Since the Act did not require that incriminating statements made to examining psychiatrists be excluded from any subsequent criminal prosecutions, the *English* court held the defendant could not be required to answer questions when the answers might be incriminating.[9]

After quoting at length from *People v. English*, the *Haskett* court held the order was valid on two grounds. First, the proceedings under the statute were

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[1] IND. ANN. STAT. §§ 9-3401 to 9-3403 (1956), 9-3404 (Supp. 1968).

[2] *Id.* § 9-3404(a).

[3] *Id.* § 9-3404.

[4] It does not appear from the opinion whether the privilege was claimed under state law or federal law or both. The petitioner's brief was unavailable. Art 1, § 14 provides, "No person, in any criminal prosecution, shall be compelled to testify against himself."

[5] IND. ANN. STAT. § 9-3404(a) (Supp. 1968). However, the statute does not explicitly prohibit the physicians from themselves testifying in any criminal prosecution. Thus, if the accused should be found not to be a psychopathic person, the "peeping in house" charge could be recommenced, and the examining physicians could conceivably testify as to inculpating disclosures made by the defendant in the examination, even though their report would be inadmissible.

[6] 31 Ill. 2d 301, 201 N.E.2d 455 (1964).

[7] ILL. REV. STAT. ch. 38, §§ 105-01 to 105-12 (Smith-Hurd 1964).

[8] 31 Ill. 2d at 305, 201 N.E.2d at 458.

[9] *Id.* at 307, 201 N.E.2d at 459.

civil in nature, not criminal, while the privilege protects only against disclosure of facts involving criminal liability.[10] Second, compelled mental examinations of defendants who plead insanity in criminal prosecutions, and admission of testimony by examiners as to their conclusions, are not unconstitutional as compelling self-incrimination.[11] Therefore, even if the commitment proceedings were criminal in nature, the privilege would not prevent the compulsory mental examination. Each ground of decision will be separately discussed.

I. THE CIVIL-CRIMINAL DISTINCTION

In addition to *People v. English*, there are other cases holding sexual psychopath commitment proceedings to be civil rather than criminal in nature,[12] and denying the applicability of the privilege against self-incrimination on this ground.[13] Arguments that have been advanced in support of the civil nature of commitment under the sexual psychopath statute include the following: the statute is not contained in the Penal Code of the State;[14] the purpose of the statute is remedial, curative, and to protect society and not punitive;[15] commitment is not based upon commission of any criminal act but on the status of being a psychopath;[16] commitment is based not upon conviction and sentence but is because of the defendant's acts and condition;[17] and the statutes are merely extensions of the laws relating to mentally incompetent persons to persons who are sexual psychopaths.[18] In no instance have proceedings under a sexual psychopath commitment statute been held criminal.[19]

A dark shadow is cast upon this unanimity of opinion by two recent decisions. In *United States ex rel. Gerchman v. Maroney*,[20] proceedings under Pennsylvania's Barr-Walker Act[21] were held invalid as denying procedural due process. Under the Barr-Walker Act, one convicted of any of several specified offenses, if found to constitute "a threat of bodily harm to members of the public,"[22] may be sentenced to a state institution for an indeterminate term, from one day to life, in lieu of the sentence otherwise provided. The government argued that the proceeding was "a civil commitment for petitioner's benefit, or alternatively, a simple sentencing

[10] 234 N.E.2d 636, 641 (Sup. Ct. Ind. 1968).

[11] *Id.* at 643.

[12] *Ex parte* Reddy, 105 Cal. App. 2d. 215, 233 P.2d 159 (1951); *In re* Moulton, 96 N.H. 370, 77 A. 2d 26 (1950). Where the requisite liability is possible in the present or some future proceedings, the privilege may be asserted in any proceeding, regardless of its nature. *See* Sevigny v. Burns, 108 N. H. 95, 227 A.2d 775 (1967).

[13] State v. Madary, 178 Neb. 383, 133 N.W.2d 583 (1965); State *ex rel.* Sweezer v. Green, 360 Mo. 1249, 232 S.W.2d 897 (1950); People v. Chapman, 301 Mich. 584, 4 N.W.2d 18 (1942).

[14] People v. Chapman, 301 Mich. 584, 4 N.W.2d 18 (1942).

[15] State *ex rel.* Sweezer v. Green, 360 Mo. 1249, 232 S.W.2d 897 (1950).

[16] *Ex parte* Keddy, 105 Cal. App. 2d. 215, 233 P.2d 159 (1951).

[17] People v. Chapman, 301 Mich. 584, 4 N.W.2d 18 (1942).

[18] Malone v. Overholzer, 93 F.Supp. 647 (D.D.C. 1950).

[19] However, in People v. Nastasio, 19 Ill. 2d 524, 529, 168 N.E.2d 728, 731 (1960), it was said that proceedings under the Illinois Sexually Dangerous Persons Act "in fact closely resemble criminal prosecutions in many critical respects." Because of this resemblance, certain provisions of the Civil Practices Act were held not authorized in such proceedings. This case was subsequently limited by *People v. English.*

[20] 355 F.2d 302 (3d Cir. 1966).

[21] PA. STAT. ANN. tit. 19, §§ 1166-74 (Purdon, 1952).

[22] *Id.* § 1166.

proceeding. . . ."[23] But the court held that the post-conviction proceedings under the Act are criminal in nature, and independent of those resulting in the conviction on which they are based.[24]

> This criminal punishment does not lose its characteristic because the Act goes beyond simple retribution. "It would be archaic to limit the definition of 'punishment' . . . to 'retribution'." Punishment serves several purposes; retributive, rehabilitative, deterrent and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.[25]

Gerchman was held entitled, to all the procedural safeguards essential to a fair trial, including the right to confront and cross-examine the witnesses against him.

This case was cited with approval in *Specht v. Patterson*,[26] where the United States Supreme Court held proceedings under a similar statute[27] deficient for the same reasons. Because an increased penalty can result from the determination that a person constitutes a "threat of bodily harm", "invocation of the . . . Act means the making of a new charge leading to . . . punishment"[28] which is "criminal punishment even though it is designed not so much as retribution as it is to keep individuals from inflicting future harm."[29]

Differences between the acts in question in *Gerchman* and *Specht* and the Indiana statutes are undeniable, and should not be minimized. The Barr-Walker and Colorado Sex Offenders Statutes require as prerequisites the conviction for certain crimes;[30] the Indiana statutes may be invoked where there has been no conviction, but a charge of certain criminal conduct filed. The Barr-Walker and Colorado Sex Offenders Statutes prescribe a maximum *sentence* of life *imprisonment*, with release dependent on a determination by the Board of Parole;[31] one found to be a criminal sexual psychopath under the Indiana statute is committed to the State Council for Mental Health for confinement in an appropriate state institution.[32]

But there are also important similarities. One is the finding of fact required. Under the Barr-Walker Act the court must find that the person, "if at large, constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill;"[33] a complete psychiatric examination and submission of a written report to the court are also required.[34] The Colorado Sex Offenders Statute contains the same requirements.[35] The Indiana statute defines a criminal sexual psychopath as one "over the age of sixteen (16) years who is suffering from a

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[23] 355 F.2d at 309.

[24] *Id.*

[25] *Id.*, quoting from United States v. Brown, 381 U.S. 437, 458 (1965).

[26] 386 U.S. 605 (1967).

[27] COLO. REV. STAT. ANN. §§ 39-19-1 to 39-19-10 (1963).

[28] 386 U.S. at 610.

[29] *Id.* at 608-09.

[30] PA. STAT. ANN. tit. 19 § 1166 (Purdon 1952); COLO REV. STAT. ANN. § 39-19-1 (1963).

[31] PA. STAT. ANN. tit. 19, §§ 1166, 1172 (Purdon 1952); COLO. REV. STAT. ANN. §§ 39-19-1, 39-19-7 (1963).

[32] IND. ANN. STAT. § 9-3404 (Supp. 1968).

[33] PA. STAT. ANN. tit. 19, § 1166 (Purdon 1952).

[34] *Id.* at § 1167.

[35] COLO. REV. STAT. ANN. §§ 39-19-1, 39-19-2 (1963).

mental disorder and is not insane or feebleminded which mental disorder is coupled with criminal propensities to the commission of sex offenses. . . ."[36] The subject's mental condition and his tendency to anti-social behavior are the major elements in each of the required findings of fact.

One against whom the Barr-Walker Act or Colorado Sex Offender Act is invoked must have been convicted of a crime, whereas one against whom the Indiana statute is invoked might not have been convicted. But this distinction is in measure offset by the fact that commitment under the Indiana statute depends on the filing of a criminal charge and a finding of "criminal propensity to commit crimes". These requirements arguably make the proceedings equally as crime-related as those in *Gerchman* and *Specht*. Further, both the Barr-Walker proceedings in *Gerchman* and the Colorado proceedings in *Specht* were held to be independent of the prior convictions,[37] rather than simply sentencing hearings. The decisive factor in those decisions was not the fact of prior convictions but the possible imposition of criminal punishment. This would seem to minimize the importance of differences between the statutory prerequisites.

The difference between imprisonment and confinement in a mental institution may be an important one in theory.[38] *Gerchman* and *Specht*, by stressing the fact of confinement more than the diverse purposes to be achieved thereby, reduce the importance of this difference. The practical difference between commitment and imprisonment may be small indeed.[39]

It is not doubted that an insanity commitment proceeding is a civil proceeding.[40] And commitment under a sexual psychopath statute has been upheld as an extension of the laws relating to insane persons and to persons with psychopathic personalities.[41] But is such a commitment still clearly a civil proceeding? The purpose of the proceeding is to effect what, in some jurisdictions, is effected by post-conviction sentencing proceedings: the proceeding is instituted only against those who have been charged with crime (and is thus in a sense an alternative to prosecution), and to commit only those found to have propensities to the commission of sex offenses. It is not clear that the proceeding is a civil one. *Gerchman* and *Specht* say nothing directly against the applicability of the privilege against self-incrimination; but they cast great doubt on the persuasiveness of the civil-criminal distinction as a basis for determining its applicability in this case.

II. Self Incrimination in Pre-Trial Examination

For the second ground of its decision, that compelled mental examinations are permissible in certain criminal proceedings, the court in *Haskett* relied on *Noelke v. State*,[42] and similar decisions.[43] These are older cases, however, and do not

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[36] Ind. Ann. Stat. § 9-3401 (1956).

[37] 355 F.2d at 309; 386 U.S. at 610.

[38] Commonwealth v. Page, 339 Mass. 313, 159 N.E.2d 82 (1959); *In re* Maddox, 351 Mich. 358, 88 N.W.2d 470 (1958).

[39] American Bar Foundation, Mentally Disabled and the Law, 306-08 (1961); Tappan, Report of the New Jersey Commission on the Habitual Sex Offender, 32 (1950); Hacker & Frym, *The Sexual Psychopath Act in Practice: A Critical Discussion*, 43 Calif. L. Rev. 766, 773 (1955); Tenney, *Sex, Sanity, and Stupidity in Massachusetts*, 42 B. U. L. Rev. 1, 19-20 (1962); Note, *The Plight of the Sexual Psychopath, A Legislative Blunder and Judicial Acquiescence*, 41 Notre Dame L. Rev. 527, 552 (1956).

[40] Hock v. Simes, 98 N. H. 380, 98 A.2d 165 (1953); *In re* Brewer, 224 Iowa 773, 276 N. W. 766 (1937).

[41] Minnesota *ex rel* Pearson v. Probate Court, 309 U.S. 270 (1940).

[42] 214 Ind. 427, 15 N.E.2d 950 (1938).

adequately reflect the current state of the law in this area. A multitude of recent cases exhibits diverse treatment of a growing number of issues, and the jurisprudence must be said to be in a state of unsettlement on this question.

Although numerous cases contain language upholding court-ordered mental examinations where defendant's sanity is an issue in a criminal prosecution,[44] in most of these cases, including *Noelke v. State*, no objection was made to appointment of physicians, or at the examination, but only at trial, to physicians' testimony regarding the examination. Thus the examinations were in these cases not compelled, and the language there supporting compelled examinations is dictum. In *State v. Myers*[45] this dictum is stated as a rule of law, and an order directing the mental examination of one charged with murder was upheld against the defendant's objection. In recent years a number of courts have ruled on the validity of ordering such examinations where defendant objects, asserting his privilege against self-incrimination. In some of these cases the privilege was held violated;[46] others have upheld the orders.[47] An analysis of the reasoning in some of these cases shows the unsettled state of the law, and the uncertainty of its implications for the somewhat analogous issue in *Haskett.*

In *French v. District Court*[48] defendant's privilege against self-incrimination was held violated when the trial court struck his defense of insanity in response to his refusal to answer questions propounded by physicans appointed to determine his mental condition. *State v. Olson*[49] held invalid an order requiring defendant to submit to and cooperate in a pre-trial examination. In both *French* and *Olson* the nature and scope of the privilege recognized is not entirely clear. The privilege could be seen as permitting compelled examinations where defendant's statements could affect the trial court's finding only as to his mental condition, but not where there is danger of their influencing in any way the finding as to his guilt or innocence. Alternatively, a broader view of the privilege as a right to remain silent even where speaking could adversely affect only the finding as to defendant's sanity could be recognized. *French* and *Olson* hint at adoption of both of these alternatives.[50]

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[43] Cases cited in Annot. 32 A.L.R.2d 434, 444-48 (1953). Several of the cases cited there specifically upheld mental examinations only to the extent that they are not compelled, however. Hunt v. State, 248 Ala. 217, 27 So. 2d 186 (1946); People v. Strong, 114 Cal. App. 522, 300 P. 84 (1931).

[44] Commonwealth v. Butler, 405 Pa. 36, 173 A.2d 468, *cert. denied*, 368 U.S. 945 (1961), *rehearing denied*, 368 U.S. 972 (1962); McVeigh v. State, 73 So. 2d 694 (Sup. Ct. Fla. 1954), *app. dismissed*, 348 U.S. 885 (1954); State v. Grayson, 239 N.C. 453, 80 S.E.2d 387 (1954); Jessner v. State, 202 Wis. 184, 231 N.W. 634 (1930).

[45] 220 S.C. 309, 67 S.E.2d 506 (1951).

[46] French v. District Court, 153 Colo. 10, 384 P.2d 268 (1963); State v. Olson, 274 Minn. 225, 143 N.W.2d 69 (1966), Sheperd V. Bowe, ——Ore.——, 442 P.2d 238 (1968).

[47] State v. Whitlow, 145 N.J. 3, 210 A.2d 763 (1965); Battle v. Cameron, 260 F.Supp. 804 (D.D.C. 1966); State *ex rel.* LaFollette v. Raskin, 34 Wis.2d 607, 150 N.W.2d 318 (1967); United States v. Albright, 388 F.2d 719 (4th Cir. 1968).

[48] 153 Colo. 10, 384 P.2d 268 (1963).

[49] 274 Minn. 225, 143 N.W.2d 69 (1966).

[50] Thus, for example, the court in *Olson* held that the problem of preventing statements made by defendant to examining physicians from influencing the jury's finding on the issue of guilt rather than solely on the issue of sanity, should be resolved by legislation. The court also remarked, however, that the Fifth Amendment and the Minnesota Constitution "prohibit without question this kind of testimonial compulsion against the defendant's will . . . the defendant may remain silent if he chooses to do so." 274 Minn. at 231, 143 N.W.2d at 72. While the court in *French* noted the danger that defendant may make incriminating statements to examin-

The Oregon Supreme Court, on the other hand, clearly saw defendant's privilege threatened only as his compelled statements threatened to have an affect on the issue of his guilt, either by being introduced at trial, or by leading investigators to other incriminating evidence. In *Phillips v. State*[51] the court upheld a court-ordered mental examination in which the defendant was required to answer questions not related to the offense charged.[52] The same approach is adopted in *State v. Whitlow*[53] and *State ex rel. LaFollette v. Raskin*;[54] and in the view of these courts, adequate measures could be taken to prevent evidence obtained in mental examinations from affecting the trial court's decision on the issue of guilt.[55]

Two theories which would support the view of these latter cases no longer seem valid or widely accepted. In a few earlier cases it was said that a plea of not guilty by reason of insanity, or even the likelihood of such a plea, constituted a waiver of the privilege.[56] This theory clearly has no relevance where, as in *Haskett*, the mental examination is required by statute and is not contingent upon any act or plea of the defendant. A more widely accepted theory was that a mental examination, like a physical examination, produced only non-testimonial evidence, and so fell outside the privilege. This view finds significant support.[57] It was espoused by Wigmore,[58] in other treatises,[59] in the Model Code of Evidence,[60] and in the Model Penal Code.[61] Nevertheless it has met with scholarly opposition, most cogently expressed in Danforth, *Death-Knell for Pre-Trial Mental Examinations? Privilege Against Self-Incrimination.*[61] What had been called the leading case on the point[63] was, in effect, overruled in *LaFollette*:

> To obtain the full benefit of compulsory examination we think it should not be limited in scope to the observation of physical characteristics of the subject but may encompass inquiries concerning past conduct of the accused

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ing physicians which could be introduced at trial with possible prejudicial influence on the finding as to his guilt, at the same time it seemed to recognize a broader right to remain silent, when it said, "A person accused of a crime who enters a plea of not guilty by reason of insanity, cannot be compelled to carry on conversations against his will under the penalty of forfeiture of the defense for failure to respond to questions. . . ." 153 Colo. at 14, 384 P.2d at 270.

[51] 245 Ore. 466, 422 P.2d 670 (1967).

[52] Sheperd v. Bowe , —— Ore. ——, 442 P.2d 238 (1968), decided after *Haskett*, reaffirmed *Phillips*, but held that defendant could not be ordered to answer questions when to do so might incriminate him, and the court may not order defendant's lawyer not to advise him not to answer incriminating questions.

[53] 145 N.J. 3, 210 A.2d 763 (1965).

[54] 34 Wis. 2d 607, 150 N.W.2d 318 (1967).

[55] In *Whitlow* this was done by not permitting questions related to the alleged crime, unless necessary, and instructing the jury to disregard evidence obtained in the mental examination except on the issue of defendant's sanity. In *LaFollette*, it was done through a sequential order of proof in a single trial.

[56] People v. Castro, 140 Colo. 493, 346 P.2d 1020 (1959); State v. Swinburne, 324 S.W.2d 746 (Sup. Ct. Mo. 1959); People v. Esposito, 257 N.Y. 389, 39 N.E.2d 925 (1942).

[57] Battle v. Cameron, 260 F. Supp. 804 (D.D.C. 1966); State v. Grayson, 239 N.C. 453, 80 S.E.2d 387 (1954); State v. Myers, 220 S.C. 309, 67 S.E.2d 506 (1951); Jessner v. State, 202 Wis. 184, 231 N.W. 634 (1930).

[58] 8 WIGMORE, EVIDENCE § 2265 (McNaughton rev. ed., 1961).

[59] 1 GREENLEAF, EVIDENCE 616 (16th ed. 1899); MCCORMICK, EVIDENCE 266 (1954).

[60] MODEL CODE OF EVIDENCE rule 25, Comment (1942).

[61] MODEL PENAL CODE § 4.05, Comment (Tent. Draft No. 5, 1966).

[62] 19 RUTGERS L. J. 489, 499 (1965). See also sources cited note 66 *infra.*

[63] Jessner v. State, 202 Wis. 184, 231 N.W. 634 (1930), so called in a comment in the Model Penal Code, cited note 61 *supra.*

and requires testimonial response to questions which would be within the privilege against self-incrimination.[64]

If all evidence obtained in a mental examination were truly non-testimonial in character, the privilege would not apply to prevent its use directly on the issue of guilt. Yet *Whitlow*, *LaFollette*, *Myers*, and other cases recognize that confessions or other inculpatory statements made in the course of the compulsory examination may be admitted only on the issue of sanity. They reject the theory to that extent. Yet if such utterances are testimonial with respect to the issue of guilt, are they not testimonial with respect to the issue of sanity? The psychiatrist certainly relies upon the information given him by the examinee[65] in forming his conclusions.

Two supporting theories have been used to justify compelled cooperation in mental examinations. First, though there is testimonial compulsion, there is no threat of incriminating where the evidence obtained will be admissible only as to the sanity of the defendant.[66] The issue of sanity is independent of the issue of guilt it is argued. Clearly, however, the issues are not independent. The defendant's mental condition at the time of the crime is material only insofar as it bears upon his guilt or innocence of the crime, either through the defense of insanity or through the requisite *mens rea* as an element of the offense.

The second argument is that of expediency. The consequences of the privilege for pre-trial mental examinations have been avoided, except in *French* and *Olson*, by stressing an ideal of fairness, the right of the government, when defendant pleads insanity, and especially where the burden of proving competence is on the state, to have equal access to evidence bearing on that issue. The gist of this argument is that, unless the privilege is held inapplicable, justice is likely to be defeated.

In *United States v. Albright*[67] the defendant's privilege was defeated by an ideal of fairness found by the court in the privilege itself. Defendant's compelled statements to the psychiatrist in a court-ordered mental examination were held admissible at trial. On the basis of language in *Miranda v. Arizona*[68] the court held that the underlying purposes of the privilege were served by upholding the compelled mental examination. Where the accused seeks to defend on the basis of insanity, the required mental examination "maintains the fair state-individual balance"[69] by allowing the government equal access to the only reliable means of ascertaining the truth. Moreover, "the inviolability of the human personality" demands that the issue be determined on the most reliable evidence available.[70] This is at least a novel interpretation of the privilege. While placing great importance on some phrases in *Miranda*, it completely ignores much else in that opinion that indicates that the privilege is not meant to be fair to the government,

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[64] 34 Wis. 2d at 622, 150 N.W.2d at 326.

[65] Danforth, *Death-Knell for Pre-Trial Mental Examinations? Privilege Against Self Incrimination.*, 19 RUTGERS L. J. 487, 497 (1965).

[66] *Id.* at 497, 498; Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 YALE L. J. 905, 920 (1961); Comment, *Compulsory Mental Examinations and the Privilege Against Self-Incrimination*, 1964 WIS. L. REV. 671, 678; Note, *Pretrial Mental Examination and Commitment: Some Procedural Problems in the District of Columbia*, 51 GEO. L. J. 143, 151.

[67] 388 F.2d 719 (4th Cir. 1968) This case was decided after *Haskett.*

[68] 384 U.S. 436 (1966).

[69] 388 F.2d at 724.

[70] *Id.* at 725.

but rather to weigh the balance in favor of the individual.[71] Perhaps it may be expedient to deny availability of the privilege in certain instances. It is not possible to do so consistently with the present theory of the privilege, as set out in *Miranda.*

Strictly, the privilege should be made available to prevent compelled conversations with examining psychiatrists in criminal prosecutions where the defendant pleads insanity. In most cases this has not been done; restrictions have been placed on the use of the evidence obtained. But the theories on which this approach has been predicated do not apply to the proceedings in *Haskett.* There the defendant's mental condition is clearly not a separate, collateral issue, but the main issue. Nor is it an issue raised by the defendant, which it would be unfair to deny the government the opportunity to rebut. There is much less reason, therefore, to refuse an assertion of the privilege.

III. CONCLUSION

The *Haskett* court bases its decision on two grounds. First, the privilege against self-incrimination protects against potential criminal liability, but the Indiana sexual psychopath proceeding involves no such liability; and second, even in criminal prosecutions, compelled mental examinations have been upheld as not violating the privilege. Neither of these arguments is persuasive. The second is an inaccurate summary of the case law, and not relevant to psychopath proceedings, where the defendant's mental condition is not a merely collateral issue. The first argument is an application of labels which conceal rather than reflect the realities.

Under the Indiana statutes one stands to be deprived of one's liberty, indefinitely, as a result of having been charged with crime and determined to have criminal propensities to commit sex offenses. The policy of the privilege against self-incrimination, according to *Miranda,* is to require the government "to shoulder the entire load," to produce the evidence against a defendant by its own independent labors rather than by the cruel, simple expedient of compelling it from his own mouth.[72] This policy should apply where the government seeks to confine a person by proving a criminal propensity as well as where it seeks to confine a person by proving the actual commission of a crime.

Implicit in decisions like *Haskett* is the fear that availability of the privilege in sexual psychopath proceedings might largely defeat operation of the statutes. This should be an irrelevant consideration. It may be noted, however, that the statutes have long been criticized as unnecessary, ineffective, and subject to abuse, and their passing should not be cause for dismay. It is unfortunate that in *Haskett* the Indiana Supreme Court upheld the statutes instead of the privilege.

Brian G. Thomas

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[71] 384 U.S. at 460.

[72] *Id.*