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The Use of Illegally Obtained Evidence to Rebut the Insanity Defense: A New Exception to the Exclusionary Rule

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COMMENTS

THE USE OF ILLEGALLY OBTAINED EVIDENCE TO REBUT THE INSANITY DEFENSE: A NEW EXCEPTION TO THE EXCLUSIONARY RULE?

I. INTRODUCTION

The fourth amendment protects individuals from unreasonable searches and seizures.[1] To effectuate these rights, the Supreme Court created the exclusionary rule,[2] which mandates that any evidence illegally obtained be excluded from trial.[3] Similarly, to ensure fifth amendment rights against self-incrimination and of due process,[4] the Court held in *Miranda v. Arizona*[5] that "the 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."[6]

Frequent conflicts have arisen between an accused's fourth or fifth

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[1] Weeks v. United States, 232 U.S. 383, 391-92 (1914). The fourth amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

[2] The Supreme Court first adopted the exclusionary rule in Weeks v. United States, 232 U.S. 383 (1914).

[3] *Weeks*, 232 U.S. at 398. In *Weeks*, the Supreme Court ordered that letters and documents seized during a warrantless search of the defendant's house be excluded from evidence and restored to the defendant. *See infra* text accompanying notes 35-40.

[4] The fifth amendment provides: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V; *see also* Bram v. United States, 168 U.S. 532 (1897) (prohibited use of involuntary confessions against defendants as violative of fifth amendment).

[5] 384 U.S. 436 (1966).

[6] *Id.* at 444. The Court further held that the right to have counsel present at the interrogation is indispensable to the protection of the fifth amendment privilege; therefore, "[n]o effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings" set forth by the Court have been given. *Id.* at 470.

amendment rights, on one hand, and, on the other hand, the interests of law enforcement personnel in securing criminal convictions.[7] More often than not, evidence excluded for either fourth or fifth amendment purposes establishes "beyond virtually any shadow of a doubt" that the defendant is guilty.[8] In the past, exclusion of illegally obtained evidence also permitted defendants to commit perjury and go unpunished because the prosecution could not use the illegal evidence to challenge their credibility.[9]

This conflict has led the Supreme Court to create several exceptions to the exclusionary rule in order to restrict application of the rule to those situations "where its remedial objectives are thought most efficaciously served."[10] Thus, the prosecution can use illegally obtained evidence to impeach a defendant.[11] The Court has also prohibited application of the rule in searches following arrests under presumptively valid statutes later held unconstitutional,[12] in federal habeas corpus proceedings,[13] in federal civil tax cases,[14] in grand jury hearings,[15] or to bar testimony of a witness whose identity was discovered as the result of an illegal search.[16] Finally, the Court has narrowed the class of persons eligible to challenge the legality of a search.[17] These recent modifications of the exclusionary rule have led some commentators to conclude that the Court is ready to abandon or modify the rule.[18]

Recently, federal prosecutors proposed a new exception to the exclusionary rule in *United States v. Hinckley*.[19] In *Hinckley* the government moved to admit illegally obtained evidence solely to rebut Hinckley's insanity defense. While both district and appellate courts denied the

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[7] *See, e.g.*, Alderman v. United States, 394 U.S. 165, 174-75 (1969).

[8] Kaufman v. United States, 347 U.S. 217, 237 (1969) (Black, J., dissenting); *see also* Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736 (1972).

[9] Walder v. United States, 347 U.S. 62, 65 (1954). Since the Court's adoption of the impeachment exception in *Walder*, this problem has been eliminated. For further discussion, see *infra* text accompanying notes 64-78.

[10] United States v. Calandra, 414 U.S. 338, 348 (1974).

[11] The impeachment exception, created in *Walder*, 347 U.S. at 65, is the oldest exception to the exclusionary rule.

[12] Michigan v. DeFillippo, 443 U.S. 31 (1979).

[13] Stone v. Powell, 428 U.S. 465 (1976).

[14] United States v. Janis, 428 U.S. 433 (1976).

[15] *Calandra*, 414 U.S. 338.

[16] Michigan v. Tucker, 417 U.S. 433 (1974).

[17] *See, e.g.*, United States v. Salvucci, 448 U.S. 83 (1980) (defendants in criminal prosecution charged with crimes of possession do not have "automatic standing" to challenge legality of search); Rakas v. Illinois, 439 U.S. 128 (1978) (only defendants whose fourth amendment rights were violated may benefit from exclusionary rule's protections).

[18] *See* 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT §1.2 at 21 (1978); *The Supreme Court 1979-80 Term—Exclusionary Rule*, 27 CRIM. L. REP. (BNA) 4137 (July 23, 1980).

[19] 515 F. Supp. 1342 (D.D.C. 1981), *aff'd*, 672 F.2d 115 (D.C. Cir. 1982).

motion,[20] within two months of the appellate court's decision an Illinois appellate court reached the opposite conclusion in *People v. Finkey*.[21]

Both the District of Columbia Circuit and the Illinois appellate courts based their decisions on the deterrence rationale underlying the exclusionary rule. The *Hinckley* court reasoned that deterrence flowing from the rule would suffer if it permitted the government to use illegally obtained evidence to rebut the defendant's insanity defense.[22] The *Finkey* court, however, noted that the same degree of deterrence existing under the impeachment exception would remain if the state used the illegal evidence in rebuttal.[23] Furthermore, where the Court of Appeals for the District of Columbia saw no reason to single out the insanity defense for special treatment under the exclusionary rule,[24] the *Finkey* court gave special weight to the difficulty of rebutting the insanity defense.[25]

These two courts reached opposite conclusions because of their different philosophies concerning application of the exclusionary rule to exclude illegal evidence relevant to an individual's insanity defense. Debate over use of illegally obtained evidence arises from the conflict between the need to protect an accused's fourth and fifth amendment rights and the equally strong interest of society in securing criminal convictions.[26] Much of the debate turns on whether exclusion of illegally obtained evidence furthers deterrence of police misconduct or merely impedes the truth-finding process.[27]

The need to present all relevant information to the trier of fact increases when a defendant asserts an insanity defense.[28] A determination

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20 515 F. Supp. at 1358, 672 F.2d at 134.

21 105 Ill. App. 3d 230, 434 N.E.2d 18 (1982). In both *Hinckley* and *Finkey*, the illegally obtained evidence that prosecutors sought to admit concerned statements made by the defendants to law enforcement officers. In *Hinckley* the government also moved to introduce papers seized from the defendant's cell at the Federal Correctional Institution at Butner. The court's opinion, however, dealt only with the *Miranda*-violative statements in relation to the rebuttal of the insanity defense. *Hinckley*, 672 F.2d at 132-34. Therefore this Comment will only address the *Miranda* issue.

22 *Hinckley*, 672 F.2d at 133.

23 *Finkey*, 105 Ill. App. 3d at 232, 434 N.E.2d at 20. The court reasoned that to allow the defendant to establish through representations to a psychiatrist a possibly fraudulent insanity defense without affording the state an opportunity to challenge those statements would be the same as allowing a defendant "to directly perjure himself and then hide behind the fifth amendment . . . ." *Id.*

24 *Hinckley*, 672 F.2d at 134.

25 *Finkey*, 105 Ill. App. 3d at 232, 434 N.E.2d at 20.

26 *Alderman*, 394 U.S. at 174-75; *see also Powell*, 428 U.S. at 488-89; *Calandra*, 414 U.S. at 348.

27 *See, e.g., Powell*, 428 U.S. at 489-92. For further discussion of this debate, see *infra* notes 51-78 and accompanying text.

28 *See, e.g.*, United States v. Brawner, 471 F.2d 969, 994 (D.C. Cir. 1972)(en banc). Both the exclusionary rule and the insanity defense have been the objects of much debate in recent

of whether illegal evidence may be used to rebut insanity turns upon the definition of insanity applied by the courts and the allocation of the

years. Groups at the state and federal levels have urged the abolition of both, thus far with only limited success. In 1982 California eliminated the exclusionary rule with the adoption of Proposition 8, which reformed California's criminal code. Since the *Hinckley* trial and its verdict of not guilty by reason of insanity, numerous states as well as Congress have been re-evaluating the insanity defense. Some urge the adoption of a new verdict form, "guilty but mentally ill." Seven states have now adopted this law: ALASKA STAT. §§ 12.47.030, 12.47.050 (Supp. 1982); DEL. CODE ANN. tit. 11 § 408 (1982); GA. CODE ANN. § 27-1503 (1983); ILL REV. STAT. ch. 38, §§ 115-3(c), 1005-2-6 (1981); IND. CODE § 35-36-2-3 (1982); KY. REV. STAT. ANN. §§ 31-9-3, 31-9-4 (Supp. 1982); MICH. COMP. LAWS § 768.36 (1976). Others advocate abolishing the defense entirely. *See* Richardson, *Should We Allow the Hinckley Backlash to Cause Bad Law? The Insanity Defense*, 53 OKLA. B.J. 2180 (1982); 13 Crim. Just. Newsletter, Apr. 26, 1982, at 1-2 (insanity defense under attack); Nat'l L. J., May 3, 1982, at 1 (is insanity defense breaking down?); 109 N.J.L.J., May 27, 1982, at 8, col. 2 (Idaho abolishes the insanity defense); 95 L.A. Daily J., June 23, 1982, at 1, col. 6 *(Hinckley* prompts call for reform); 95 L.A. Daily J., July 7, 1982, at 4, col. 3 (pro "guilty but insane" verdict); 95 L.A. Daily J., August 11, 1982, at 4, col. 1 (against "guilty but mentally ill"); 110 N.J.L.J., August 12, 1982, at 7, col. 2 *(Hinckley* aftermath).

Numerous commentators have advocated abolishing the insanity defense and removing from the criminal trial the choice between medical and penal treatment of a convicted defendant. *See* United States v. Chandler, 393 F.2d 920, 927 (4th Cir. 1968) (penologists, rather than trial court, should determine criminal responsibility of defendant who raises insanity defense); AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW 378 (S. Brakel & R. Rock rev. ed. 1971); Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 YALE L.J. 853, 869-71 (1963)(new laws rather than the insanity defense are necessary to deal with insane individuals who have committed crimes); Pugh, *The Insanity Defense in Operation: A Practicing Psychiatrist Views* Durham *and* Brawner, 1973 WASH. U.L.Q. 87, 106-08 (commitment for psychiatric treatment should be considered at sentencing, not at adjudication of guilt). *But see Brawner*, 471 F.2d at 985-86 (reassessment of viability of insanity defense is for the legislative branch, not the judiciary). Other commentators believe that the defense comprises so integral a part of the common law that abolition might violate the accused's constitutional right of due process. AMERICAN BAR FOUNDATION, *supra*, 378-79; A. GOLDSTEIN, THE INSANITY DEFENSE 222-23 (1967); Dershowitz, *Abolishing the Insanity Defense: The Most Significant Feature of the Administration's Proposed Criminal Code—An Essay*, 9 CRIM. L. BULL. 434, 436 (1973)(insanity defense has traditional place in our legal system).

Several Supreme Court justices have proposed changes in the exclusionary rule. *See, e.g.*, Illinois v. Gates, 103 S. Ct. 2317, 2336-51 (1983) (White, J., concurring) and Brown v. Illinois, 422 U.S. 590, 611-13 (1975)(Powell, J., concurring in part)(advocating adoption of good faith exception to exclusionary rule); Bivens v. Six Unknown Named Fed. Narcotics Agents, 403 U.S. 388, 420-23 (1971)(Burger, C.J., dissenting) (exclusion is an "anomalous and ineffective mechanism" and Congress should evaluate the rule and adopt a more effective alternative); Coolidge v. New Hampshire, 403 U.S. 443, 490 (1971) (Harlan, J., concurring) (search and seizure law in general should be completely overhauled); Olmstead v. United States, 277 U.S. 438, 468 (1928) (exclude evidence only where admission would violate constitutional rights). Commentators have also advocated reform; for a sampling, see Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1 (1964)(exclusion has not successfully deterred illegal law enforcement; proposes civil commission to review unconstitutional acts); Burns, Mapp v. Ohio: *An All American Mistake*, 19 DEPAUL L. REV. 80 (1969) (exclusionary rule and fourth amendment enforcement generally should be placed in hands of states); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 720-57 (1970) (rule is ineffective deterrent of illegal searches); *see also* Wingo, *Growing Disillusionment with the Exclusionary Rule*, 25 SW. L.J. 573 (1971) and Wright, *supra* note 8 (narrow application of rule by invoking only when violation is substantial).

burden of proof for this defense.[29] The Supreme Court has limited the exclusionary rule so that illegal evidence must automatically be excluded only from the prosecution's direct case, *i.e.*, where the prosecution must establish the guilt of the accused.[30] Specifically, the constitutionality of admitting illegal evidence to rebut the insanity defense depends upon whether proof of sanity is an element of a crime that the prosecution must prove as part of its case in chief.[31] Judges and commentators disagree as to whether insanity and mens rea can coexist.[32] Some urge that insanity completely negates mens rea, and therefore proof of insanity is an essential element of the crime.[33] Others maintain that mens rea exists separately from insanity, thus proof of sanity is completely separate from proof of the crime charged.[34]

This Comment analyzes whether the practical effects of using illegal evidence to rebut the insanity defense are consistent with current exclusionary jurisprudence, and concludes that the insanity-rebuttal exception is proper under certain circumstances. This Comment argues that this exception to the exclusionary rule conforms to the traditional exclusionary rationale for the impeachment exception. Moreover, the insanity-rebuttal exception is well-suited to the context of the insanity defense because it ensures that the trier-of-fact will receive all relevant information on the issue of the defendant's sanity.

II. THE DETERRENCE RATIONALE AS A BASIS FOR EXCEPTIONS TO THE EXCLUSIONARY RULE

A. THE DETERRENCE RATIONALE

From the inception of the exclusionary rule in *Weeks v. United States*,[35] courts and commentators alike have debated the theoretical rationale underlying the rule.[36] The judiciary and commentators have ad-

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29 The various definitions of the rules for the burden of proof with regard to insanity are set forth *infra* at notes 91-161 and accompanying text.

30 Harris v. New York, 401 U.S. 222, 225 (1971). For further discussion, see *infra* notes 64-78 and accompanying text.

31 *See infra* text accompanying notes 122-43.

32 *See infra* text accompanying notes 144-61.

33 *See* Davis v. United States, 160 U.S. 469, 484-85 (1895).

34 Note, *Mens Rea and Insanity*, 28 ME. L. REV. 500, 511 (1976). For further discussion of the relationship between insanity and mens rea, see *infra* notes 144-161 and accompanying text.

35 232 U.S. 383 (1914).

36 Justice Blackmun explicitly noted that "the evolution of the exclusionary rule has been marked by sharp divisions in the Court." United States v. Janis, 428 U.S. 433, 446 n.15 (1976). For a sample of commentators' debates over the theories and efficacy of the exclusionary rule, compare J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 78-79 (1966) *(Weeks* created personal right to exclusion of illegally seized evidence) with Burger, *supra* note 28, at 5, and McKay, Mapp v. Ohio, *The Exclusionary Rule and the Right of Privacy*, 15

vanced three theories in the cases: the personal right or privacy theory,[37] the judicial integrity theory,[38] and the deterrence theory.[39] Of

ARIZ. L. REV. 327, 329, 336 (1973) (*Weeks* decision represents Court's refusal to acquiesce in violations of fourth amendment). *Compare* Kamisar, *Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?*, 62 JUDICATURE 66, 78 (1978) (must enforce exclusionary rule because to do otherwise would be to sanction illegality) *with* Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214, 222, 227 (1978) (application of exclusionary rule leads to total distortion of truth and it should be discarded).

[37] Under the personal right or privacy theory, the victim of an illegal search and seizure is entitled to judicial exclusion of any illegally seized evidence as a matter of personal right. *See* J. LANDYNSKI, *supra* note 36, at 78-79. The *Weeks* Court apparently followed this theory in holding that the Constitution requires the police to return illegally obtained evidence to the accused. 232 U.S. at 392, 397-98. In *Weeks*, a United States Marshall conducted a warrantless search of the defendant's home and seized personal letters which implicated Weeks in a numbers racket. *Id.* at 387-88. The defendant asserted that this search violated his constitutional rights, demanding that the letters be returned to him. *Id.* at 389. The Court initially stated that all persons, innocent or guilty, are entitled to resort to the courts to vindicate their fourth amendment rights. *Id.* at 392. The Court concluded that use of evidence obtained illegally against an accused would emasculate the guarantees of the fourth amendment. *Id.* While the Court excluded the letters from evidence and ordered their restoration to Weeks, it did not specifically state that he was personally entitled to them. *Id.* at 392-94.

The *Weeks* personal right theory has eroded to the point that an accused has no absolute right to retrieve illegally seized evidence, *see* Welsh v. United States, 220 F.2d 200, 202 (D.C. Cir. 1955), to seek redress in the courts, *see* Walder v. United States, 347 U.S. 62 (1954), or have illegally obtained evidence excluded, *id.*; *see also* United States v. Calandra, 414 U.S. 338, 347 (1974) (purpose of exclusionary rule is not to redress injury to the privacy of search victim because " 'the ruptured privacy of the victims' homes and effects cannot be restored' ") (quoting Linkletter v. Walker, 381 U.S. 618, 637 (1965)). Moreover, the Court has stated outright that exclusion is not a constitutional right in and of itself, but merely a device created to effectuate fourth amendment guarantees. Stone v. Powell, 428 U.S. 465, 482, 486 (1976). Justice Rehnquist applied this rationale to exclude evidence obtained in violation of *Miranda* in Michigan v. Tucker, 417 U.S. 433, 446-49 (1974).

[38] The premise of the judicial integrity rationale is that the judiciary should not acquiesce in violations of the fourth amendment. The *Weeks* Court suggested this rationale when it warned that obtaining criminal convictions by unlawful means "should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution . . . ." 232 U.S. at 392; *see also* Elkins v. United States, 364 U.S. 206, 223-24 (1960). By excluding illegally obtained evidence, a court avoids legitimizing unconstitutional police conduct. Terry v. Ohio, 392 U.S. 1, 13 (1968); *see* Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1562 (1972).

The Court's use of the judicial integrity rationale has declined since its decision in Mapp v. Ohio, 367 U.S. 643 (1961), when it extended the exclusionary rule to state prosecutions under the fourteenth amendment, overruling its earlier decision in Wolf v. Colorado, 338 U.S. 25 (1949). *See* Kamisar, *supra* note 36. This decline has coincided with Supreme Court decisions limiting application of the exclusionary sanction. These decisions allow judicial acquiescence in police misconduct under certain circumstances, and are thus antithetical to the judicial integrity rationale. J. LANDYNSKI, *supra* note 36, at 76-77. Justice White, dissenting in *Powell*, pointed out the fallacies underlying the judicial integrity argument. Justice White argued that judges are not rendered participants in fourth amendment violations if they do not exclude illegally obtained evidence because "[e]xclusion of the evidence does not cure the invasion of the defendant's rights which he has already suffered." 428 U.S. at 540. Furthermore, when reliable and probative evidence is kept from the trier of fact, the entire truthfinding process is substantially impaired. *Id.* This in turn leads to a weakening of the public's conception of judicial integrity. Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV.

these rationales, deterrence has emerged as the primary justification for the exclusionary rule.[40]

The basic premise of the deterrence theory is that exclusion of illegally obtained evidence will "compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[41] Law enforcement personnel will respect fourth amendment rights because they learn that illegal searches and seizures will not produce admissible evidence.[42] Thus, the goal of the exclusionary rule is "to prevent, not to repair," or to protect the general public from future police misconduct rather than to redress the accused's constitutional rights or to ensure judicial integrity.[43]

In *United States v. Calandra*,[44] the Court went so far as to characterize deterrence as the sole purpose of the rule.[45] Although the Court has consistently recognized that all courts must be concerned with preserving the integrity of the judicial process,[46] it has explicitly stated that "this concern has limited force as a justification for the exclusion of highly probative evidence."[47] Furthermore, where the deterrent effect is insubstantial or "incremental," there is no reason for exclusion of the illegally obtained evidence.[48] Deterrence is the narrowest of the three rationales advanced for the exclusionary sanction.[49]

B. CRITICISM OF THE DETERRENCE THEORY

Even in its present limited form, the exclusionary rule has generated extensive criticism. Much of this commentary has centered on the

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1027, 1036 n.53 (1974). For further discussion of how exclusion impairs the truthfinding process, see *infra* text accompanying notes 64-78. Despite Justice White's valid arguments, the Court continues to recognize that "judicial integrity" is a relevant, although subordinate, factor in exclusionary jurisprudence. *See* United States v. Janis, 428 U.S. 433, 458 n.35 (1976).

39 *See, e.g.*, *Wolf*, 338 U.S. at 31-32.

40 *See, e.g.*, *Calandra*, 414 U.S. at 348; *Mapp*, 367 U.S. at 660; *Elkins*, 364 U.S. at 217; *Wolf*, 338 U.S. at 31. In *Calandra* the Court characterized deterrence as the rule's sole rationale. 414 U.S. at 348.

41 *Elkins*, 364 U.S. at 217. *See generally* United States v. Calandra, 414 U.S. 338 (1974).

42 *See* Oaks, *supra* note 28, at 668.

43 *Elkins*, 364 U.S. at 217; *see also Calandra*, 414 U.S. at 348.

44 414 U.S. 338 (1974).

45 *Id.* at 348.

46 *Powell*, 428 U.S. at 485.

47 *Id.*

48 *Calandra*, 414 U.S. at 349-51; *see also* Desist v. United States, 394 U.S. 244, 254 n.24 (1969) (Court "decline[s] to extend the court-made exclusionary rule to cases in which its deterrent purpose would not be served"); *Walder*, 347 U.S. at 65 (refused to extend the exclusionary rule to situations which would result in a perversion of the fourth amendment).

49 Note, *Confusion Regarding Exclusion: The Evolution of The Fourth Amendment*, 23 ARIZ. L. REV. 801, 806 (1981).

perceived inefficacy of the deterrence rationale.[50] Criticism from the Supreme Court, however, has centered primarily on the havoc the rule wreaks on the trial process.[51] In *Stone v. Powell*,[52] the Court noted that application of the exclusionary sanction diverts the focus of the trial from the ultimate question of guilt or innocence. Furthermore, application of the rule perverts the truth-finding process because the evidence excluded is "typically reliable and often the most probative information

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[50] *Powell*, 428 U.S. at 492 & n.32; *see also* United States v. Janis, 428 U.S. 433, 450 & n.22 (1976), for a review of the problems with various empirical studies of the exclusionary rule. These studies have been inconclusive as to whether deterrence does result from exclusion of illegally seized evidence. *See* S. SCHLESINGER, EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE 50-56 (1977); OAKS, *supra* note 28, at 678-89, 700-09; Spiotto, *Search and Seizure, An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243, 275-78 (1973). *See generally* Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681, 725-26 (1974); COMMENT, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and* United States v. Calandra, 69 NW. U.L. REV. 740 (1974). Chief Justice Burger fails to see how the police are deterred by a judicial ruling on suppression which never affects them personally, and of which they learn (if at all) long after having "forgotten the details of the particular episode which occasioned suppression." Burger, *supra* note 28, at 11. This fact was recognized by the Court in *Janis*, 428 U.S. at 458, where it stated that the imposition of the exclusionary rule in a civil tax proceeding would have an insignificant deterrent effect since "[i]t falls outside the offending officer's zone of primary interest." The Court also took notice of the suggestion of some commentators that the police often view "trial and conviction as a lesser aspect of law enforcement." *Id.* at 448 n.20.

[51] *See, e.g.*, Stone v. Powell, 428 U.S. 465, 540 (1976) (White, J., dissenting) (only consequence of rule as presently administered is unimpeachable and probative evidence is kept from trier of fact, substantially impairing truthfinding function or even totally aborting the trial); Bivens v. Six Unknown Federal Agents, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting) ("the history of the suppression doctrine demonstrates that it is both conceptually sterile and practically ineffective in accomplishing its stated objective [of giving meaning to constitutional guarantees against unlawful conduct by government officials]"); Irvine v. California, 347 U.S. 128, 136 (1954) (exclusion does not punish the official for his or her misconduct but it is likely to result in release of a guilty defendant); People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (Cardozo, J.) ("The criminal is to go free because the constable has blundered"); Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 389 (1964) ("[rule's] deterrent efficacy at some stage reaches a point of diminishing returns, and beyond that point its continued application is a public nuisance"); Burger, *supra* note 28, at 12 (suggesting that a vast number of people are losing respect for law and the administration of justice because they think that the supression doctrine is defeating justice); Oaks, *supra* note 28, at 739-49 (rule encourages police to give false testimony, fosters delay and diverts focus of trial from guilt or innocence of the accused); Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L.CRIMINOLOGY & POLICE SCI., 255, 256 (1961) (the "startling result achieved under the rule: to deter the police both the guilty defendant and the law-breaking officer go unpunished.").

[52] 428 U.S. at 489-90. The Court held that a state prisoner cannot seek federal habeas corpus relief simply because illegally obtained evidence was introduced at the prisoner's trial, reasoning that any advancement of fourth amendment rights is minimal in light of the substantial societal costs of applying the rule. *Id.* at 495. The Court rejected the argument that law enforcement officials would be deterred by a fear that federal habeas review might reveal police misconduct that escaped detection in the courts below. *Id.* at 493.

bearing on the guilt or innocence of the defendant."[53] Invocation of the rule also may diminish the accuracy of evidence presented in court because it encourages the police to lie to avert suppression of evidence.[54]

Moreover, the Court in *Powell* noted that the rule often creates an imbalance in particular cases "between the error committed by the police and the windfall afforded a guilty defendant by application of the rule [which] is contrary to the idea of proportionality that is essential to the concept of justice."[55] This perceived imbalance has led the Court to conclude that indiscriminate use of the rule may ultimately generate disrespect for the law and for the administration of justice.[56]

Thus, the Court has weighed the costs and benefits of the rule,[57] and—most notably in cases proposing a new exception or seeking application of an already existing one— has increasingly found that "the societal interest in presenting probative evidence to the trier of fact" far outweighs the interest in deterring illegal police conduct.[58] The Court has reasoned that the rule sufficiently discourages police misconduct if the prosecution is prevented from using illegal evidence to fulfill its constitutional burden of establishing all elements of the crime charged.[59] For example, the Court has refused to extend the rule to grand jury proceedings. The Court has reasoned that the need to keep the grand jury unimpeded by an evidentiary rule that would only delay and disrupt the proceedings outweighs any incremental deterrence benefits.[60] Invocation of the rule would only deter a police investigation knowingly

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53 *Id.*; *see also* Burger, *supra* note 28, at 1; Wilkey, *supra* note 36, at 222.

54 *Janis*, 428 U.S. at 447 n.18.

55 *Powell*, 428 U.S. at 490 & n.29.

56 *Id.* at 491. *See generally* Kaplan, *supra* note 38. Chief Justice Burger noted that the public see only the frustration of justice; they experience the impact of the exclusionary rule without understanding the important reasons underlying it. Moreover, he stated that the view of the police themselves is that "the whip of justice is diverted from the lawbreaker to the law-enforcer." Burger, *supra* note 28, at 12.

57 *See* United States v. Payner, 447 U.S. 727, 734-37 & 736 n.8 (1980); *Powell*, 428 U.S. at 485-86; United States v. Calandra, 414 U.S. 338, 348 (1974); Alderman v. United States, 394 U.S. 165, 174-75 (1969); *see also* Amsterdam, *supra* note 51, at 389.

58 *Payner*, 447 U.S. at 736 n.8. In *Payner*, the defendant was not the one whose fourth amendment rights were violated, thus he lacked standing to invoke the rule. *Id.* at 735-37.

59 Harris v. New York, 401 U.S. 222, 225 (1971). Under certain circumstances, the "speculative possibility that impermissible police conduct will be encouraged" by admission of illegal evidence is outweighed by the need to present all relevant information to the trier of fact. *Id.* It is well-settled that illegally obtained evidence is admissible in federal probation revocation hearings. The courts have reasoned that exclusion of such evidence from the determination of guilt achieves the maximum deterrent effect. Any additional deterrence that might flow from also excluding the evidence at probation revocation hearings would be minimal. *See* United States v. Winsett, 518 F.2d 51 (9th Cir. 1975); United States v. Farmer, 512 F.2d 160 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975).

60 *Calandra*, 414 U.S. at 349, 351-52.

directed toward discovering evidence solely for a grand jury;[61] the inadmissibility of the evidence in a subsequent criminal prosecution negates this incentive.[62] Finally, the Court stressed that grand juries do not finally adjudicate guilt or innocence.[63]

C. THE IMPEACHMENT EXCEPTION

Beginning with *Walder v. United States*,[64] the Supreme Court has restricted application of the exclusionary rule so as not to impair the accuracy of the truthfinding process, stressing that the ascertainment of truth "is a fundamental goal of our legal system."[65] The *Walder* Court created the impeachment exception, allowing the prosecution to use physical evidence, inadmissible to establish the guilt of the accused, for impeachment purposes.[66] The Court reasoned that the principles underlying the exclusionary rule do not justify allowing a defendant to commit perjury "in reliance on the Government's disability to challenge his credibility."[67]

The Court extended this exception in *Harris v. New York*.[68] While Walder had been impeached with physical evidence relating to testimony in his direct examination,[69] Harris was impeached with *Miranda*-violative statements that bore directly on the crimes charged.[70] Never-

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61 *Id.* at 351.

62 *Id.*

63 *Id.* at 349. Similarly, in the context of civil tax proceedings, the Court refused to extend the rule because "the deterrent effect of the exclusion of relevant evidence is highly attenuated when the 'punishment' imposed upon the offending criminal enforcement officer is the removal of that evidence from a civil suit by or against a different sovereign." *Janis*, 428 U.S. at 458. Because the use of the illegal evidence "falls outside the offending officer's zone of primary interest," exclusion from a civil case would not deter the officer. *Id.*

The Court has also held that only the victim of the challenged practices may invoke the exclusionary rule. Rakas v. Illinois, 439 U.S. 128, 134 (1978). The Court is unconvinced that any additional deterrence to be gained from allowing third parties, whose fourth amendment rights have not been violated, to assert violations of others' fourth amendment rights justifies "further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Id.* at 137 (quoting Alderman v. United States, 394 U.S. 165, 174-75 (1969)).

64 347 U.S. 62 (1954).

65 United States v. Havens, 446 U.S. 620, 626 (1980).

66 347 U.S. at 65. In *Walder*, the defendant testified before the jury that he had never sold illegal narcotics. *Id.* at 63. The government thereafter sought to impeach his testimony with evidence obtained through an unconstitutional search and seizure. *Id.* at 64.

67 *Id.* at 65. The defendant is, however, entitled to the freedom to deny all elements of the case against him or her without the government resorting to use of the illegal evidence in its case in chief. *Id.*

68 401 U.S. 222 (1971).

69 *Walder*, 347 U.S. at 63-64.

70 *Harris*, 401 U.S. at 225. In the most recent Supreme Court case invoking the impeachment exception, *Havens*, the Court made it clear that the testimony impeached in both *Walder* and *Harris* was given by the defendant while testifying on direct examination. 446 U.S. at

theless, the Court applied the *Walder* rationale, reasoning that the impeachment process provides a "valuable aid to the jury in assessing petitioner's credibility." The Court noted that "sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief."[71]

Nevertheless, lower courts[72] and dissenting justices have argued that the existence of any possible use for illegal evidence will encourage law enforcement officers to violate an individual's constitutional rights.[73] The Supreme Court rejected this argument in *Oregon v. Hass*,[74] where it further elaborated on the relationship between the deterrence rationale of *Miranda* and the impeachment exception. In *Hass* the Court stated that police are deterred from future illegal behavior by "the necessity to give [*Miranda*] warnings."[75] If the warnings subsequently prove to be incomplete and therefore defective, this does not mean "that they have not served as a deterrent to the officer who is not then aware of their defect . . . ."[76] The Supreme Court dismissed the argument that even though officers may know *Miranda* has been violated they may continue to question the suspect in the hopes of gaining something "possibly [by] uncovering impeachment material."[77] The Court noted that, where there clearly is an abuse, the traditional standards for evaluating

627. In *Havens*, however, the Court refused to make a flat rule permitting only statements on direct examination to be impeached. *Id.* The Court held that statements made in response to proper cross-examination reasonably suggested by the defendant's direct examination are subject to impeachment with illegally obtained evidence inadmissible on the government's direct case. *Id.* at 627-28. In reaching this conclusion, the Court stressed the importance of arriving at the truth in criminal trials. *Id.* at 626.

71 *Harris*, 401 U.S. at 225. The Court stated: "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Id.* at 226.

72 The Supreme Court also raised the argument in *Hass* only to reject it. 420 U.S. at 723.

73 *See Hass*, 420 U.S. at 725 (Brennan, J., dissenting) (police will have almost no incentive to follow *Miranda* requirements); *Harris*, 401 U.S. at 232 (Brennan, J., dissenting) (majority's holding tells police they may freely interrogate an accused because any evidence may be used "if the defendant has the temerity to testify in his own defense"); United States v. Hinkley, 672 F.2d 115, 134 (D.C. Cir. 1982) (broad scope of evidence relevant to insanity defense will enhance possibility that law enforcement officers will abuse *Miranda*).

74 420 U.S. 714 (1975).

75 *Id.* at 723.

76 *Id.* The situation in *Hass* is somewhat analogous to that in *Hinckley*. In *Hass* the suspect was given full *Miranda* warnings and accepted them. He later stated that he would like to telephone an attorney, but was told he could not do so until the officers and he reached the station. The suspect then provided inculpatory information. 420 U.S. at 715-16. While Hinckley was in the custody of the Metropolitan Police Department of the District of Columbia, he was advised of his rights. He then asked the police to allow him to confer with counsel prior to answering any questions. Later that day, the FBI assumed jurisdiction and took custody of Hinckley, again advising him of his rights. Without repeating his request for counsel, Hinckley informed the FBI agents that he would answer background questions. *Hinckley*, 672 F.2d at 120 & n.35.

77 *Hass*, 420 U.S. at 723.

voluntariness and trustworthiness will come into play.[78]

III. THE INSANITY DEFESNE

Society views the insanity defense, as it does the exclusionary rule, as a windfall to the defendant.[79] The public believes that defendants escape punishment by means of the "insanity dodge," developed by shrewd lawyers and amenable experts.[80] Yet the insanity defense is rooted in the idea that criminal punishment should be imposed only on those individuals who are responsible for their acts,[81] hence, the defense has long been viewed as essential to the American criminal justice system.[82]

The criminal sanction is grounded on the idea that human conduct is based on free choice; in fact, the sanction functions as though human beings have free choice.[83] The mentally ill, however, have impaired volitional capacities. This impairment is given legal recognition in the form of the insanity defense, under which such persons cannot be punished.[84]

Moreover, invocation of the insanity defense presupposes that the

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[78] *Id.*

[79] *See* Note, *Guilty but Mentally Ill: A Retreat From the Insanity Defense*, 7 AM. J.L. & MED. 237, 237-38 (1981); Nat'l L. J., May 3, 1982, at 1.

[80] H. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 8 (1954); *see also* Eule, *The Presumption of Sanity: Bursting the Bubble*, 25 U.C.L.A. L. REV. 637, 648 (1978) (public hostility derives from widespread belief that insane offenders are treated with greater leniency and are "back on the streets" sooner than their sane counterparts). The public's sense of insecurity about insane defendants has grown with the increasing skepticism about the abilities of psychiatrists to determine when mentally ill criminals are well enough to return to society. Note, *supra* note 79, at 237-38. While the public is apprehensive, defendants have their own misgivings about raising the insanity defense. Defendants are usually reluctant to plead insanity except when confronted by the death sentence or long imprisonment. A. GOLDSTEIN, *supra* note 28, at 24. Moreover, the insanity verdict leads to an indeterminate commitment in a maximum security mental hospital, an unattractive alternative to a penal institution in the eyes of most defendants. A. MATTHEWS, MENTAL DISABILITY AND THE CRIMINAL LAW 24 (1970); *see also* A. GOLDSTEIN, *supra* note 28, at 24. For further discussion, see *infra* text accompanying notes 179-86.

[81] W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 1 at 2 (1972). Punishment in the criminal law is predicated upon several different theories: prevention, restraint, rehabilitation, deterrence, education and retribution. *Id.* § 36, at 271-72; *see also* Goldstein & Katz, *supra* note 28, at 855-56.

[82] Wallach & Rubin, *The Premenstrual Syndrome and Criminal Responsiblity*, 19 U.C.L.A. L. REV. 209, 238 (1971).

[83] United States v. Brawner, 471 F.2d 969, 985-86 (D.C. Cir. 1972); *see also* Wallach & Rubin, *supra* note 82, at 237 n.113.

[84] Wallach & Rubin, *supra* note 82, at 237 n.113; *see also* Davis v. United States, 160 U.S. 469, 484-85 (1895); *Brawner*, 471 F.2d at 985; Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

defendant "has committed all the elements of a proscribed offense."[85] The defense places in issue the existence of a particular mental state necessary to the commission of the crime, although it is not limited to that particular mental state.[86] If successfully interposed,[87] the insanity defense leads to a special verdict, not guilty by reason of insanity,[88] and usually commitment of the defendant to a mental institution for an indefinite time period.[89] Thus, the purpose of the insanity defense is usually said to be that of separating from the criminal justice system those who should only be subjected to medical-custodial disposition.[90]

A. THE INSANITY TESTS

Federal and state courts have generally applied one of four tests to

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85 United States v. Scott, 437 U.S. 82, 97-98 (1978); *see* Goldstein & Katz, *supra* note 28, at 858.

86 Wallach & Rubin, *supra* note 82, at 237 n.113. Goldstein and Katz argue that the real function of the insanity defense is "to authorize the state to hold those 'who must be found not to possess the guilty mind *mens rea*,' even though the criminal law demands that no person be held criminally responsible if doubt is cast on any material element of the offense charged." Goldstein and Katz, *supra* note 28, at 864 (footnote omitted). For further discussion of the relationship between mens rea and insanity, see *infra* text accompanying notes 144-61.

87 For further discussion of the burden of proof for insanity, see *infra* text accompanying notes 122-43. The insanity defense is raised in only a very small percentage of criminal cases, in part because many who might raise it never to go trial. *See* A. GOLDSTEIN, *supra* note 28, at 171.

88 W. LAFAVE & A. SCOTT, *supra* note 81, § 36 at 268. Recently, another verdict, "guilty but mentally ill," has been proposed by commentators and legislatures. *See supra* note 28. For a discussion of this proposal and what effect it would have on the use of illegally obtained evidence to rebut insanity, see *infra* notes 179-86 and accompanying text.

89 In some automatic commitment jurisdictions defendants are committed upon a determination of insanity without further inquiry into their mental state. Note, *The Insanity Defense: The Need for Articulate Goals at the Acquittal, Commitment, and Release Stages*, 112 U. PA. L. REV. 733, 742 n.46 (1964). Finally, in other mandatory commitment jurisdictions, a defendant will be committed only after further proceedings are held to determine if he or she is still insane or dangerous. *Id.* A few states authorize commitment only if civil commitment standards have been met. *Id.* at 744 & n.56. In other jurisdictions commitment is discretionary. *Id.* at 742 n.46.

The defendant is not released until he or she is cured. Although the theory of the insanity defense is that the insane cannot be held responsible and thus should not be subjected to imprisonment, W. LAFAVE & A. SCOTT, *supra* note 81, § 36 at 268, several commentators have pointed out that being termed insane and committed to a mental institution stigmatizes the defendant just as much as a sentence in a penal institution would. Moreover, institutionalization of an accused has clear penal overtones, but mandatory commitment statutes have survived constitutional attack. Note, *supra*, at 737 & n.22. One commentator has also argued that the present insanity tests, *see infra* notes 91-121 and accompanying text, do not fulfill the therapeutic and protective goals of mandatory commitment. Since none of the tests "[focus] on either the defendant's amenability to treatment or his danger to the community . . . they do not determine whether he should be set free or confined to an institution." Note, *supra*, at 742.

90 MODEL PENAL CODE § 4.01, comment (Tent. Draft No. 4, 1955). For another view, see Goldstein and Katz, *supra* note 28.

determine criminal responsibility when the accused's sanity is at issue.[91] All of these tests share two criteria: evidence of a mental disease or defect, and evidence of a causal relationship between the mental disease or defect and the criminal act.[92]

The traditional and prevailing rule is the *M'Naghten* test.[93] Under this rule, the defendant cannot be convicted if at the time of committing the act the accused was laboring under a disease of the mind or a defect of reason such that she or he did not know the nature and quality of the act or, if the accused did know it, she or he did not know that the act was wrong.[94] Commonly described as the "right-wrong" test, the *M'Naghten* rule prescribes a narrow definition for insanity.[95] "Only the defendant's lack of knowledge of the nature of the conduct or inability to recognize those actions as legally or morally impermissible constitutes criminal incapacity."[96] Moreover, this test requires total impairment; temporary or partial mental incapacity is not a sufficient basis for a finding of insanity.[97]

Courts have criticized the *M'Naghten* test as based on outmoded concepts of the nature of insanity.[98] By focusing exclusively on cognitive ability, the test fails to address behavioral and emotional incapacities.[99] Furthermore, the rule restricts expert testimony.[100] Since the rule directs the inquiry to ethical and moralistic rather than scientific con-

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91 AMERICAN BAR FOUNDATION, *supra* note 28, at 379-85.

92 Wallach & Rubin, *supra* note 82, at 238.

93 W. LAFAVE & A. SCOTT, *supra* note 81, § 36 at 268. Seventeen states currently apply the *M'Naghten* test: Ariz., State v. Steelman, 120 Ariz. 301, 585 P.2d 1213 (1978); Fla., Witt v. State, 342 So. 2d 497 (Fla.), *cert. denied*, 434 U.S. 935 (1977); Iowa, State v. Donelson, 302 N.W.2d 125 (Iowa 1981); Kan., Re Application of Jones, 228 Kan. 90, 612 P.2d 1211 (1980); La., State v. Andrews, 369 So. 2d 1049 (La. 1979); Minn., State v. Larson, 281 N.W. 2d 481 (Minn.), *cert. denied*, 444 U.S. 973 (1979); Miss., King v. United States, 374 So. 2d 808 (Miss. 1979), *cert. denied*, 445 U.S. 917 (1980); Neb., State v. Simants, 197 Neb. 549, 250 N.W. 2d 881, *cert. denied*, 434 U.S. 878 (1977); Nev., Ogden v. State, 96 Nev. 258, 607 P.2d 576 (1980); N.J., State v. Trantino, 44 N.J. 358, 209 A.2d 117 (1965), *cert. denied*, 382 U.S. 993 (1966); N.C., State v. Connley, 295 N.C. 327, 245 S.E. 2d 663 (1978), *vacated on other grounds*, 441 U.S. 929, *on remand*, 297 N.C. 584, 256 S.E.2d 234, *cert. denied*, 444 U.S. 954 (1979); Okla., Eddings v. State, 616 P.2d 1159 (Okla. Crim. 1980), *modified*, 455 U.S. 104 (1981); Pa., Commonwealth v. Scarborough, 491 Pa. 300, 421 A.2d 147 (1980); S.C., State v. Goolsby, 275 So.C. 110, 268 S.E.2d 31, *cert. denied*, 449 U.S. 1037 (1980); S.D., State v. Restau, 290 N.W. 2d 487 (S.D. 1980); Wash., State v. Tyler, 77 Wash. 2d 726, 466 P.2d 120 (1970), *vacated on other grounds*, 408 U.S. 937 (1972); W. Va., State v. Rhodes, 274 S.E.2d 920 (W. Va. 1981).

94 Daniel M'Naghten's Case, 8 Eng. Rep. 718, 722 (H.L. 1843).

95 Note, *Constitutional Limitations on Allocating the Burden of Proof of Insanity to the Defendant in Murder Cases*, 56 B.U.L. REV. 499, 500 (1976).

96 Note, *supra* note 95, at 501; *see also* United States v. Freeman, 357 F.2d 606, 618 (2d Cir. 1966); *Durham*, 214 F.2d at 871.

97 *See* R. PERKINS, CRIMINAL LAW 860-63 (2d ed. 1969).

98 *Durham*, 214 F.2d at 871-72.

99 *Freeman*, 357 F.2d at 618-20; *Durham*, 214 F.2d at 871-72. Some courts have given the word "know" in *M'Naghten* a broader interpretation, requiring "knowledge 'fused with affect'

cerns, psychiatrists find it impossible to convey the full range of information material to an assessment of the defendant's responsibility.[101] On the other hand, the test allows expert witnesses to inject into their testimony moral judgments more properly left to the jury.[102]

Several jurisdictions, in an attempt to rectify the *M'Naghten* test's deficiencies, have supplemented the *M'Naghten* rule with the "irresistible impulse" test.[103] This test retains the language of the *M'Naghten* rule, but adds that insanity can also be a defense for a person who is unable to refrain from doing the act—even though the individual may appreciate the wrongfulness of the act.[104] Advocates of the irresistible impulse test claim that by including volitional as well as cognitive incapacities within its criteria the test redresses the problems raised by the *M'Naghten* rule.[105] Critics have nevertheless pointed out that the irresistible impulse test still requires complete loss of mental capacity and fails to address the importance of partial impairments.[106]

To conform the notion of criminal responsibility with society's evolving understanding of mental illness, the United States Court of Appeals for the District of Columbia proposed a third test for insanity in *Durham v. United States*.[107] The court held that a defendant lacked criminal responsibility if his unlawful act was the product of a mental disease or defect.[108] The *Durham* court reasoned that this test would enable a

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and assimilated by the whole personality." Wallach & Rubin, *supra* note 82, at 247, quoting People v. Wolff, 61 Cal. 2d 795, 800, 394 P.2d 959, 961-62, 40 Cal. Rptr. 271, 274 (1964).

100 *Brawner*, 471 F.2d at 976; *Freeman*, 357 F.2d at 619; AMERICAN BAR FOUNDATION, *supra* note 28, at 386-87.

101 *Brawner*, 471 F.2d at 976. Nevertheless, one commentator has argued that *M'Naghten* really only calls upon the psychiatrist to indicate whether the defendant was able to make moral and ethical discriminations. Allen, *The Rule of American Law Institute's Model Penal Code*, 45 MARQ. L. REV. 494, 498 (1962).

102 United States v. Currens, 290 F.2d 751, 767 (3d Cir. 1961); Note, *M'Naghten Rule Abandoned in Favor of "Justly Responsible" Test for Criminal Responsibility*, 14 SUFFOLK U.L. REV. 617, 621 (1980).

103 W. LAFAVE & A. SCOTT, *supra* note 81, § 36 at 269. For a list of states explicitly recognizing that the irresistible impulse test modifies *M'Naghten*, see AMERICAN BAR FOUNDATION, *supra* note 28, at 380 n.25.

104 *See, e.g.*, Smith v. United States, 36 F.2d 548, 549 (D.C. Cir. 1929); *see also* Keedy, *Irresistible Impulse as a Defense in the Criminal Law*, 100 U. PA. L. REV. 956, 988-89 (1952).

105 *See* A. GOLDSTEIN, *supra* note 28, at 68 (irresistible impulse test initially perceived as remedying *M'Naghten's* deficiencies).

106 *See, e.g.*, United States v. Frazier, 458 F.2d 911, 917 (8th Cir. 1972). "[T]he irresistible impulse criterion presupposes a complete impairment of capacity for self-control." MODEL PENAL CODE § 4.01 comment 4 (Tent. Draft No. 4, 1955).

107 214 F.2d 862 (D.C. Cir. 1954).

108 *Id.* at 874-75. The *Durham* Court did not explain its concept of "product of" which led to numerous problems with applying the test. W. LAFAVE & A. SCOTT, *supra* note 81, § 38 at 288. Eventually, in McDonald v. United States, 312 F.2d 847 (D.C. Cir. 1962), the United States Court of Appeals for the District of Columbia incorporated a qualification into its definition of "mental disease" that made the product test more workable. The court there

jury to consider all relevant aspects of a defendant's personality without restricting the scope of expert testimony.[109] Other authorities, however, have viewed the product test as illusory "because no psychiatrist would be able to deny the possibility of a causal connection between the illness and the act," thus permitting the conclusion that a defendant is never criminally responsible for any acts following the onset of a mental abnormality.[110] The *Durham* product rule might also tend to cause juries to rely exclusively on expert testimony in making determinations of mental disease or defect.[111] The magnitude of the problem of conclusory expert testimony eventually led even Judge Bazelon, the author of the *Durham* opinion, to reject the product test.[112]

The American Law Institute has proposed a fourth standard which attempts to join medical science and social purpose in a functional rule.[113] Under the ALI rule, a defendant is not criminally responsible if at the time of the criminal conduct the accused, because of a mental disease or defect, lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law.[114]

Advocates of the ALI standard assert that it encompasses an indi-

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stated that mental disease or defect "includes any abnormal mental condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls." *Id.* at 851. Thus, the court established a substantiality test for the relationship between the disease and the criminal act. Nevertheless, the Court of Appeals for the District of Columbia Circuit later rejected the product test in favor of the ALI test. *Brawner*, 471 F.2d at 973. For further discussion of the ALI test, see *infra* text accompanying notes 113-19. A form of the product test was originally followed by New Hampshire courts. *See* State v. Jones, 50 N.H. 369, 398 (1871). Presently, only New Hampshire applies the product test.

109 214 F.2d at 875-76; *see also* Washington v. United States, 390 F.2d 444, 451 (D.C. Cir. 1967) (purpose of product test was to enable jury to consider all information advanced by relevant scientific disciplines).

110 *Brawner*, 471 F.2d at 1016 (Bazelon, C.J., concurring in part); *see also* United States v. Smith, 404 F.2d 720, 726 (6th Cir. 1968) (if defendant had a mental illness, any act might be termed a product of the illness).

111 The problem of conclusory expert testimony has been noted by several courts. *See Brawner*, 471 F.2d at 978-79 (experts may effectively decide issue of responsibility under product test); *Washington*, 390 F.2d at 453 (under product test, psychiatric labels substitute for facts and the analysis underlying them); *Freeman*, 357 F.2d at 621 (under product test, psychiatrists function as jury).

112 *See Brawner*, 471 F.2d at 1010 (Bazelon, C.J., concurring in part).

113 Wallach & Rubin, *supra* note 82, at 257.

114 MODEL PENAL CODE, § 4.01(1) (Proposed Official Draft 1962). Almost all federal courts now use the ALI test. *See Brawner*, 471 F.2d 969 (D.C. Cir. 1972); *Frazier*, 458 F.2d 911 (8th Cir. 1972); Wade v. United States, 426 F.2d 64 (9th Cir. 1970); Blake v. United States, 407 F.2d 908 (5th Cir. 1969); *Smith,* 404 F.2d 720 (6th Cir. 1968); United States v. Chandler, 393 F.2d 920 (4th Cir. 1968); United States v. Shapiro, 383 F.2d 680 (7th Cir. 1967); *Freeman*, 357 F.2d 606 (2d Cir. 1966); Wion v. United States, 325 F.2d 420 (10th Cir. 1963); *Currens*, 290 F.2d 751 (3d Cir. 1961). Nineteen states have also adopted the ALI test. For cases and statutes, see Note, *Modern Insanity Tests—Alternatives*, 15 WASHBURN L.J. 88, 107-08 & n.231 (1976).

vidual's entire mental condition, both cognitive and volitional.[115] Additionally, by requiring only lack of substantial capacity rather than total impairment, the rule recognizes that partial impairment of mental capacity may preclude criminal responsibility.[116] The ALI standard enables experts to communicate their observations in a simplified manner, without the dangers of "expert dominance and encroachment on the jury's function" that were present with the *Durham* test.[117] Critics argue, however, that the ALI test still invites conclusory expert testimony because of the use of "result" language.[118] Some critics have stated that the "substantial impairment" element is vague and therefore susceptible to personal interpretation by jurors.[119]

All of these insanity tests necessitate factual determinations. The burden of proof on factual issues is important to the outcome of any

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115 *See Freeman*, 357 F.2d at 622; *Chandler,* 393 F.2d at 926 (ALI test demands unrestricted inquiry into the whole personality of the defendant); AMERICAN BAR FOUNDATION, *supra* note 28, at 383. In United States v. Currens, 290 F.2d 751 (3d Cir. 1961), the Court of Appeals for the Third Circuit completely rejected any cognitive test, reasoning that an abnormality in the cognitive function is neither sufficient nor necessary. *Id.* at 774 n.32. Under the rule set forth in *Brawner*, a defendant may request deletion of the cognitive phase when there is no evidence of cognitive impairment. *Brawner*, 471 F.2d at 992.

116 *See Shapiro,* 383 F.2d at 685; *Freeman*, 357 F.2d at 622-23; A. GOLDSTEIN, *supra* note 28, at 87; W. LAFAVE & A. SCOTT, *supra* note 81, § 38 at 293.

117 *Brawner*, 471 F.2d at 983. *Brawner*, concerned with the expert domination problem, requires the judge to instruct the jury on the expanded definition of "mental disease or defect" adopted in McDonald v. United States, 312 F.2d 847, 851 (D.C. Cir. 1962). 471 F.2d at 983. Moreover, the United States Court of Appeals for the District of Columbia requires pretestimonial instruction of expert witnesses to ensure that the jury is informed of the experts' underlying reasons and approach, and is "not confronted with ultimate opinions on a take-it-or-leave-it basis." *Id.* at 1006; *see also id.* at 1006 n.82, 1008 (Note to Appendix B). The court thus emphasized that the jury is not to be made to feel that it is foreclosed from its own evaluation of the defendant's sanity by the opinions of experts.

118 *See Brawner*, 471 F.2d at 1027 (Bazelon, C.J., concurring in part) ("Where a psychiatrist would formerly have testified that the act was not the 'product' of the disease, he can now assert that the disease of the defendant does not entail as a 'result' the kind of impairment that could have produced the act in question.").

119 *Wade*, 426 F.2d at 77-78 (Trask, J., dissenting). Fear of such personal interpretation by jurors has also led courts and commentators alike to reject a fifth insanity test, the "justly responsible" rule, included as an alternative to the majority ALI test. MODEL PENAL CODE § 4.01 alternative (a) to ¶ (1) (Tent. Draft No. 4, 1955). Rhode Island is the only state that has adopted this fifth test. *See* State v. Johnson, 399 A.2d 469 (R.I. 1979). The Supreme Court of Rhode Island reasoned that jurors must always resolve questions of the degree of mental impairment according to a collective sense of justice. *Id.* at 476-77. The court found that only the justly responsible test adequately conveyed this duty to the jury. *Id.* For further discussion of this topic, see generally Note, *supra* note 102. Proponents of the standard hoped that it would encourage the jury to consider the factual background and expert testimony in light of a community sense of justice rather than simply base its decision on expert opinion. *See Brawner*, 471 F.2d at 1034 (Bazelon, C.J., concurring in part). Other courts have rejected this approach, however, because it relies on a highly abstract and vague concept of justice which permits jurors to make individual determinations of justice through unreviewable personal criteria. *See, e.g., Brawner*, 471 F.2d at 988-89.

trial. When a defendant raises the insanity defense, however, allocation of the burden of proof becomes crucial because it determines in part whether insanity negates mens rea,[120] which is an essential element of almost every crime.[121] Thus, allocation of the burden of proof determines whether the prosecution must disprove the defendant's insanity as part of its case in chief.

B. ALLOCATION OF THE BURDEN OF PROOF ON THE ISSUE OF INSANITY

The prosecution must prove beyond a reasonable doubt all elements constituting the crime charged[122] in order to convict a defendant in a criminal trial.[123] While the "beyond a reasonable doubt" standard is a basic tenet of our criminal justice system,[124] defendants may raise an affirmative defense which places facts in issue that either negate or justify elements of the crime or acts established by the prosecution.[125] When a defendant raises an affirmative defense, such as insanity, the prosecution must prove the defendant's guilt by negating that defense by a preponderance of the evidence.[126]

Because a defendant's sanity is presumed in all criminal trials,[127] the prosecution can establish its case without having to establish the defendant's sanity unless the accused places sanity in issue.[128] If sanity

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120 *See* Note, *supra* note 95, at 502-504; *see also* W. LAFAVE & A. SCOTT, *supra* note 81, § 10 at 46-48. LaFave and Scott conclude that proof of insanity is proof that the defendant lacked the requisite mental state for the crime charged. *Id.* § 10 at 47, § 36 at 270. This conclusion rests heavily upon In Re Winship, which held that due process requires the prosecution to prove beyond a reasonable doubt "every fact necessary to constitute the crime . . . charged." 397 U.S. 358, 364 (1970). *Winship*, however, was subsequently severely undercut by the Court's holding in Patterson v. New York, 432 U.S. 197 (1977), that the burden of proof on affirmative defenses does not fall within the due process test of *Winship*. For further discussion of the relationship between insanity and mens rea, see *infra* notes 158-178 and accompanying text.

121 W. LAFAVE & A. SCOTT, *supra* note 81, § 8 at 44 n.13, §28 at 195-98.

122 The elements of a crime are: a specified act or omission; usually a concurring mental state; certain attendant circumstances; and a specified harmful result. *Id.* § 8 at 45 n.13.

123 *Id.* § 8 at 44.

124 Leland v. Oregon, 343 U.S. 790, 802-03 (1952) (Frankfurter, J., dissenting). The standard is designed to safeguard the presumption of innocence afforded in our free society. In re Winship, 397 U.S. 358, 363-64 (1970). In a criminal trial, the presumption of innocence mandates that the defendant be acquitted unless proven guilty. Coffin v. United States, 156 U.S. 432, 458-59 (1895).

125 Comment, *The Burden of Proof for Extreme Emotional Disturbance and Insanity: The Deterioration of Due Process*, 52 TEMP. L.Q. 79, 80 (1979).

126 *Id.* at 80 & n.11. In somes states, such as Illinois, the prosecution must disprove affirmative defenses beyond a reasonable doubt. *See, e.g.*, ILL. REV. STAT. ch. 38, § 3.2 (1981).

127 H. WEIHOFEN, *supra* note 80, at 214-15; Orfield, *Burden of Proof and Presumptions in Federal Criminal Cases*, 31 U. KAN. CITY L. REV. 30, 46 (1963).

128 H. WEIHOFEN, *supra* note 80, at 214. The Court stated in Davis v. United States, 160 U.S. 469, 486 (1895) (dictum), that to require the government to prove defendant's sanity in

is an issue, the defendant must initially meet the burden of production on that issue;[129] should defendant fail, the prosecution does not have to put forward any evidence of sanity.[130]

Authorities differ, however, concerning who has the ultimate burden of proof of insanity—the risk of nonpersuasion[131]—and by what measure.[132] The defendant must persuade by a preponderance of the evidence in some jurisdictions, while in others the prosecution must persuade beyond a reasonable doubt.[133] One commentator suggests that courts and legislatures have based their allocation of the burden of persuasion for insanity on their perception of the relationship between sanity and mens rea.[134]

Under one view, the presumption of sanity is merely a procedural convenience to relieve the prosecution of proving sanity when it is not in issue.[135] Once the defendant has satisfied the burden of production, the burden shifts to the prosecution to prove sanity beyond a reasonable doubt, and the presumption of sanity has no further evidentiary significance.[136] The rationale for this view is that a mentally diseased person is incapable of committing a crime.[137] This definition of sanity posits that sanity is necessary to form the requisite culpable state of mind—mens rea—and hence is an essential element of the crime.[138] Therefore, in jurisdictions where proof of insanity is considered "inseparable from

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every case "would seriously delay and embarrass the enforcement of the laws against crime, and in most cases be unnecessary."

129 Practice varies as to how much evidence the defendant must introduce to place insanity in issue. The prevailing view is that an accused must produce enough evidence to raise a reasonable doubt of his or her mental responsibility for an act. W. LAFAVE & A. SCOTT, *supra* note 81, § 40 at 313. Some states, however, require only a "scintilla" of evidence. *Id.*

130 *Id.* § 40 at 312.

131 The burden of proof consists of two elements, the burden of production and the burden of persuasion. *Id.* § 8 at 44.

132 *Id.* § 8 at 47-48, § 40 at 313.

133 *Id.* LaFave and Scott favor the latter rule. *Id.* § 8 at 48. The defendant must rebut the presumption of sanity by a preponderance of the evidence in twenty-two states and the District of Columbia. Note, *supra* note 95, at 503 & n.35 (collecting cases and statutes).

134 Note, *supra* note 95, at 505.

135 *See* Orfield, *supra* note 127, at 46.

136 Note, *supra* note 95, at 504 n.37 (citing J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 575-76 (1898)). Professor Thayer argued that "a presumption itself contributes no evidence, and has no probative quality." J. THAYER, *supra*, at 575-76.

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

138 *See Davis*, 160 U.S. at 484-85. Although the Supreme Court in *Davis* adopted a "rule of procedure for the federal courts" by requiring the government to negate insanity beyond a reasonable doubt once the defendant introduced evidence on that issue, *Leland*, 343 U.S. at 797-98, as a constitutional matter legislatures could require the defendant to prove his or her insanity beyond a reasonable doubt. *Id.* at 797-99 (dictum). For further discussion of Supreme Court decisions affecting the burden of proof, see *infra* note 143.

the ascertainment of guilt,"[139] the prosecution bears the burden of proving the defendant's sanity beyond a reasonable doubt.[140]

The opposing view is that the prosecution can establish guilt separately from proof of sanity, therefore the defendant must bear the burden of persuasion as well as that of production.[141] Jurisdictions with this view hold that sanity is not relevant to the determination of guilt.[142] Twenty-two states and the District of Columbia require the defendant to rebut the presumption of sanity by a preponderance of all the evidence.[143]

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139 Louisell & Hazard, *supra* note 137, at 805.

140 W. LAFAVE & A. SCOTT, *supra* note 81, § 8 at 48.

141 In most jurisdictions applying this rule, the defendant must establish insanity by a preponderance of the evidence, a less demanding quantum of proof than the beyond reasonable doubt standard. *Id.* § 8 at 47-48. Under *Leland*, however, the defendant can be required to prove his insanity beyond a reasonable doubt. 343 U.S. at 798-99; *see also supra* note 138.

142 *See, e.g.*, Phillips v. State, 86 Nev. 720, 722, 475 P.2d 671, 672 (1970) ("Whether insanity is an element of the crime of murder which must be proven by the state is a question that has been well-settled. Insanity is an affirmative proposition which the defendant must establish by a preponderance of proof."), *cert. denied*, 403 U.S. 940 (1971); *see also* Commonwealth v. Donough, 377 Pa. 46, 50, 103 A.2d 694, 697 (1954) (dictum that defendant has burden of proving affirmative defenses of insanity, alibi and self-defense by a fair preponderance of the evidence). The Supreme Court of Washington advanced another rationale in State v. Clark, 34 Wash. 485, 497-98, 76 P. 98, 102 (1904), where it stated that because insanity is "easily feigned, and difficult to disprove," it is right in principle to impose the burden of persuasion of insanity on the defendant. *See generally*, Note, *supra* note 34. Under this view, the treatment of the insanity defense is analogous to a bifurcated trial in which the determination of guilt is made in a separate proceeding prior to the determination of insanity. Note, *supra* note 95, at 503 n.34. For further discussion of bifurcation, insanity and mens rea, see *infra* note 161.

143 *See* Note, *supra* note 95, at 503 n.35 (collecting cases and commentary); D.C. CODE ANN. § 24-301(j) (1981). In *Davis*, 160 U.S. at 484-85, the Supreme Court established a rule of procedure for federal courts, holding that the prosecution must negate insanity beyond a reasonable doubt once the defendant introduces evidence on the issue. In *Leland*, however, the Court upheld the constitutionality of a state statute placing the burden of proof on the defendant. Leland v. Oregon, 343 U.S. 790 (1952). The Court found that requiring the defendant to prove insanity beyond a reasonable doubt was not inconsistent with the prosecution's burden of establishing deliberate and premeditated killing beyond a reasonable doubt, *id.* at 794-95, since the state did not require the accused to disprove the prosecution's showing of the statutorily required mens rea. *Id.* at 795-96. Finally, the Court held that due process does not require the prosecution to prove the defendant's sanity in all criminal cases. *Id.* at 798-99. Justice Frankfurter dissented because he believed sanity and culpability are inextricably related; thus, when sanity is in issue, the prosecution must prove the absence of insanity beyond a reasonable doubt. *Id.* at 803-04.

Subsequent Supreme Court decisions, notably In re Winship, 397 U.S. 358 (1970), and Mullaney v. Wilbur, 421 U.S. 684 (1975), placed the vitality of *Leland* in question. In these later decisions, the Court appeared to be expanding a constitutional mandate that the prosecution bear the ultimate burden of proof for issues essential to a determination of guilt. *See* Comment, *supra* note 125, at 81-82. In *Winship* the Court held that due process requires the prosecution to prove beyond a reasonable doubt "every fact necessary to constitute the crime . . . charged." 397 U.S. at 364. This high standard of proof protects important interests of both the state and individual defendants because it reduces the risk of erroneous convictions

The idea that insanity negates mens rea rests on the assumption that mens rea contains an element of moral culpability.[144] Since courts have traditionally viewed insane persons as incapable of appreciating what conduct is immoral,[145] they cannot possess mens rea, hence they

based on factual errors, thereby maintaining the respect and confidence of the community in the criminal justice system. *Id.*

While *Winship* mandated only that a court determine whether a given fact was an element of the crime charged in order to decide whether the state could constitutionally allocate the burden of proving that fact to the accused, the Court subsequently extended *Winship* to factual issues which were not express elements of the crime as defined by statute. Note, *supra* note 95, at 507. The issue in *Mullaney* was whether Maine could constitutionally require a defendant to prove by a preponderance of the evidence that he acted in the heat of passion on sudden provocation. 421 U.S. at 684-85. The heat of passion defense would negate a presumption of malice, thereby reducing murder to manslaughter. *Id.* at 686-87. The Court struck down the Maine Rule, reasoning that it was contrary to *Winship* because the law relieved the prosecution of the burden of proving malice—the fact that differentiated murder and manslaughter—beyond a reasonable doubt. *Id.* at 699-701. While neither *Winship* nor *Mullaney* concerned the insanity defense *per se*, many commentators believed that the broad position enunciated in these cases overruled *Leland sub silentio*. *See* United States v. Greene, 489 F.2d 1145, 1175 (D.C. Cir. 1973) (Bazelon, C.J., dissenting) (reasoning that because the factual issue of sanity is an essential element of almost all crimes, *Winship* requires the prosecution always to prove sanity whenever a defendant places it in issue), *cert. denied*, 419 U.S. 977 (1974).

In 1976, however, the Court in *Rivera v. Delaware* did not take the opportunity to overrule a statute placing the burden of proof for insanity on the defendant. 429 U.S. 877 (1976) (appeal dismissed for want of substantial federal question). A dismissal for want of a substantial federal question is treated as a decision on the merits and accorded precedential weight. Hicks v. Miranda, 422 U.S. 332, 343-45 (1975). The *Rivera* decision thus effectively halts any lower court's attempt to extend the *Mullaney* rule to insanity cases, as well as signals that the *Leland* rule is still valid. Comment, *supra* note 125, at 89-90

Finally, in *Patterson v. New York*, the Court upheld a New York statute placing the burden of proof for extreme emotional disturbance on the defendant, over the defendant's argument that, under *Mullaney*, this law was a violation of due process. 432 U.S. 197, 205-06. The Court viewed this affirmative defense as a separate issue which did not negate any of the elements necessary to constitute the crime. *Id.* at 206-07. Therefore, once the prosecution proved beyond a reasonable doubt the elements constituting the crime, the due process test of *Winship* was satisfied and the defendant could be required to sustain his defense. *Id.* at 206. For further discussion of *Patterson*, see Comment, *supra* note 125, at 90-95.

144 Note, *supra* note 34, at 503. The Court in *Davis* adopted this view of mens rea: " '[T]o constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will.' " 160 U.S. at 484 (quoting 4 W. BLACKSTONE, COMMENTARIES 195 (W. Lewis ed. 1898)). Blackstone, however, placed the burden of proving insanity on the defendant. 4 W. BLACKSTONE, COMMENTARIES 201 (W. Lewis ed. 1898). *But see* J. STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 74 (1890) ("[Mens rea] is a mischievous phrase, because it is usually understood to mean that legal guilt cannot exist in the absence of moral guilt . . . . The only true meaning which can be attached to it is that every definition of a crime involves some mental element . . . ."); *see also* Note, *supra* note 34, at 509-10. On the distinction between "wrongfulness" and "criminality," *see* Weihofen, *Capacity to Appreciate "Wrongfulness" or "Criminality" Under the ALI Model Penal Code Test of Mental Responsibility*, 58 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 27 (1967).

145 *See, e.g.*, Daniel M'Naghten's Case, 8 Eng. Rep. 718 (H. L. 1843); *see also supra* text accompanying notes 93-102.

are not blameworthy.[146] Under this view, proof of sanity is an essential element of the prosecution's case in chief.[147]

The opposing view of mens rea is that it can exist even if the defendant is insane, thus proof of sanity is not an element of the case in chief.[148] First, the mere existence of the insanity defense suggests that insanity and mens rea are separate issues and that they are distinguishable, coexisting states of mind. As one commentator has stated, "If legal insanity is no more than an incapacity to possess the 'guilty mind' required for crime, then there is no reason to plead it as a special defense to criminal liability."[149] In other words, if insanity were merely the absence of mens rea, the insanity defense would simply be a device for committing those who are not guilty of any criminal act. Moreover, although mens rea and insanity frequently involve similar factual determinations, "the insanity defense is broader than the mens rea concept."[150] Insofar as mental illness is offered to disprove state of mind, it is thus material to the mens rea determination "only if it is reasonable to believe that it influenced the defendant's conscious awareness in such a manner that he lacked the state of mind required for liability."[151]

Mens rea can also be defined as morally neutral.[152] Technically, mens rea refers to the specific mental states found in the statutory definitions of crimes, not to "guilty mind."[153] The basic elements of mens rea are intent and knowledge.[154] To act intentionally, an individual must

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146 Note, *supra* note 34, at 503. Goldstein and Katz conclude that proof of insanity is proof of the absence of mens rea. Goldstein & Katz, *supra* note 28, at 864-65; *see also* United States v. Currens, 290 F.2d 751, 773 (3d Cir. 1961) (anyone who lacks capacity to choose and to control himself could not possess "guilty mind" necessary for crime). In *Currens* the Court of Appeals for the Third Circuit developed a new test for insanity which would relate mental disease to "guilty mind" or mens rea in a way that the jury could understand. For further discussion of *Currens*, see *supra* note 115.

147 Note, *supra* note 34, at 503-05.

148 *See id.* at 501-02.

149 *Id.* at 509.

150 Note, *supra* note 89, at 734; *see also* Note, *supra* note 95, at 512. Another commentator explains the distinction between mens rea and insanity based on the nature of the inquiry. Investigation into mens rea assumes that the person is mentally responsible and then asks whether that person acted with guilty intent. The insanity inquiry, however, asks whether the defendant was a responsible person in the first place. Note, *The Right and Responsibility of a Court to Impose the Insanity Defense Over the Defendant's Objection*, 65 MINN. L. REV. 927, 950 (1981).

151 Dix, *Mental Illness, Criminal Intent, and the Bifurcated Trial*, 1970 LAW & SOC. ORD. 559, 565.

152 Note, *supra* note 34, at 504; *see also* State v. Buzynski, 330 A.2d 422, 429-30 (Me. 1974) (court ruled that insanity and mens rea can coexist by construing mens rea devoid of any notion of mental control).

153 Note, *supra* note 34, at 510.

154 *Id.* The MODEL PENAL CODE sets forth requirements for criminal culpability:

simply engage in conduct purposely to cause the proscribed result.[155] To act knowingly, the person need only be "practically certain that his conduct will cause the forbidden result."[156] These definitions do not mandate that the person have either the ability to refrain from causing the result or the knowledge that causing the result is morally reprehensible.[157]

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1) Minimum Requirements of Culpability. Except as provided in section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.

2) Kinds of culpability defined.

A) Purposely.

A person acts purposely with respect to a material element of an offense when:
1) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
2) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

B) Knowingly.

A person acts knowingly with respect to a material element of an offense when:
1) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
2) if the element involves the result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

C) Recklessly.

A person acts recklessly with respect to a material element of an offense which he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and the purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

D) Negligently

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purposes of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that would be exercised by a reasonable man in his situation.

MODEL PENAL CODE § 2.02 (Proposed Official Draft 1962).

155 *See supra* note 154; Note, *supra* note 34, at 510.

156 Note, *supra* note 34, at 510-11. The mens rea standard and definition of insanity may occasionally coincide such that a defendant who pleads insanity will be required to disprove an essential element of the prosecution's case. Note, *supra* note 95, at 513. To determine whether or not they overlap to this extent requires a close analysis of the statutory language as to whether it requires deliberate and premeditated malice. *Id.* at 515. For example, the author of that Note contrasted two cases as follows. In United States v. Greene, 489 F.2d 1145 (1973), the defendant was charged with felony murder which did not require deliberate and premeditated malice, thus sanity was not an element of the offense. In *United States v. Brawner*, however, the prosecution had to show that the defendant acted in a deliberate, calculated manner in order to convict him of first degree murder. 471 F.2d 969, 998-99 (D.C. Cir. 1972) (en banc). In *Brawner*, therefore, the prosecution had to prove these elements of mens rea beyond a reasonable doubt. *See* Note, *supra* note 95, at 516-18. That author emphasized, however, that this interrelationship occurs only in an extremely small number of cases. *Id.* at 513.

157 Note, *supra* note 95, at 511.

Finally, the insanity tests focus on volitional impairment—the incapacity to refrain from causing a certain result—and cognitive impairment—the inability to know that causing the result is wrong.[158] One commentator illustrates the distinction as follows:

> [A] person may be capable of formulating a plan with an awareness that carrying out the plan will likely result in the death of another, and yet be incapable of understanding the difference between right and wrong. In a state in which the mens rea for murder is premediation and the test of insanity is the M'Naghten Rule, there is no substantial overlap between the facts necessary to prove mens rea and the elements of insanity.[159]

When mens rea is defined in terms of the conscious mind's cognitive and volitional functions,[160] a legally insane defendant can act in such a way as to satisfy the formal, definitional elements of the crime. Guilt, in the sense of whether the defendant committed all the specified elements of the crime, can thus be established prior to the determination of whether the defendant had the capacity to conform his conduct to the law.[161] Consequently, the prosecution does not have to prove sanity in its direct case.

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158 *See supra* text accompanying notes 93-119.

159 Note, *supra* note 95, at 512; *see also* Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827, 834 (1977) ("most mentally abnormal offenders are fully capable of thinking about their criminal act before they do it, turning it over in their minds, planning the act, and then performing it in accordance with their preconceived plan").

160 *See, e.g.*, State v. Sikora, 44 N.J. 453, 470, 210 A.2d 193, 202 (1965); Arenella, *supra* note 159, at 834.

161 In a bifurcated trial, the trial is formally split into a guilt phase and an insanity phase. This two stage procedure implies that guilt can be completely adjudicated without an inquiry into the defendant's sanity, since there would be no reason for bifurcation unless an insane defendant can entertain the required mens rea. Note, *supra* note 34, at 500. The purpose of bifurcation is to eliminate from the basic trial on guilt or innocence the mass of highly emotional evidence on the defendant's insanity which has no bearing on the issue of guilt. Louisell & Hazard, *supra* note 137, at 808 n.11.

This objective has not been realized, at least in California. In People v. Wells, 33 Cal. 2d 330, 202 P.2d 53, 66 (1949), the California Supreme Court held that evidence bearing on mental disease or defect was admissible on the mental state element in the guilt phase of the trial. This ruling has led Louisell and Hazard to advocate abolition of the bifurcated system. Louisell & Hazard, *supra* note 137, at 830; *see also* State v. Shaw, 106 Ariz. 103, 471 P.2d 715 (1970) (allowing evidence of mental illness in both portions of bifurcated trial emasculates the intended purposes of the bifuracted procedure; due process requires that evidence of mental illness be admissible in criminal trial because it is relevant to state of mind, thus bifurcated procedure denies defendants due process). *But see* Dix, *supra* note 151, at 575 (proposes restructuring the bifurcated system by splitting the phases between those issues involving proof of mental illness and those that do not).

Five jurisdictions currently provide for bifurcated trials: D.C., *see* Holmes v. United States, 363 F.2d 281 (1966) (decision to bifurcate trial within broad discretion of judge); Cal., CAL. PENAL CODE § 1026 (West Supp. 1980); Me., ME. REV. STAT. ANN. tit. 17-A, § 59 (Supp. 1983); Minn., MINN. R. CRIM. P. 20.02 (6)(2) (1983); Wis., WIS. STAT. ANN. § 971.175 (West 1980).

The separateness of guilt and insanity has received extensive analysis in an analogous context, court-compelled psychiatric examination of defendants who raise insanity as a defense or whose competency to stand trial is at issue. A court can require defendants to cooperate in a complete psychiatric examination, and their responses to questions specifically designed to probe the issue of sanity may be introduced in the responsibility phase[162] of the trial.[163] Although the compelled psychiatric examination has generated much commentary on whether it is an infringement on the accused's right against self-incrimination,[164] a majority of courts have held there is no violation.[165] The premise of these decisions is that the testimony from the results of the examinations is being used only to determine whether the defendant may be held criminally responsible and not to prove the guilt of the accused. Thus, the defendant is not being made the " 'deluded instrument of his own

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162 "Responsibility phase" refers to the part of the trial in which evidence is presented on the insanity issue to determine whether an individual may be held criminally responsible for his or her conduct.

163 Note, *The Fifth Amendment and Compelled Psychiatric Examinations: Implications of* Estelle v. Smith, 50 GEO. WASH. L. REV. 275, 275 (1982). Two theories for analyzing the fifth amendment's application to sanity examinations have been advanced. Some courts have found that a defendant's disclosures in these examinations are non-testimonial (i.e., they do not establish guilt) and, therefore, are not protected by the fifth amendment. *See* United States v. Baird, 414 F.2d 700, 709 (2d Cir. 1969), *cert. denied*, 396 U.S. 1005 (1970); People v. Nelson, 92 Ill. App. 3d 35, 39-40, 415 N.E.2d 688, 693 (1980), *cert. denied*, 454 U.S. 900 (1981). The Supreme Court rejected this theory in Estelle v. Smith, 451 U.S. 454 (1981). Other courts have taken the approach endorsed in *Estelle* that the defendant waives his fifth amendment privilege with respect to psychiatric examinations when the defendant raises the issue of insanity. 451 U.S. at 465. *See generally* Wesson, *The Privilege Against Self-Incrimination in Civil Commitment Proceedings*, 1980 WIS. L. REV. 697, 722-24; Wesson, Miranda *On the Couch: An Approach to Problems of Self-Incrimination, Right to Counsel and* Miranda *Warnings in Pre-Trial Psychiatric Examinations of Criminal Defendants*, 11 COLUM. J.L. & SOC. PROBS. 403, 431-38 (1975).

164 The prevailing opinion of such commentators is that these compelled examinations do violate the defendant's fifth amendment privilege. *See generally* Danforth, *Death Knell for the Pre-Trial Mental Examination?: Privilege Against Self-Incrimination*, 19 RUTGERS L. REV. 489 (1965); Comment, *Requiring a Criminal Defendant to Submit to a Government Psychiatric Examination: An Invasion of the Privilege Against Self-Incrimination*, 83 HARV. L. REV. 648 (1970); Comment, *Pretrial Mental Examinations in Maine: Are They Mechanisms for Compelling Self-Incrimination?* 18 ME. L. REV. 96 (1966); Note, *Mental Examinations of Defendants Who Plead Insanity: Problems of Self-Incrimination*, 40 TEMP. L.Q. 366 (1967); Comment, *Changing Standards for Compulsory Mental Examinations*, 1969 WIS. L. REV. 270; Comment, *Compulsory Mental Examinations and the Privilege Against Self-Incrimination*, 1964 WIS. L. REV. 671.

165 *See* United States v. Cohen, 530 F.2d 43, 47-48 (5th Cir.), *cert. denied*, 429 U.S. 855 (1976); Karstetter v. Cardwell, 526 F.2d 1144, 1145 (9th Cir. 1975); United States v. Bohle, 445 F.2d 54, 66-67 (7th Cir. 1971); United States v. Weiser, 428 F.2d 932, 936 (2d Cir. 1969), *cert. denied*, 402 U.S. 949 (1971); United States v. Albright, 388 F.2d 719, 724-25 (4th Cir. 1968); Pope v. United States, 372 F.2d 710, 720-21 (8th Cir. 1967) (en banc), *cert. denied*, 401 U.S. 949 (1971); *see also* United States v. Whitlock, 663 F.2d 1094, 1107 (D.C. Cir. 1980) (no infringement of right against self-incrimination where challenged testimony was elicited solely for purpose of supporting experts' conclusion that defendant was criminally responsible for her actions at time of offense).

conviction.' "[166]

Where the compelled testimony is used to determine guilt or the nature of punishment, however, the Court has found a violation of the fifth amendment.[167] The Court has reasoned that, because of the gravity of the decision made in the penalty phase, any attempt by the prosecution to establish the defendant's future dangerousness[168] through compelled psychiatric testimony would contravene the fifth amendment.[169] Thus, the Court has found no distinction for fifth amendment purposes between the guilt and punishment phases of a capital case,[170] but has noted explicitly that this holding would not apply where the defendant raises the issue of sanity at trial.[171]

Other courts have held that if compelled psychiatric testimony is used only to support expert witnesses' conclusions that the defendant was sane at the time of the offense, and not to establish guilt, there is no question of self-incrimination.[172] As in the admission of illegally obtained evidence, the central question is whether the prosecution is using the compelled testimony to establish the defendant's guilt. The courts' conclusion that using compelled testimony to determine sanity does not create problems of self-incrimination, as it would if it were used to determine guilt, implicitly demonstrates that insanity and mens rea can coexist. To find otherwise would mean that courts are allowing the prosecution to use "illegal" evidence to establish an essential element of the crime charged, the mens rea. Proof of sanity is thus not part of the

166 *Estelle*, 451 U.S. at 462 (quoting Culombe v. Connecticut, 367 U.S. 568, 581 (1961)).

167 *Id.* In *Estelle*, the prosecution introduced psychiatric testimony at the death penalty phase of a Texas murder trial, based upon a court-ordered psychiatric examination to determine the defendant's competency to stand trial. The defendant was not advised before the pre-trial psychiatric examination that he had a right to remain silent and that any statement he made could be used affirmatively to persuade the jury to return the death sentence. *Id.* Since the defendant had no opportunity to refuse to submit to an examination for that purpose, the Court held that admission of this testimony violated the defendant's fifth amendment privilege against self-incrimination. *Id.* at 469.

168 In Texas, capital cases require bifurcated proceedings—a guilt phase and a penalty phase. TEX. CODE CRIM. PRO. ANN. art. 3.071(a) (Vernon 1981). The judge must impose the death penalty if the jury affirmatively answers three questions on which the State has the burden of proof beyond a reasonable doubt. One of these questions is whether the defendant is likely to be dangerous in the future. *Id.* at 458. In *Estelle*, the State's psychiatrist testified that, among other things, Smith's previous behavior was irreversible, that he would commit other such criminal acts given the opportunity, and that he had "no remorse or sorrow for what he [had] done." *Id.* at 459-60. The jury answered the three questions affirmatively.

169 *Id.* at 463.

170 *Id.* at 462-63.

171 *Id.* at 466.

172 *See, e.g.*, *Whitlock*, 663 F.2d at 1107. There the court stated: "Had [the experts'] testimony been admitted for its tendency to buttress appellant's guilt, the self-incrimination question would generate grave concern. But the challenged testimony was elicited solely for the purpose of supporting the experts' conclusion that appellant was criminally responsible for her actions at the time of the offense." *Id.* (footnotes omitted).

prosecution's case in chief.[173]

IV. ANALYSIS

Courts can admit illegally obtained evidence to rebut the insanity defense without jeopardizing constitutional principles under certain limited circumstances. Courts have held that police misconduct is sufficiently deterred when the prosecution is barred from using illegally obtained evidence in its case in chief to establish the accused's guilt.[174] Under the insanity-rebuttal exception, courts would still achieve this level of deterrence. Moreover, the rationale underlying the impeachment exception is applicable to insanity-rebuttal: defendants cannot be allowed to establish an insanity defense only through experts and thereby escape impeachment. Finally, there exists a special need in trials where insanity is the issue to present all relevant and probative evidence on the defendant's insanity to the trier of fact.

A. THE EXCLUSIONARY RATIONALE AND THE INSANITY-REBUTTAL EXCEPTION

It is well-settled that the exclusionary rule provides adequate deterrence if illegal evidence is not used to establish guilt. The efficacy of using illegal evidence to rebut the insanity defense therefore turns on the separateness of the guilt and insanity issues, specifically, whether proving insanity is inconsistent with proving the elements of the offense charged.[175] A determination of who bears the burden of proof partially resolves this problem.

1. Invalid Applications of the Insanity-Rebuttal Exception

If sanity is an element of the crime that the prosecution must prove beyond a reasonable doubt, then clearly the introduction of illegally obtained evidence to rebut the insanity defense would be constitutionally impermissible.[176] Where sanity is viewed as necessary to form the requisite culpable state of mind,[177] proof of sanity would be essential to estab-

[173] *See* Battie v. Estelle, 655 F.2d 692, 701 (5th Cir. 1981) ("The State's use of the results of a competency examination does not infringe upon a defendant's fifth amendment privilege because it does not assist the State in proving any of the elements necessary to support the imposition of a criminal punishment").

[174] *See* Harris v. New York, 401 U.S. 222, 225 (1971).

[175] The insanity-rebuttal exception thus parallels the impeachment exception. For further discussion, see *infra* text accompanying notes 197-218.

[176] Under this circumstance, the prosecution would be establishing guilt with illegally obtained evidence by using the evidence to prove the existence of an element of the crime. This would be an "affirmative" use of illegal evidence which the Court has repeatedly stated is impermissible. *See* Walder v. United States, 347 U.S. 62, 65 (1954).

[177] *See supra* text accompanying notes 135-40.

lishing the defendant's guilt beyond a reasonable doubt. Permitting rebuttal use of illegally obtained evidence under these circumstances would thus allow the prosecution to obtain criminal convictions by unlawful means.[178]

Furthermore, the proposed verdict "guilty but insane," adopted by several states and currently being considered by several others,[179] might create another situation in which rebuttal use of illegal evidence would infringe on the defendant's constitutional rights. Under this verdict, the defendant is sentenced to a prison term and receives psychiatric treatment there rather than being committed to a mental institution.[180] Those individuals who recover before their prison sentence expires must complete the balance of their sentence in prison.[181] The significance of this verdict is that, because the defendant's mental illness was not severe enough to impair his mens rea, he is held criminally responsible.[182] Defendants who are legally insane, however, cannot be found "guilty but insane."[183] The prosecution could not use illegally obtained evidence to rebut insanity in this situation because of the possibility that the trier of fact will select the lesser verdict under which the mentally ill defendant is punished by being sent to prison. Thus, use of illegal evidence in a case resulting in a "guilty but mentally ill" verdict could mean that the prosecution is using illegal evidence affirmatively to determine punishment.

The result of this use of illegal evidence would therefore be analogous to the result in *Estelle v. Smith*,[184] where the Supreme Court barred the introduction of testimony from a compelled psychiatric examination of the defendant at the sentencing phase. The Court stated that using

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178 Weeks v. United States, 232 U.S. 383, 392 (1914).

179 Seven states have adopted the "guilty but mentally ill verdict" in addition to the traditional verdict of "not guilty by reason of insanity." *See supra* note 28. For further discussion of this new verdict, see *infra* note 186, and text accompanying notes 174-184. The plea and verdict for the insanity defense throughout the United States today is "not guilty by reason of insanity." *See* W. LAFAVE & A. SCOTT, *supra* note 81, § 40 at 316.

180 W. LAFAVE & A. SCOTT, *supra* note 81, § 37 at 237. This verdict is to be used only where the accused's mental illness is not severe enough to negate culpability, *id.*, thus it expands the class of mentally ill offenders eligible to be found guilty. *Id.* § 34 at 239. For a discussion of the problems with this proposal, see *id.* § 35 at 257-58. This verdict distinguishes mental illness from legal insanity, acknowledging varying degrees of mental illness. Other rules and proposals, such as diminished capacity, attempt to do this also. *See generally* Arenella, *supra* note 159.

181 Note, *supra* note 79, at 258.

182 *Id.* at 253. Moreover, this verdict could imply that the state considers that the fullest extent of mental illness, legal insanity, cannot coexist with mens rea. If so, admission of illegal evidence for rebuttal purposes would be impermissible because the prosecution would be using it to establish an essential element of the crime, the defendant's mens rea.

183 *Id.* at 254.

184 451 U.S. 454 (1981).

this testimony at the sentencing stage would be tantamount to making the defendant the " 'deluded instrument' of his own execution."[185] The prosecution cannot seek the imposition of a penalty, just as it cannot establish guilt, by relying upon constitutionally impermissible evidence.[186]

2. *Valid Applications of the Insanity-Rebuttal Exception*

In jurisdictions placing the burden of proof for insanity on the defendant, guilt is established separately from proof of sanity; proof of insanity does not negate the mens rea necessary to establish the defendant's guilt in the sense that he or she committed all elements of the offense.[187] Since sanity is not an element that the prosecution constitutionally must prove to establish the guilt of the accused,[188] the introduction of illegal evidence to rebut insanity would be permissible under exclusionary theory because it would not be probative of guilt. The court would thus satisfy the deterrence mandate because the prosecution is denied affirmative use of the illegal evidence.

Nevertheless, the *Hinckley* court concluded that *Miranda*'s deterrence rationale would not be satisfied if the government were merely prohibited from using illegally obtained evidence in its case in chief.[189] The court thus refused to allow the government to use evidence obtained in violation of *Miranda* solely to rebut Hinckley's insanity defense.[190] The court reasoned that the broad scope of evidence relevant

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185 *Id.* at 462 (quoting Culombe v. Connecticut, 367 U.S. 568, 581 (1961)).

186 Yet, use of illegal evidence to rebut insanity in cases where the guilty but mentally ill verdict is rendered is more analogous to the use of compelled psychiatric testimony on the insanity issue than to its use in the sentencing phase. Courts have found no constitutional violation where the prosecution uses compelled testimony to defeat an insanity claim. *See* United States v. Whitlock, 663 F.2d 1094, 1107 (D.C. Cir. 1980). Similarly, rebuttal use of illegal evidence in a trial where the trier of fact returns the "guilty but mentally ill" verdict would mean only that the prosecution used the evidence to defeat the insanity claim. The evidence is not necessarily probative of guilt. Subsequent imprisonment should not raise any questions of constitutional violations.

187 *See supra* text accompanying notes 135-161.

188 *See* United States v. Greene, 489 F.2d 1145, 1155 (D.C. Cir. 1973), where the court held that proof of sanity is not included in the elements of the crime of felony murder, stating, "If that were the case, the Government would be required to produce evidence establishing sanity beyond a reasonable doubt as part of its direct case, before the defendant introduced an iota of testimony, and that is not and never has been the law."

189 United States v. Hinckley, 672 F.2d 115, 133 (D.C. Cir. 1982). John Hinckley was tried for shooting President Reagan, the President's Press Secretary, a Secret Service agent, and a District of Columbia Metropolitan Police Department Officer. *Id.* at 117.

190 On the day of his arrest, Hinckley was held in custody first by the Metropolitan Police and later by the Federal Bureau of Investigation. *Id.* at 117. When the FBI assumed jurisdiction over the case and took custody of Hinckley, two federal agents again advised him of his rights. Although earlier he had asked the police to allow him to confer with counsel prior to answering any questions, Hinckley informed the FBI agents that he would answer questions.

to an insanity defense "[w]ill serve to enhance the possibility that any retreat from [the *Miranda*] protections will be abused."[191] Furthermore, the court stated that to curtail the exclusionary rule in this manner would provide "little or no deterrence of constitutional violations against defendants whose sanity is the principal issue in the case."[192]

Underlying the *Hinckley* court's reasoning is the theory that so long as there is some use for the illegal evidence, police will have an incentive to violate the constitutional rights of suspects. The Supreme Court specifically rejected this theory in the context of the impeachment exception in *Oregon v. Hass*.[193] The Court dismissed as a mere "speculative possibility" the contention that an officer, having given *Miranda* warnings, may, after a suspect has requested an attorney, continue to question the individual in the hopes of gaining something "possibly [by] uncovering impeachment material."[194] Such an abuse of *Miranda* is even more speculative in the context of rebutting the insanity defense. At the time of the violation, the police would not know whether the defendant will raise the insanity defense at trial; they might not even be aware of the suspect's mental state at the time of arrest.

Furthermore, the *Hinckley* court's fear that illegally obtained evidence will be used to disprove the "principal issue" of the case misinterprets the application of the exclusionary rule. The rule is not applied on

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Id. at 120 & n.35. During the ensuing interview, the agents elicited basic biographical data such as his address, age, names of members of his family, and what he had been doing during the last year. Appendix to Brief for Appellant at 65, United States v. Hinckley, 672 F.2d 115 (D.C. Cir. 1982). This questioning lasted only for twenty-five minutes. *Hinckley*, 672 F.2d at 122. Despite the background nature of this information, the questions were found to be an interrogation. *Id.* at 123-24. Furthermore, both the district and appellate courts held that not only the biographical information gathered but also any testimony by the agents relating to Hinckley's demeanor during the interview must be excluded because the information was obtained in violation of *Miranda*. *Id.* at 118. According to the court of appeals, Hinckley's earlier request for counsel "precluded any interrogation until he had an opportunity to confer with counsel," *id.*, hence, any information connected with the interview was illegally obtained. *Id.* at 133. Neither the defendant nor the court argued that these statements were involuntary. This finding of illegality mandated that the government not use the evidence in its direct case at trial. *See Harris*, 401 U.S. at 225.

191 672 F.2d at 134. *But see infra* text accompanying notes 196-211. In reaching this conclusion, the court distinguished FBI and Secret Service agents from the "typical police officer," stating that the former have "special concerns" and are "fully aware of the critical importance of their demeanor testimony about a suspect arrested in the course of an attempted or actual assassination." *Id.* at 133-34. The court thus implied that, due to their expertise and the greater importance of their cases, special agents may have a greater incentive and propensity to engage in unconstitutional questioning of suspects. Yet, at least in *Hinckley*, the record demonstrates these special agents were extremely sensitive to possible constitutional violations and attempted to avoid them at all costs. *See generally* Appendix to Brief for Appellant, United States v. Hinckley, 672 F.2d 115 (D.C. Cir. 1982).

192 *Hinckley*. 672 F.2d at 134.

193 420 U.S. 714 (1975).

194 *Id.* at 723.

the basis of whether the illegal evidence will go to the "principal issue" of the case. On the contrary, the rule bars the prosecution only from establishing the essential elements of the crime with illegal evidence.[195] Proof of the elements of a crime does not necessarily include proof of insanity,[196] even when sanity is the principal issue in a case.

Moreover, as the Illinois appellate court found in *People v. Finkey*,[197] the use of illegally obtained evidence to rebut an insanity defense is virtually indistinguishable from the use of such evidence for impeachment purposes. In both situations the state is merely challenging the veracity of statements made by the defendant. In *Finkey*, the defendant's sanity was the principal issue in the case.[198] Finkey's psychiatrist concluded that he suffered from pathological intoxication,[199] based upon the defendant's statement that he had no independent recollection of the events at issue.[200] The state rebutted this expert testimony with illegally obtained evidence, the testimony of a detective to whom the defendant had revealed that he had some recall of the events charged.[201] Applying a balancing test in accordance with exclusionary jurisprudence,[202] the *Finkey* court concluded that the extreme relevance of the statements to the defendant's insanity defense outweighed the need for suppression of

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195 *Id.*

196 *Harris*, 401 U.S. at 225. This reasoning also implies that the *Hinkley* court considers sanity an element of the crime, which is not the case. *See supra* text accompanying notes 141-73. In the District of Columbia, the defendant bears the burden of proving insanity. D.C. CODE. ANN. § 24-301(j)(1981).

197 105 Ill. App. 3d 230, 434 N.E.2d 18 (1982).

198 There was no question in *Hinkley* or *Finkey* that the defendants fired the guns that wounded the victims. In *Finkey*, the defendant ordered police officers, summoned because of an altercation he was having with his wife, off his property, and shot and wounded several officers in the process. 105 Ill. App. 3d at 231, 434 N.E.2d at 19.

199 Pathological intoxication is an acute organic brain syndrome that, according to the psychiatrist, caused Finkey to lack substantial capacity to conform his conduct to the requirements of the law or to appreciate the criminality of his conduct. *Id.*

200 *Id.*

201 *Id.* Finkey never took the stand, so the evidence could not be used for impeachment purposes. As in *Hinckley*, these statements were excluded from the state's case in chief on a pretrial motion *in limine* because they were obtained in violation of *Miranda*. Although the *Finkey* court did not expressly state the basis of the violation, it did note that the statements were made in a conversation between the detective and the defendant which occurred "in the defendant's hospital room, after the defendant had been charged and had retained an attorney. Only Detective Collins and the defendant were present." *Finkey*, 105 Ill. App. 3d at 231, 434 N.E.2d at 19. The facts in *Finkey* indicate a possible key difference from *Hinckley*. In the latter case, the motion to suppress the rebuttal use of the evidence came before the trial, thus the experts' testimony was not available to determine what was relied upon in reaching their conclusions. Another distinction lies in the fact that Finkey did not object during the trial to the admission of the illegally obtained evidence for rebuttal, which would ordinarily be dispositive of the issue. *See* People v. Martinico, 101 Ill. App. 3d 250, 253, 427 N.E.2d 1340, 1342 (1981). The Illinois appellate court, however, ignored this point in its analysis and holding. *Finkey*, 105 Ill. App. 3d at 232-33, 434 N.E.2d at 19-20.

202 *See supra* text accompanying notes 55-59.

the illegally obtained evidence, holding the evidence admissible solely for rebuttal purposes.[203]

While the *Hinckley* court emphasized the dangers of police misconduct if it were to allow this rebuttal use of illegal evidence,[204] the *Finkey* court stressed the injustice of allowing the defendant to establish a fraudulent insanity defense:

> Just as a defendant cannot be allowed to directly perjure himself and then hide behind the fifth amendment, he cannot be allowed to *prima facie* establish an insanity defense by his representations to a psychiatrist without affording the State an opportunity to challenge the veracity of those statements.[205]

The Illinois appellate court recognized that a defendant can establish a fraudulent insanity defense that the prosecution cannot challenge because the relevant evidence was illegally obtained. An analogous situation prompted the Supreme Court to adopt the impeachment exception in *Walder v. United States*.[206] Extension of the impeachment rationale to rebuttal of insanity merely affords prosecutors the opportunity to challenge the truth of the defendant's statements that form the basis for the experts' medical conclusions on the accused's insanity. The defendant should not be allowed to establish an insanity defense with lies, thereby perverting the shield provided by *Miranda*, free from the risk of confrontation with prior inconsistent statements.[207]

The analogy to the impeachment rationale can be carried one step further. In permitting rebuttal use of illegal evidence, the *Finkey* court recognized that the enormous influence the defendant's statements had upon his expert's testimony created an imbalance in favor of the defense. Thus, the court sanctioned the prosecution's use of illegal evidence concerning the issue to put both sides on equal footing. Other courts have similarly justified admission of statements from compelled psychiatric examinations by emphasizing the "overwhelming difficulty" of responding to psychiatric testimony.[208] These courts recognize that the defense, by introducing expert testimony based on a psychiatric examination of the defendant, constructively puts the defendant on the

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203 105 Ill. App. 3d at 232, 434 N.E.2d at 20.

204 *Hinckley*, 672 F.2d at 134; *see also supra* text accompanying notes 72-78.

205 *Finkey*, 105 Ill. App. 3d at 232, 434 N.E.2d at 20.

206 347 U.S. 62 (1954). The Court reasoned:

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the *Weeks* doctrine would be a perversion of the Fourth Amendment.

Id. at 65; *see also* Harris, 401 U.S. at 225-26.

207 *See id.* at 226; *Walder*, 347 U.S. at 65.

208 Battie v. Estelle, 655 F.2d 692, 702 (5th Cir. 1982).

stand.[209] Therefore, these courts allow the state to have its own psychiatrists examine the defendant and testify as to their conclusions.[210]

This "testimony by proxy" theory is applicable to the situation where illegal evidence is used to rebut expert testimony on the defendant's insanity. Psychiatrists base their conclusions as to whether a defendant could appreciate the criminality of his or her conduct or was able to conform that conduct to the law upon the defendant's statements to them about the events.[211] Since the insanity defense allows defendants to "testify" through statements made to third parties without ever taking the stand, courts should not permit them to insulate themselves from impeachment and contradiction merely by testifying through proxies.[212] An expert's testimony should be subject to rebuttal with pertinent statements made by the defendant, such as in *Finkey*,[213] or by lay testimony on the defendant's demeanor, as in *Hinckley*.[214] The *Hinckley* court rejected the testimony by proxy theory because it could find no basis to distinguish the insanity defense from other affirmative defenses.[215] Yet the insanity defense does differ from other affirmative defenses such as alibi, duress and self-defense.[216] Rebuttal of these other affirmative defenses would go to the prosecution's case in chief because some of these defenses directly negate the criminal act charged, as with

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209 *Id.*

210 *Id.* The *Battie* court stated that once the defendant introduces psychiatric testimony he waives his fifth amendment privilege "in the same manner as would the defendant's election to testify at trial." *Id.* at 701-02. Moreover, the *Battie* court held that the state's use of the results of an incompetency examination does not violate the fifth amendment because the state cannot use the results to prove any of the elements necessary to support imposition of a criminal punishment under state law. *Id.* at 701. The court found that any burden imposed on the defendant by this use of the results was more than justified by the difficulty the prosecution has in rebutting psychiatric testimony. *Id.* at 702. Finally, the court referred to the need to prevent fraudulent mental defenses as support for imposing a greater burden on the defense. *Id.*; *see also* F. INBAU, SELF-INCRIMINATION 52-65 (1950); Berry, *Self-Incrimination and the Compulsory Mental Examination: A Proposal*, 15 ARIZ. L. REV. 919, 920 n.10 (1973).

211 *See* Battie v. Estelle, 655 F.2d at 700-01.

212 It is well-documented that the defendant has a tactical advantage if he is examined by a psychiatrist whose orientation and examination procedures favor his side. *See* W. LAFAVE & A. SCOTT, *supra* note 81, § 40 at 304. Prosecutors, however, can gain the advantage through a court-ordered examination conducted by a state psychiatrist. *Id*; *see also Estelle*, 451 U.S. at 465. The report from the court-ordered examination significantly affects the resolution of the insanity issue; usually the jury believes its results above the testimony of a retained expert. *See* Weihofen, *Eliminating the Battle of the Experts in Criminal Insanity Cases*, 48 MICH. L. REV. 961, 967-68 (1950).

213 For further discussion of the expert witness problem, see *supra* text accompanying notes 109-12.

214 672 F.2d at 134.

215 *Id.*

216 *See, e.g.*, Leland v. Oregon, 343 U.S. 790 (1952) (state placed burden on the defendant to prove insanity beyond a reasonable doubt); State v. Clark, 34 Wash. 485, 76 P. 98 (1904) (since sanity is easily feigned and difficult to disprove, it is right in principle to impose the burden of persuasion for insanity on the defendant).

alibi, or justify the act itself, as with self-defense.[217] These defenses can exist only at the time of the offense. Thus, disproving an affirmative defense, regardless of which side bears the ultimate burden of proof, establishes an essential element of the crime.[218] Admission of illegally obtained evidence to rebut one of these defenses would therefore violate the basic premise of the exclusionary sanction since, in disproving the defense with illegally obtained evidence, the government would also be establishing one of the essential elements of the crime with that evidence.

The insanity defense, however, is broader than the other affirmative defenses. This defense questions whether the defendant was responsible in the first place.[219] Moreover, a defendant can be legally insane and still satisfy the mens rea requirement for the crime charged.[220] Use of illegally obtained evidence solely for rebuttal of insanity would leave fully intact the government's burden of proof without any reliance on tainted evidence, thus satisfying the deterrence rationale of the exclusionary rule since "sufficient deterence flows when the evidence in question is made unavailable to the prosecution in its case in chief."[221]

One court has argued, however, that courts should never admit illegally obtained evidence because it is impossible to know how the jury will use the evidence.[222] The *Finkey* court found that since the trial judge instructed the jury to consider the illegal evidence only as it related to the defendant's state of mind at the time of the offense, the accused received sufficient protection against constitutional infringements.[223] In reality, though, the jury is unlikely to be able to obey such an instruction.[224]

If, however, courts try the issue of insanity in a separate hearing

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217 W. LAFAVE & A. SCOTT, *supra* note 81, § 8 at 47-48. LaFave and Scott include insanity among the affirmative defenses that negate a required element of the crime, *id.* at 47, since they believe, relying upon *In re Winship*, that insanity negates mens rea. *Id.* at 48. The Supreme Court's more recent decisions in *Patterson v. New York* and *Rivera v. Delaware*, however, counsel otherwise. *See supra* note 143.

218 W. LAFAVE & A. SCOTT, *supra* note 81, § 8 at 47-48.

219 Note, *supra* note 34, at 509.

220 *See supra* text accompanying notes 150-161.

221 *Harris*, 401 U.S. at 225.

222 *See* State *ex rel.* LaFollette v. Raskin, 34 Wisc. 2d 607, 150 N.W.2d 318 (1967).

223 The court's use of the phrase "state of mind" here refers only to whether Finkey was insane, and should not be confused with the establishment of mens rea. The *Finkey* court explicitly noted that other evidence properly produced during the trial "establish[ed] beyond a reasonable doubt the *actus reus* portion of the crimes with which Finkey was charged." 105 Ill. App. 3d at 232, 434 N.E.2d at 20.

224 *Raskin*, 34 Wisc. 2d at 625, 150 N.W.2d at 327-28. Yet courts do not seem to have this problem when statements from compelled psychiatric examinations are used to rebut the insanity defense. In that situation the jury could easily apply the information from compelled testimony to the issue of guilt.

following the determination of guilt, the jury could not misapply the illegal evidence.[225] Under such a bifurcated system, the trier of fact would completely adjudicate the guilt of the accused without the influence of the illegally obtained evidence. The physical separation of the adjudication of guilt and insanity would ensure that the prosecution does not make affirmative use of illegally obtained evidence in its case in chief. Thus, no constitutional violations would arise, while the trier of fact would receive a more complete picture of the defendant's mental state in accordance with exclusionary jurisprudence.[226]

B. THE INSANITY-REBUTTAL EXCEPTION AND THE NEED FOR ALL RELEVANT EVIDENCE

In rejecting the insanity-rebuttal exception, the *Hinckley* court totally ignored the benefits to be derived from permitting rebuttal with illegally obtained evidence.[227] The Supreme Court has consistently stated that the interests protected by exclusion must be weighed against "the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce."[228] This interest is perhaps strongest when the issue is the defendant's mental state at the time of the offense.

Courts have often recognized the extraordinary complexity of the insanity defense, pointing out that it "intertwin[es] moral, legal, and medical judgments . . . ."[229] Therefore, the trier of fact should receive "all possibly relevant evidence bearing on cognition, volition, and capacity."[230] Thus, other courts have found the relevance of the evidence to a complete determination of the accused's mental state sufficient to justify admission of illegal evidence.[231] Moreover, courts have admitted

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225 *Raskin*, 34 Wisc. 2d at 625, 150 N.W.2d at 328.

226 *See supra* text accompanying notes 52-78.

227 The *Hinckley* court thus failed to weigh the benefits against the utility of exclusion, contrary to current Supreme Court practice in exclusionary rule cases. *See* Stone v. Powell, 428 U.S. 465, 489 (1976).

228 Michigan v. Tucker, 417 U.S. 433, 450 (1974).

229 King v. United States, 372 F.2d 383, 389 (D.C. Cir. 1966).

230 United States v. Brawner, 471 F.2d 969, 994 (D.C. Cir. 1972) (footnote omitted).

231 *See* Jacks v. Duckworth, 651 F.2d 480, 484 (7th Cir. 1981). In *Jacks*, a tape recording of the defendant was obtained in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1976), but the court specifically noted that the "rationale [of *Harris* and its progeny] has been extended, and properly so, to cases involving evidence obtained, as here, in violation of Title III . . . ." *Id.*; *see* United States v. Caron, 474 F.2d 506, 509-10 (5th Cir. 1973). The *Jacks* court reasoned that, in addition to its impeachment value, the tape was of "probative effect and of particular relevance" to the defendant's mental condition, and was thus admissible. 651 F.2d at 484. The *Hinckley* court dismissed *Jacks* on two bases: (1) the defendant failed to object at trial to letting the jury consider the illegally obtained evidence as to his sanity, and (2) federal review in a habeas proceeding was limited. 672 F.2d at 133 n.116. It must be noted, however, that in reaching its decision the

Miranda-violative statements even when a defendant did not testify where those statements disclosed understanding and awareness relevant to a determination of insanity.[232]

Similarly, the *Finkey* court concluded that the relevance of the statements to the defendant's insanity defense outweighed the need for exclusion of the illegal evidence.[233] As long as the prosecution uses illegal evidence only to present a complete picture of the accused's insanity defense through rebuttal and not to prove the elements of the crime charged, the strong societal interest in an accurate determination of the defendant's sanity outweighs any incremental deterrence that might be gained from exclusion.[234]

V. CONCLUSION

This Comment advocates the adoption of the insanity-rebuttal exception to the exclusionary rule. In jurisdictions where the parties can establish proof of sanity after the prosecution has completely established all essential elements of the crime charged, the prosecution would be barred from making affirmative use of illegal evidence in its case in chief, thus accommodating the need to discourage police illegality. This exception allows the trier of fact to hear highly probative evidence on insanity while still satisfying the deterrence principles of the exclusionary rule. Moreover, the insanity-rebuttal exception merely extends the impeachment exception to those cases where a defendant does not take the stand but does in effect testify through third parties. Finally, the trier of fact would receive extremely relevant information on the issue of sanity. Thus, rather than deflecting the truthfinding process, admission of illegal evidence solely for rebuttal of insanity would further the pro-

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Seventh Circuit focused on the admissibility issue, citing these latter bases only as additional support for its finding of admissibility. *Jacks*, 651 F.2d at 484-85.

232 United States v. Trujillo, 578 F.2d 285, 288 (10th Cir.), *cert. denied*, 439 U.S. 858 (1978). In *Trujillo*, the court rejected the claim that testimony concerning a defendant's request for an attorney, introduced by the government solely to rebut the defendant's insanity defense, unconstitutionally infringed on the defendant's fifth amendment right to remain silent. As in *Finkey*, the defendant in *Trujillo* did not take the stand. Thus, the illegally obtained testimony could not be used for impeachment purposes. *Id.* The defendant in *Trujillo*, convicted of attempted murder and found insane, illegally purchased a gun. An FBI agent interviewed the defendant in the hospital the day the gun was found. There the agent gave the defendant the *Miranda* warnings and the defendant told the agent he did not read, write or understand English. A nurse told the agent that the defendant was "articulate in English," and he later admitted this fact. *Id.* at 287. At the police station, the defendant was again given *Miranda* warnings. He then stated that he would not make any statements until he had consulted with an attorney, but he gave the agent personal background information. *Id.* at 287-88. The agent testified to all of this at trial in relation to the defendant's insanity defense. *Id.* at 288.

233 105 Ill. App. 3d at 232, 434 N.E.2d at 20.

234 *See Powell*, 428 U.S. at 489.

cess without diminishing protection of fourth and fifth amendment rights.

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