CROSS-EXAMINATION OF PSYCHIATRIC WITNESSES UNDER THE VERMONT PATIENT'S PRIVILEGE WHEN THE ISSUE OF INSANITY IS RAISED

INTRODUCTION

Unlike exclusionary rules of evidence such as hearsay and the opinion rule[1] which are designed to facilitate discovery of the truth by eliminating evidence that is unreliable or may carry improper weight with the trier of fact, privileges have the effect of hindering the search for the truth by preventing the admission of evidence that is trustworthy and probative. This impediment is a price paid to protect an interest that society considers to be more significant than any benefit that the excluded evidence may have in ascertaining a correct verdict.[2]

One particular privilege, that between physician and patient,[3] has been the subject of considerable debate regarding its desirability and usefulness.[4] Despite such debate the Vermont General As-

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1. *See* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 11 (2d ed. 1972).

2. *Id.* §§ 72-74.

3. The discussion of the physician-patient privilege in this note is generally applicable to the psychiatrist-patient privilege as well. In the mental health field, there is near unanimity of opinion that a patient's full participation is essential for successful treatment and that this full participation can only be obtained by an assurance of absolute confidentiality. *See* Slovenko, *Psychotherapy and Confidentiality*, 24 CLEV. ST. L. REV. 375, 375 (1975). Due to this belief, there has been less criticism of the psychiatrist-patient privilege, and the scope of the protection offered by it is usually more comprehensive than the physician-patient privilege. But when treatment is not the purpose of a psychiatric examination and the mental condition of the party relying on the privilege is put in issue, the psychiatrist-patient privilege, just as the physician-patient privilege, generally will not shield a patient's disclosures made in anticipation of litigation. *See, e.g.*, CAL. EVID. CODE §§ 1016-1017 (West 1966). *But see*, OR. REV. STAT. § 44.040(1)(h) (1977) (psychologist-patient privilege).

4. *See* Chafee, *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?*, 52 YALE L.J. 607 (1943). In this frequently cited article, the author argues that the reasons usually advanced as justification for the privilege play no role in a patient's decision to consult a doctor.

For a discussion of the positive aspects of the privilege, see United States *ex rel.* Edney v. Smith, 425 F. Supp. 1038, 1041-42 (E.D.N.Y. 1976) (quoting Professor Charles L. Black's statement at Hearings on the Proposed Rules of Evidence), *aff'd mem.*, 556 F.2d 556 (2d Cir. 1977).

The physician-patient privilege did not exist at common law but is purely a creature of legislative enactment. Although no state has repealed the privilege after its adoption, the debates and criticisms surrounding it have had a widely varying effect on its scope. *See*

sembly in 1974[5] enacted a physician-patient privilege (hereinafter patient's privilege).[6] This privilege makes confidential all information acquired by a medical professional while "attending a patient in a professional capacity," and was written broadly to include people "authorized to practice medicine."[7]

In the case of *State v. Lapham,*[8] the Vermont Supreme Court considered whether the patient's privilege applied when the defendant raised the issue of insanity in a criminal proceeding. In *Lapham,* the defendant had consulted a psychiatrist solely in anticipation of raising the issue of insanity to a charge of first degree murder.

In most states, when the issue of insanity is raised, the

Comment, *Federal Rules of Evidence and the Law of Privileges,* 15 WAYNE L. REV. 1286, 1324 (1969). The author states that numerous exceptions, usually in the form of implied waiver, have rendered the physician-patient privilege "substantially impotent." Many of the exceptions riddling the privilege reflect the policy that concerns of confidentiality are outweighed by the need to bring all relevant evidence before the trier of fact. Some statutes provide explicitly and courts have construed others to apply the privilege only in non-criminal circumstances. *See, e.g.,* CAL. EVID. CODE § 997 (West 1966). North Carolina permits disclosure of medical communications if "necessary to a proper administration of justice." N.C. GEN. STAT. § 8-53 (1969).

The Advisory Committee on the Federal Rules of Evidence in explaining its decision to omit any provision for a general physician-patient privilege noted that: "While many states have by statute created the privilege, the exceptions which have been found necessary in order to obtain information required by the public interest or to avoid fraud are so numerous as to leave little if any basis for the privilege." *Advisory Committee's Note to Proposed Rule 504,* 56 F.R.D. 183, 241-42 (1972).

5. Prior to this enactment, Vermont was one of the few states that did not have a physician-patient privilege. *See* MCCORMICK, *supra* note 1, § 98 at 213 n.5.

6. VT. STAT. ANN. tit. 12, § 1612(a) (Cum. Supp. 1977) provides in full:

> Confidential information privileged. Unless the patient waives the privilege or unless the privilege is waived by an express provision of law, a person authorized to practice medicine or dentistry, or a registered professional or licensed practical nurse, shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity.

7. *Id.* Vermont's inclusion of the psychiatrist in a general patient's privilege is in contrast to recently enacted state statutes providing a separate privilege for the psychiatrist-patient relationship. Many states, persuaded by the arguments of psychiatric associations that psychiatric examinations require more comprehensive protection against disclosure than that provided by the physician-patient privilege, have enacted new privilege statutes which often grant psychiatrists and psychologists broader protection than that provided by existing physician-patient privileges. *See In re* Lifschutz, 2 Cal. 3d 415, 422 & n.3, 467 P.2d 557, 560 & n.3, 85 Cal. Rptr. 829, 832 & n.3 (1970).

8. ___ Vt. ___, 377 A.2d 249 (1977).

physician-patient privilege is not available to shield a defendant's disclosures to a psychiatrist.[9] Either the privilege is inapplicable if the psychiatrist is not consulted for treatment purposes,[10] or if treatment is involved in the consultation, the privilege is waived once the question of the defendant's mental condition is put in issue.[11] The *Lapham* court, however, was not persuaded by the traditional reading of the privilege in other jurisdictions and held that the patient's privilege applied to a psychiatrist who was approached solely as an expert witness for testimonial purposes.[12] The court also summarily rejected the concept of waiver of the privilege;[13] an issue that courts in most jurisdictions would not have addressed because the privilege would not have been applied to a psychiatrist consulted for testimonial purposes. Rather than applying the traditional treatment concept of the privilege, the Vermont Supreme Court seemed concerned with allowing a defendant a fair opportunity to raise the issue of insanity and acquire a truthful and objective psychiatric examination.[14]

This note will analyze the holding in *Lapham* in light of the unusual interpretation that the court has given to the privilege and examine issues that may arise in future litigation involving cross-examination of psychiatric witnesses when the issue of insanity is raised. Specifically, this note will consider the various alternatives open to the Vermont Supreme Court in determining the scope of cross-examination opened up by a defendant when he selectively introduces otherwise privileged incriminating statements that he believes to be important to the issue of insanity. In addition, it will consider the possibility of the use of limiting instructions for the purpose of admitting privileged statements into evidence to evaluate the opinion of a psychiatric witness. Finally, the use of a bifurcated trial as a means of presenting the jury with a full picture of the defendant's mental condition without prejudicing his defense as to the commission of the act charged will be explored.

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9. *See generally* 8 J. WIGMORE, EVIDENCE §§ 2382-2391 (J. McNaughton rev. ed. 1961).
10. *Id.* § 2383.
11. *Id.* § 2389.
12. ___ Vt. at ___, 377 A.2d at 255.
13. *Id.*
14. *See* text accompanying note 34 *infra*.

I. APPLICABILITY OF THE PRIVILEGE

In deciding whether the physician-patient privilege will apply, most courts have based their decisions on the concept of treatment. This criterion is based on the original justification for the privilege—encouraging the seeking of proper medical treatment.[15] Typically, if a physician's examination is not for the purpose of enabling the doctor to prescribe "remedies or relief," the doctor is not acting within the capacity that the privilege is intended to protect and the privilege will not attach.[16] This principle has been applied to prevent the use of the privilege when a criminal defendant consults a psychiatrist solely for testimonial purposes in anticipation of trial.[17]

The Vermont patient's privilege is modeled after statutes that use the traditional treatment concept.[18] The Vermont statute, as that of many other states, refers to information acquired by a medical professional while attending a patient in a "professional capacity and which was necessary to enable him to act in that capacity."[19] The phrase "professional capacity" has become a term of art and has been consistently interpreted to mean treatment.[20]

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15. *See* MCCORMICK, *supra* note 1, § 98 at 213.

16. *See, e.g.*, State v. Jensen, 286 Minn. 65, 174 N.W.2d 226 (1970).

17. *See, e.g.*, Taylor v. United States, 222 F.2d 398, 402 (D.C. Cir. 1955). "Examination for testimonial purposes only has nothing to do with treatment. A doctor who makes such an examination is not 'attending a patient'. There is no confidential relation between them."

This same principle was recognized in State v. Oakes, 129 Vt. 241, 276 A.2d 18 (1971), *cert. denied*, 404 U.S. 965 (1971).The defendant had argued that the physician-patient privilege prevented the state's psychiatrist from testifying as to facts learned from the defendant during a court-ordered psychiatric examination. Brief for Defendant at 26. Although the patient's privilege had not yet been enacted, the court stated that since the examination was for the purpose of enabling the doctor to give evidence as to the defendant's sanity, and was conducted at the insistance of the prosecution, the application of the physician-patient relationship was inappropriate. 129 Vt. at 257, 276 A.2d at 28.

18. Vermont's privilege statute was modeled after New York's statute. (Statement by Senator Bloomer to the Vermont Senate Judiciary Committee Hearing, January 4, 1974). *See* N.Y. CIV. PRAC. LAW § 4504 (McKinney 1963). New York's privilege has been interpreted to apply only when treatment is the purpose of a consultation with a doctor. Interpreting the statute, the court in Milano v. State, 44 Misc. 2d 290, 294, 253 N.Y.S.2d 662, 668 (1964), declared: "It is well settled that where a physician is required to examine a patient for a purpose other than treatment, the requisite relationship which gives rise to the privilege does not exist."

19. For the full text of the statute *see* note 6 *supra*.

20. *See, e.g.*, Browne v. Brooke, 236 F.2d 636, 637-38 (D.C. Cir. 1956) (interpreting D.C. CODE § 14-308 (1951)) (current version at D.C. CODE § 14-307 (1973)) ("attending a patient in a professional capacity" refers to treatment); State v. Nowlin, 244 N.W.2d 596, 602-03

The Vermont Supreme Court in *Lapham*, however, was not persuaded by traditional treatment interpretations and held that the "professional capacity" of a person authorized to practice medicine included an examination given as a basis for anticipated court testimony as well as an examination given for treatment purposes.[21] The court reasoned that to distinguish between examinations for treatment and for testimony would create different rules of admissibility based on a fine factual distinction—where a defendant could establish a pre-existing medical relationship or even an intent to continue such a relationship, he would benefit by the privilege, whereas a defendant who could not establish any type of treatment purpose would not have the protection of the privilege.[22]

Traditionally, although the physician-patient privilege applies when a party seeks medical treatment, it may be waived when the party relying on the privilege places his medical condition in issue.[23]

(Iowa 1976) (interpreting IOWA CODE ANN. § 622.10 (West Cum. Supp. 1967)) ("in his professional capacity" refers to the purpose of treatment); State v. Jensen, 286 Minn. 65, 73, 174 N.W.2d 226, 230 (1970) (interpreting MINN. STAT. ANN. § 595.02(4) (West Cum. Supp. 1977)) ("attending the patient in a professional capacity" refers only to those communications which are "'necessary for obtaining the benefits of the professional relation—in other words, for enabling the physician to prescribe remedies or relief.'") (quoting State v. Emerson, 266 Minn. 217, 223, 123 N.W.2d 382, 386 (1963); State v. Sullivan, 60 Wash. 2d 214, 224, 373 P.2d 474, 479 (1962) ("professional capacity" refers to attending a patient for the purpose of treating an ailment). *See* note 18 *supra*.

21. The court stated that "[e]xamination as a basis of testimony is as much 'in a professional capacity' as examination for treatment; this distinction cannot contravene the plain wording of the statute." ___ Vt. at ___, 377 A.2d at 255.

22. *Id.* Such a result does not necessarily occur, however, for even if the defendant can establish a treatment motive, the privilege will usually be considered waived when the defendant puts his mental condition in issue. *See, e.g.*, People v. Newbury, 53 Ill. 2d 228, 234, 290 N.E.2d 592, 596 (1972). After having been charged with first degree murder, the defendant employed a psychiatrist for the purpose of diagnosis and treatment. The court ruled that the privilege applied to the psychiatrist but was waived when the defendant called him as a witness.

23. 3 WHARTON'S CRIMINAL EVIDENCE § 818 (12th ed. D. Anderson 1955). *See, e.g.*, People v. Whitmore, 251 Cal. App. 2d 359, 366, 59 Cal. Rptr. 411, 416 (1967). The *Whitmore* court stated that if the privilege existed it was waived when a psychiatrist was called as a witness in support of an insanity defense. On cross-examination, the prosecution was entitled to question the psychiatrist concerning any statements made to him by the defendant which formed the foundation of his opinion.

The New York Court of Appeals has discussed the traditional waiver rationale as follows:

> [W]here insanity is asserted as a defense and . . . the defendant offers evidence tending to show his insanity in support of this plea, a complete waiver is effected, and the prosecution is then permitted to call psychiatric experts

Relying on this traditional concept of waiver, the prosecution in *Lapham* asserted that even if the patient's privilege applied to a psychiatric examination of the defendant for testimonial purposes, the introduction of the issue of insanity constituted a waiver of the privilege.[24] The court rejected this argument, however, and held that there is no waiver when the issue of insanity is raised.[25]

In light of the numerous contrary holdings by courts in other jurisdictions, the Vermont Supreme Court has taken a most unique approach in its definition of "professional capacity" and in its interpretation of waiver. Although this approach to the patient's privilege may be realistic in light of an attorney's dependence on medical experts in cases involving medical issues,[26] the *Lapham* court's interpretation does not follow from the history of the privilege or from the policy reasons usually given in support of it. The United States Supreme Court has stated that the chief policy of the physician-patient privilege is to encourage proper medical treatment by relieving the patient from the fear of embarrassing disclosures.[27] Such

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> to testify regarding his sanity even though they may have treated the defendant. When the patient first fully discloses the evidence of his affliction, it is he who has given the public the full details of his case, thereby disclosing the secrets which the statute was designed to protect, thus creating a waiver removing it from the operation of the statute; and once the privilege is thus waived, there is nothing left to protect against for once the revelation is made by the patient there is nothing further to disclose. . . . "The legislature did not intend to continue the privilege when there was no reason for its continuance and it would simply be an obstruction to public justice." (Citations omitted).

People v. Edney, 39 N.Y.2d 620, 624, 350 N.E.2d 400, 402, 385 N.Y.S.2d 23, 25 (1976), *aff'd sub nom.* United States *ex rel.* Edney v. Smith, 425 F. Supp. 1038 (E.D.N.Y. 1976), *aff'd mem.*, 556 F.2d 556 (2d Cir. 1977).

24. Brief for State at 9, ___ Vt. ___, 337 A.2d 249 (1977). The patient's privilege specifically provides for a waiver. *See* note 6 *supra.* Interpreting the patient's privilege, the Vermont Supreme Court in Mattison v. Poulen, 134 Vt. 158, 161, 353 A.2d 327, 330 (1976) (a civil action for damages from physical injuries), held that by putting his medical condition in issue the plaintiff waived any protection regarding his injuries that he may have been afforded by the privilege.

25. ___ Vt. at ___, 377 A.2d at 255.

26. Regarding the importance of psychiatric experts, the court in United States *ex rel.* Edney v. Smith, 425 F. Supp. 1038, 1047 (E.D.N.Y. 1976), *aff'd mem.*, 556 F.2d 556 (2d Cir. 1977), remarked: "Only a foolhardy lawyer would determine tactical and evidentiary strategy in a case with psychiatric issues without the guidance and interpretation of psychiatrists and others skilled in this field."

27. The express object is to exclude the physician's testimony, at the patient's option, respecting knowledge gained at the bedside, in view of the

confidentiality concerns are not present when a defendant consults a psychiatrist for the purpose of bolstering an insanity defense. In these situations, the psychiatrist is viewed by the defendant as a legal expert for trial rather than a medical advisor, and there is no expectation of treatment or of confidentiality.

Although strained, the *Lapham* court's application of the patient's privilege may have been the most equitable result that the court could have reached. The court seemed to rest its decision on equitable considerations, expressing concern with the unfairness that would result if the rules of admissibility applied to the psychiatric examination conducted at the defendant's initiative were different from those applied to the examination conducted by the prosecution.[28] This unfairness would result because a guarantee of confidentiality would be given only to a defendant who is examined by the prosecution's psychiatrist pursuant to title 13, section 4816 of the Vermont Statutes Annotated (the state's examining statute).[29] When a defendant raises the issue of insanity, the court may order a psychiatric examination to determine the mental condition of the defendant.[30] Under the state's examining statute, the defendant is guaranteed that no statement made during this examination will be admitted at trial to prove the commission of a criminal offense.[31]

> very delicate and confidential nature of the relation between the parties. . . . The patient is more or less suffering from pain or weakness, distracted by it, ignorant of the nature or extent of his injury or illness, driven by necessity to call in a professional adviser, sometimes with little freedom of choice; he relies, perforce, upon the physician's discretion, as well as upon his skill and experience, and is obliged by the circumstances of his own condition not only to make an explanation of his ailment or injury, so far as it may be within his knowledge and may be communicable by word of mouth, but also to submit to the more intimate disclosure involved in a physical examination of his person. . . . The chief policy of the statute, as we regard it, is to encourage full and frank disclosures to the medical adviser, by relieving the patient from the fear of embarrassing consequences.

Arizona & N.M. Ry. v. Clark, 235 U.S. 669, 676-77 (1915).

28. ___Vt. at ___, 377 A.2d at 255.

29. VT. STAT. ANN. tit. 13, § 4816(c) (1974) provides in full:

> No statement made in the course of the examination by the person examined, whether or not he has consented to the examination, shall be admitted as evidence in any criminal proceeding for the purpose of proving the commission of a criminal offense or for the purpose of impeaching testimony of the person examined.

30. *Id.* § 4814.

31. *Id.* § 4816(c). For the complete text of this subsection see note 29 *supra*.

The prosecution, therefore, is able to obtain a full and trustworthy evaluation of the defendant's mental condition and may produce the defendant's nonincriminating statements to bolster its psychiatric testimony before the trier of fact. If the defendant does not have the same guarantee of confidentiality in talking with his own psychiatrist that he has when being examined by the prosecution's psychiatrist, the reliability of the examination will be impaired.

In noting that its decision was not constitutionally required, but that the "constitutional premise" lent support,[32] the *Lapham* court reasoned that the statutory insanity defense[33] would be meaningless if the defendant's psychiatric evaluation could not be performed in an atmosphere of candor so that the psychiatrist could

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32. ___ Vt. at ___, 377 A.2d at 255. The defendant argued that the admission through cross-examination of incriminating statements that he made to his own psychiatrist was a violation of the fifth amendment. Brief for Defendant at 34.

Fifth amendment challenges have generally been unsuccessful under these factual circumstances. In United States v. Albright, 388 F.2d 719, 725 (4th Cir. 1968), the court held that there is no violation of the privilege against self-incrimination from psychiatric testimony regarding statements made by the defendant when he concedes commission of the act and contests only his sanity at the time of the offense. Even when the defendant does not concede commission of the act, courts have held that the limited use of statements made by the defendant prevents the danger of self-incrimination as all statements elicited from the defense psychiatrist are inadmissible on the issue of guilt. *See* notes 67 & 76 *infra*. *Cf.* Tarrants v. State, 236 So.2d 360, 366-67 (Miss. 1970), *cert. denied*, 401 U.S. 920 (1971). The court stated that when a waiver occurs, the prosecution can cross-examine the psychiatrist on any issue relative to sanity. In addressing defendant's claim that this was in effect forcing him to testify against himself, the court observed that in the particular case there was no dispute that the defendant had committed the act charged. The court noted that if there was a dispute as to commission of the act, defendant's contention was an "interesting question."

Although fifth amendment challenges have generally been unsuccessful, sixth amendment challenges have been raised in an attempt to shield a defendant's statements from disclosure and under certain circumstances have been successful. In United States v. Alvarez, 519 F.2d 1036, 1046 (3d Cir. 1975), the court, in dictum, reasoned that because the effective assistance of counsel requires confidentiality of trial preparation communications between a defendant and his attorney, the sixth amendment similarly affords confidentiality to consultations between a defendant and his psychiatric expert as the psychiatrist is an agent of the attorney, and statements made to the psychiatrist who is not called at trial are privileged. *Compare* note 26 *supra*.

The United States District Court for the Eastern District of New York, however, refused to interpret the sixth amendment in a manner which would prevent the defense psychiatrist from being subpoenaed by the prosecution. The court noted that the testimony of the psychiatrist was limited to his opinion as to sanity, and any statements made by the defendant that were elicited from the psychiatrist were admitted only to establish a basis for the psychiatrist's evaluation of sanity; they were not evidence of guilt. United States *ex rel.* Edney v. Smith, 425 F. Supp. 1038, 1054 (E.D.N.Y. 1976), *aff'd mem.*, 556 F.2d 556 (2d Cir. 1977).

33. VT. STAT. ANN. tit. 13, § 4801 (1974).

form an objective and independent opinion.[34] Without the protection afforded by the *Lapham* decision the defendant would have to guard against making incriminating statements, for at trial they could be elicited from his psychiatrist on cross-examination. In preparing his defense, the defendant would be forced to choose between two evils. He could employ a psychiatrist for the preparation of his defense and risk the admission of inculpatory statements made to the psychiatrist, or refuse full disclosure and forego a complete and objective analysis of his mental condition.[35]

II. The Scope of the Patient's Privilege

By holding that the patient's privilege applies when the issue of insanity is raised, the *Lapham* court has in effect put the prosecution and the defense on an equal footing by relieving the defendant of the fear that incriminating statements to his psychiatrist may be used against him at trial. Thus, the *Lapham* court has essentially made the patient's privilege and the state's examining statute equivalent. In fact, the court used the standard of admissibility that it had developed for the state's examining statute to determine the admissibility of evidence under the patient's privilege.[36] Therefore, after *Lapham* the body of case law dealing with the state's examining statute is helpful for purposes of defining the extent of permissible cross-examination of a defense psychiatrist under the patient's privilege.

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34. ___Vt. at ___, 377 A.2d at 255.

35. *See* Brief for Defendant at 2 (brief in opposition to motion for reargument).

Judge Rodgers, in Tarrants v. State, 236 So.2d 360, 368 (Miss. 1970) (Rodgers, J., specially concurring), noted the unfairness that results from application of the traditional rules relating to cross-examination of psychiatric witnesses:

> I must point out that I think it is a serious mistake to permit the State's attorney to question a psychiatrist, who was introduced by the attorney for the defendant for the purpose of showing mental incapacity of the accused, as to whether or not the accused patient admitted his guilt of the crime for which he is being tried. There are many reasons why this sort of testimony is unfair. In the first place, an insane person will admit any number of fanciful suggestions. In the second place, where the defendant is being tried, not only to determine his sanity, but also his guilt, to admit the babbling of persons thought to be insane will chill and often prevent defense attorneys from offering psychiatric evidence to show insanity.

36. ___ Vt. at ___, 377 A.2d at 256.

The state's examining statute is a recognition of the problems of self-incrimination involved with court-ordered examinations and an attempt in light of these problems to enable the prosecution to conduct a full disclosure examination of the defendant.[37] In *State v. Miner*,[38] which was decided before the state's examining statute was in effect, the Vermont Supreme Court held that the admission of the defendant's incriminating statements made during a court-ordered psychiatric examination was error.[39] The *Miner* court stated that in a court-ordered examination a defendant is in custody and is interrogated by representatives of the state. Therefore, the admission of incriminating statements obtained without proper self-incrimination warnings was a violation of the fifth and fourteenth amendments of the United States Constitution and chapter I, article 10 of the Vermont Constitution.[40] Without the protection of the fifth amendment rights that the state's examining statute guarantees, under some circumstances, silence would be the most advantageous course for the defendant to follow.[41]

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37. Although the state's examining statute was not in effect at the time State v. Miner, 128 Vt. 55, 69, 258 A.2d 815, 823-24 (1969) was decided, the Vermont Supreme Court in *Miner* noted that the purpose of the statute is "to promote objective examination by removing the danger that communications made by an accused to a psychiatrist, in the course of clinical testing, will be called upon to do service as evidence of guilt under the protection of the sanity issue."

38. 128 Vt. 55, 258 A.2d 815 (1969).

39. *Id.* at 771, 258 A.2d at 824. The incriminating statements consisted of defendant's explanation of how the crime occurred.

40. *Id.*

41. The *Miner* court remarked, "[t]he penalty of silence in the clinical testing for mental competency or criminal responsibility is the stifling of the examination. This result is against the interests of the respondent and the State alike. The inducement toward full disclosure to the examining psychiatrist is real and compelling." 128 Vt. at 70, 258 A.2d at 824.

A right to silence, absent a guarantee against self-incrimination as is provided by Vermont's examining statute, was recognized by the Minnesota Supreme Court in State v. Olson, 274 Minn. 225, 143 N.W.2d 69 (1966). In holding that fifth amendment rights attach to court-ordered psychiatric examinations, the court stated:

> We conclude that since there are no statutes in this state governing the procedure in cases where the accused pleads insanity as a defense and providing the necessary machinery and guidelines for the protection of the accused from self-incrimination, the courts have no legal basis, without the defendant's consent, for ordering an examination either to determine his mental condition at the time of the alleged criminal acts or to qualify an expert psychiatric witness by virtue of such examination to testify at trial.

Id. at 233, 143 N.W.2d at 75.

The state's examining statute was first interpreted in *State v. Oakes.*[42] In *Oakes,* the state's psychiatrist had testified on direct examination as to statements made by the defendant concerning his drinking habits. The defendant objected to the admission of these statements on the grounds that it constituted a violation of the state's examining statute.[43] Finding no error, the court devised a standard of admissibility for statements made to the prosecution's psychiatrist. Statements made by the defendant which "were essential ingredients in the full evaluation of the issue of the defendant's sanity"[44] were admissible in evidence whereas statements which "tend[ed] to establish in any way the truth or falsity of the charge laid against the defendant" were inadmissible.[45] Thus, after *Oakes,* any statements made by the defendant during a court-ordered psychiatric examination which the psychiatrist used in forming an opinion as to sanity are admissible unless they tend to prove commission of the crime for which the defendant is charged.

The same standard of admissibility outlined in *Oakes* was utilized by the *Lapham* court to determine the proper scope of cross-examination of a defense psychiatrist under the patient's privilege.[46] The *Lapham* court, interpreting the patient's privilege, held that certain statements made by the defendant and elicited through the defense psychiatrist on cross-examination were objectionable because they tended to prove commission of the offense charged.[47] The court noted that the objectionable statements went to the issues of malice and premeditation which were essential elements of the crime charged.[48] Therefore, based on the standard outlined in *Oakes* and applied to the patient's privilege by the *Lapham* court, a defen-

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42. 129 Vt. 241, 276 A.2d 18 (1971), *cert. denied,* 404 U.S. 965 (1971).

43. *Id.* at 256, 276 A.2d at 88 (VT. STAT. ANN. tit. 13, § 4816 was at this time codified in VT. STAT. ANN. tit. 13, § 4823).

44. 129 Vt. at 257, 276 A.2d at 28.

45. The court in *Oakes* explained why the admission of the evidence was proper:

> [T]he elicited facts were not incriminating, and did not tend to establish, in any way, the truth or falsity of the charge laid against the respondent. On the other hand, these facts were essential ingredients in the full evaluation of the issue of the respondent's sanity, or lack of it.

Id.

46. *See* ___ Vt. at ___, 377 A.2d at 255-56.

47. *Id.*

48. *Id.*

dant's statements may be admitted through cross-examination of the defense psychiatrist so long as they do not tend to prove commission of the offense charged. Thus the traditional procedure of cross-examination of a psychiatric witness has been altered by *Lapham*. Traditionally, Vermont permitted cross-examination of a psychiatrist to encompass all of the data that he used in forming his opinion as to the defendant's sanity. Under this approach, subject to the judge's discretion, a defendant's incriminating statements to his psychiatrist could be elicited on cross-examination.[49] Arguably, after *Lapham*, the prosecution will be permitted to introduce the defendant's incriminating statements before the trier of fact only if the defendant first raises them and thus opens the door to cross-examination.

A. *Opening the Door to Cross-Examination*

Although *Lapham* has provided a shield for the defendant's incriminating statements made during a psychiatric examination, it is as yet undetermined whether otherwise privileged information elicited from the psychiatrist by the defendant will result in a partial waiver of the patient's privilege.[50] The issue is illustrated in *Parkin v. State*.[51] In *Parkin*, the Florida Supreme Court held that a psychiatrist's testimony regarding a psychiatric examination into mental capacity must be confined to the sanity issue alone. If the defendant questions the psychiatrist as to statements regarding commission of the act charged, however, the prosecution can also examine the psychiatrist as to issues raised by the defense.[52] The court observed, "[a] defendant pleading insanity may in the end

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49. *See* VT. STAT. ANN. tit. 12, § 1643 (1973).

50. The danger regarding the use of such statements is illustrated in People v. Newbury, 53 Ill. 2d 228, 290 N.E.2d 592 (1972). The defense psychiatrist on direct examination testified that the defendant made statements to him in which the defendant described how he had committed the crime for which he was charged. The court stated that although the statutory psychiatrist-patient privilege could be used to exclude statements made by a defendant to his psychiatrist, by questioning the psychiatrist regarding the statements, the defendant waived the privilege and the incriminating statements could be admitted on the issue of guilt. The court explained that because the statements constituted an admission by the defendant, they were not objectionable under the hearsay rule; and because the state played no part in eliciting the statements, their use did not violate the defendant's right against self-incrimination.

51. 238 So.2d 817 (Fla. 1970), *cert. denied*, 401 U.S. 974 (1971).

52. *Id.* at 820.

prove himself guilty while trying to prove himself insane; this is a risk he must take."[53]

When the issue of a waiver arises as a result of a defendant's elicitation of otherwise privileged information, there remains the further question of the extent of that waiver. In many jurisdictions, if the defendant causes a significant part of the communication with the doctor to be disclosed, then the court may declare a total waiver.[54] Although there is no clear definition of a "significant part of the communication,"[55] general principles of evidence provide that when part of a conversation is put into evidence an adverse party is entitled to prove the remainder of the conversation so long as it is relevant, and particularly when it explains or gives new meaning to the part initially admitted.[56] Although the Vermont Supreme Court

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53. *Id.* at 821.

54. *See, e.g.*, People v. Garaux, 34 Cal. App. 3d 611, 612-13, 110 Cal. Rptr. 119, 120 (1973) (interpreting CAL. EVID. CODE §§ 912, 1014 (West 1965)); People v. Preston, 13 Misc. 2d 802, 809, 176 N.Y.S.2d 542, 551-52 (1958); Capps v. Lynch, 253 N.C. 18, 23, 116 S.E.2d 137, 142 (1960).

55. General statements abound as to what constitutes a total waiver, *see* 8 WIGMORE, *supra* note 9, at § 2390(2), but there seems to be no clear test to determine whether there will be a waiver when portions of a privileged communication are disclosed. For example, it is unclear whether the introduction of incriminating statements that deal with the issue of malice would result in a waiver of the protection against the admission of other incriminating statements that elucidate other issues of the offense of first degree murder which are not favorable to the defendant's plea of insanity and were not brought out in his questioning.

56. *See generally* 7 J. WIGMORE, EVIDENCE § 2115 (3d ed. 1940). The Supreme Court of South Carolina applied this principle in holding that the entire conversation of a line-up witness should have been admitted:

> "All statements made in a conversation, in relation to the same subject or matter, are to be supposed to have been intended to explain or qualify each other, and therefore the plainest principles of justice requires that if one of the statements is to be used against the party, all of the other statements tending to explain it or to qualify this use should be shown and considered in connection with it." (Citations omitted).

State v. Jackson, 265 S.C. 278, 284, 217 S.E.2d 794, 797 (1975) (quoting State v. Thomas, 159 S.C. 76, 83, 156 S.E.2d 169, 171 (1950).

As the right against self-incrimination is of constitutional dimension, courts may be more reluctant to find a waiver of that right than a waiver of the statutory patient's privilege. Wigmore states that the justification for a total waiver of the right against self-incrimination is the necessary connection between all of the relevant facts so that any voluntary limited disclosure by the accused, except in the most unlikely situations, distorts the true picture. 8 WIGMORE, *supra* note 9, § 2276(b)(2) at 458. Citing WIGMORE, the Vermont Supreme Court in State v. Rocheleau, 131 Vt. 563, 575-76, 313 A.2d 33, 42 (1973), stated that the defendant could not testify as to the circumstances surrounding the giving of his written statement to the police without being subjected to unrestricted cross-examination by the prosecution.

has not yet ruled on the extent of a voluntary waiver in a criminal trial, it has addressed the general policy considerations of the patient's privilege in *Mattison v. Poulen*[57] (a civil action for physical injuries). The court clearly stated that the patient's privilege is to be used as a shield only, not a sword, and that it would be an abuse of the privilege to allow a party to manipulate it by selective application.[58] Forcing a defendant to totally waive his privilege when asserting an insanity defense is repugnant to notions of fairness, but it is equally distasteful to allow the defendant to selectively choose the information that will be disclosed to the jury while denying the prosecution the opportunity to put the information in its proper perspective.

While it is uncertain what course the Vermont Supreme Court will follow in determining the extent of a waiver resulting from the defendant's elicitation of otherwise privileged information from his psychiatrist, it is clear that a partial waiver of another sort exists. Notwithstanding the *Lapham* court's statement that no waiver occurs when the issue of insanity is raised,[59] in effect a partial waiver occurs when the defendant puts his psychiatrist on the stand. This partial waiver permits the prosecution to cross-examine the psychiatrist within the bounds outlined by *Oakes* as to the basis of the psychiatrist's opinion of sanity. Thus medical evidence which forms the basis of the defense psychiatrist's opinion is open to cross-examination only to the extent that it does not tend to prove commission of the offense for which the defendant is charged.

B. *Proof of Commission of the Offense Charged*

By permitting the introduction of evidence upon which the psychiatrist has based his opinion, the defendant may be subjected to as great a prejudicial effect as would be caused by the admission of incriminating statements. Often when the issue of insanity is raised, the main question presented to the trier of fact is not the commis-

57. 134 Vt. 158, 353 A.2d 327 (1976).

58. *Id.* at 161-62, 353 A.2d at 330.

59. The effect of holding that no waiver of the patient's privilege occurs may be to prevent the prosecution from issuing a subpoena to a defense psychiatrist who is not called by the defendant to testify. *See* People v. Edney, 39 N.Y.2d 620, 350 N.E.2d 400, 385 N.Y.S.2d 23 (1976), *aff'd sub nom.* United States *ex rel.* Edney v. Smith, 425 F. Supp. 1038 (E.D.N.Y. 1976), *aff'd mem.*, 556 P.2d 556 (2d Cir. 1977).

sion of the act itself but the presence of the mental state required to justify a criminal sanction.[60] In such cases what in fact constitutes the most damaging evidence of proof of the commission of the offense charged is evidence that tends to prove the ability of the defendant to possess the requisite mental state required for a particular crime. Proof of mental capacity is especially important in Vermont where, unlike some jurisdictions, the issue of insanity is not an affirmative defense to be proved by the defendant,[61] but is an essential element of the crime that the prosecution must establish beyond a reasonable doubt once the issue is raised.[62]

Vermont's use of the distinction between statements that reveal the basis of the psychiatrist's opinion and statements that tend to prove commission of the offense charged is therefore questionable because any statement made by the defendant that tends to prove a psychiatrist's opinion of sanity in effect tends to prove commission of the offense charged. In addition to proving the mental element of the offense charged, a defendant's statements that are admissible under the *Oakes* distinction may prejudice the trier of fact even though the evidence does not immediately bear upon the act for which the defendant is charged. When the issue of insanity is raised, all of the facts of a defendant's life may become relevant to the issue.[63] Evidence such as defendant's past crimes, misconduct, bad

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60. *See* Louisell & Hazard, *Insanity as a Defense: The Bifurcated Trial*, 49 CAL. L. REV. 805, 806 (1961).

61. In some jurisdictions the defendant has the burden of proving a defense of insanity by a preponderance of the evidence. *See, e.g.*, Smotherman v. Beto, 276 F. Supp. 579, 584 (N.D. Tex. 1967); State v. Booth, 169 N.W.2d 869, 871 (Iowa 1969).

62. The Vermont Supreme Court in State v. Bishop, 128 Vt. 221, 227, 260 A.2d 393, 398 (1969), stated:

> When evidence appears in a criminal prosecution to indicate the respondent did not possess the requisite mental capacity to make him criminally responsible, it becomes the duty of the prosecution to establish, beyond a reasonable doubt, the respondent's sanity as an essential ingredient of the crime. Insanity is not an affirmative defense. It is a means of meeting the case made by the prosecution and weakening one of its essentials; beyond this it need not go. (Citations omitted).

63. *See* Stevens v. State, 354 N.E.2d 727, 734 (Ind. 1976). The court stated that when a defendant enters a plea of not guilty by reason of insanity, the door is open to all evidence relating to the defendant's past behavior and his environment.

The Vermont Supreme Court has similarly stated that "[c]onsiderable latitude is allowed by the courts in admitting evidence which has a tendency to throw light on the mental condition of a respondent at the time of the commission of the crime, provided the proof tends

reputation, homosexuality and sadistic tendencies have all been admitted as relevant to the issue of insanity.[64] A defendant's fantasies, dreams, memories and past conduct can be valuable tools to a highly trained psychiatrist, but in a courtroom their probative value seems to be far outweighed by their prejudicial effect.[65] Although such evidence does not directly prove the commission of the crime for which the defendant is charged, the jury's impression of the defendant's character may be so colored that the use of the distinction made by the court may be of no real value when commission of the act is not in question and may be of little value when the question of commission of the act does exist.

Although the *Oakes* distinction may present the theoretical and prejudicial problems discussed above, it is apparently the result of a weighing process of the belief that the essential data used by a psychiatrist to formulate his opinion should be before the trier of fact,[66] and the need to protect the defendant from prejudicial evidence. In this balancing process, the Vermont Supreme Court has gone beyond the traditional approach of distinguishing evidence to determine its proper evidentiary use and has applied the distinction to determine admissibility of the evidence. The conventional approach in most jurisdictions is to compartmentalize evidence into the basis of the psychiatrist's opinion and proof of the commission of the offense only for the purpose of determining the use of the evidence, not its admissibility. Although the physician-patient privilege traditionally has not shielded the defendant's incriminating statements from cross-examination of the defense psychiatrist, the jury is instructed that the statements of the defendant are not to be considered as evidence of guilt but can be used only as an evaluation of the psychiatrist's opinion.[67] Vermont, however, now uses the

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to prove or disprove the issue involved." State v. Bishop, 128 Vt. 221, 227-28, 260 A.2d 393, 398 (1969) (citations omitted).

64. *See* Stevens v. State, 354 N.E.2d 727, 734 (Ind. 1976).

65. *See* Note, *Psychotherapist Privilege*, 12 WASHBURN L. REV. 297, 304 (1973).

66. *See* text accompanying notes 44 & 45 *supra*.

67. *See* Fields v. State, 221 Ga. 307, 309, 144 S.E.2d 339, 342 (1965). The court declared that a psychiatrist-patient privilege was waived when the defendant called the psychiatrist as his witness and questioned him as to the defendant's mental condition. The waiver, however, only allowed cross-examination relevant to determine the basis of the witness' opinion, and the defendant's incriminating statements could not be used to establish commission of the act for which the crime was charged. *But see* Parkin v. State, 238 So. 2d 817 (Fla. 1970), *cert. denied*, 401 U.S. 974 (1971).

distinction to determine admissibility of the evidence so that incriminating statements are kept entirely from the trier of fact.

C. *Limiting Instructions*

What in fact occurs through the use of the *Oakes* distinction is that evidence that directly relates to the crime in question is shielded from the jury, whereas evidence of a more remote nature that may be less understandable to a jury, but also prejudicial, is allowed before it. If one accepts the proposition suggested in *Oakes* that the essential data that a psychiatrist uses to formulate his opinion should be before the trier of fact, then a prohibition against the admission of the defendant's incriminating statements that tend to prove the elements of the offense is a questionable practice.[68] In addition to psychological testing, personal history, and general interviews, some of the most probative evidence of the defendant's mental condition at the time the act was committed may be the defendant's statements concerning the act itself. In line with this reasoning, the New Jersey Supreme Court in *State v. Whitlow*,[69] a case dealing with a defense of insanity, stated that discussion of the criminal offense during a psychiatric examination is vital in reaching an opinion as to the defendant's criminal responsibility.[70] The effectiveness of psychiatric testimony, the court explained, hinges on the ability of the expert to learn as much as possible about the mental condition of the accused and to present that information to the court and jury in explanation and support of his opinion.[71] It has been stated by some courts that in determining whether a defendant was sane at the time of the act in question a jury is often asked to believe one expert witness over another and that to intelligently make a choice the jury must be apprised of the basis upon which the conflicting opinions were made.[72]

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68. *See* State v. Pyle, 216 Kan. 423, 442, 532 P.2d 1309, 1323 (1975). The court stated that if the defense psychiatrist's opinion is based on statements made to him, then they must be revealed and to that extent the physician-patient privilege is waived. The court stressed that the data upon which the psychiatrist bases his decision must be before the trier of fact.

69. 45 N.J. 3, 210 A.2d 763 (1965).

70. *Id.* at 19, 210 A.2d at 772.

71. *Id.* at 19, 210 A.2d at 771-72 (quoting Dieden & Gasparich, *Psychiatric Evidence and Full Disclosure in the Criminal Trial*, 52 CAL. L. REV. 543, 544 (1964)).

72. *See* Rollerson v. United States, 343 F.2d 269, 270-71 (D.C. Cir. 1964). *But see* Parkin v. State, 238 So.2d 817, 820 (Fla. 1970), *cert. denied*, 401 U.S. 974 (1971). The Florida

While not addressed by the *Lapham* court,[73] it may be that the prosecution can introduce incriminating statements into evidence with the use of limiting instructions.[74] Applying the *Oakes* distinction which the *Lapham* court has adopted—between evidence as the essential ingredient in the total appraisal of the defendant's sanity and evidence as proof of guilt[75]—it is possible that incriminating statements could be admitted into evidence with proper instructions to the jury cautioning them to consider the statements only to evaluate the defendant's sanity and not to determine if he in fact committed the act in question.[76] Such a limited use of evidence was recognized by the Vermont Supreme Court in *State v. Stacy*,[77] which was decided prior to the enactment of the patient's privilege. The court in *Stacy* found no error in the admission of an incriminating statement made by the defendant to the state psychiatrist, noting that the evidence was not put forward as proof that it was true,

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Supreme Court stated: "[T]he Court and the State should not in their inquiry go beyond eliciting the opinion of the expert as to sanity or insanity, and should not inquire as to information concerning the alleged offense provided by a defendant during his interview. . . ."

73. At the trial, in response to defendant's objection, it was argued by the prosecution that the incriminating statements being elicited from the defense psychiatrist on cross-examination were offered as evidence for the limited purpose of challenging the psychiatrist's opinion of sanity. Interview with John D. Burke, Parisi & Broderick, Counsel for the Defendant, in Castleton, Vt. (Dec. 10, 1977).

As the issue of limiting instructions was not pursued by the parties before the supreme court, arguably, the court in making its decision must have assumed that the jury instructions were satisfactory. Since the Vermont Supreme Court did not mention this issue in its opinion and the prosecution did not base its argument for admissibility on the fact that the jury was instructed that the defendant's incriminating statements were offered for a limited purpose, however, it may be argued that the admissibility of incriminating statements coupled with proper limiting instructions is still an unresolved issue.

74. The use of limiting instructions is illustrated in People v. Schrantz, 50 Mich. App. 244, 251, 213 N.W.2d 257, 261-62 (1973), where the Michigan Court of Appeals stated that although the fifth amendment prevents inculpatory statements made by a defendant to a psychiatrist during a court-ordered examination from being admitted into evidence as proof of the defendant's guilt, the statements can be admitted to demonstrate the basis upon which the psychiatrist formed his opinion.

75. *See* text accompanying notes 44 & 45 *supra*.

76. In State v. Whitlow, 45 N.J. 3, 20, 210 A.2d 763, 772 (1975), the court noted that the defendant's inculpatory statements are admissible as a basis for evaluating the opinion of the expert witness, but the jury must immediately be instructed that such statements are not competent as admissions of guilt.

Missouri, by statute, authorizes the admission of incriminating statements with proper limiting instructions. MO. REV. STAT. § 552.030(6) (Cum. Supp. 1978).

77. 104 Vt. 379, 160 A. 257 (1932).

but only as a portion of the conversation upon which the psychiatrist had based his opinion as to sanity.[78]

In *State v. Miner*,[79] the Vermont Supreme Court again dealt with the issue of limiting instructions, this time in a more indirect way. The *Miner* court implied that a limiting instruction might have solved the constitutional problem of incriminating statements testified to by the state's psychiatrist. The prosecution had argued that the admission of defendant's incriminating statements was not error because the evidence was not offered as proof of guilt but only as a basis of the psychiatrist's opinion. Rather than dismissing this distinction, the supreme court based its decision on the fact that improper instructions were given to the jury regarding the use of the evidence.[80] The court stressed that incriminating facts related by the defendant in a psychiatric examination cannot be used to "establish his guilt."[81]

Although the *Miner* court remarked in dictum that admission of the defendant's incriminating statements obtained during a court-ordered examination was forbidden by the state's examining

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78. *Id.* at 400, 160 A. at 266. It should be noted that State v. Miner, 128 Vt. 55, 69, 258 A.2d 815, 824 (1969), seems to imply that the result in *Stacy* is no longer possible under the state's examining statute. This may not be controlling, however, because the evidence in *Stacy* was not used as evidence of guilt. This factual distinction may be important in a later decision on the issue.

79. 128 Vt. 55, 258 A.2d 815 (1969).

80. In referring to the psychiatrist's testimony regarding his interview of the defendant, the *Miner* court stated:

> In the course of this conversation the respondent, in answer to the psychiatrist's inquiry of why he was there, replied he was there because he shot his wife. He told the doctor that he intended to frighten her but that she started to run. "He said, if she hadn't started to run, he wouldn't have shot her." He said he wanted to come to the state hospital because he thought something was wrong with him.
>
> The state's attorney defends the ruling on the contention that the evidence was not offered as proof of guilt, but merely to indicate the extent of the psychiatrist's examination as a basis of his opinion on the sanity issue. The record does not bear him out.
>
> . . . The jury was instructed that the statements to Dr. Brooks "constitute admission that he had committed the act of killing Bonnie Anderson Miner." And the jury was charged that these statements could be considered as evidence of his guilt.

Id. at 68-69, 258 A.2d at 823.

81. *Id.* at 70, 258 A.2d at 824.

statute,[82] the court did not specifically address the use of limiting instructions in regard to the statute. It should also be noted that the language of the statute only prohibits the use of statements "for the purpose of proving the commission of a criminal offense or for the purpose of impeaching testimony of the person examined."[83]

The effectiveness of limiting instructions, however, has long been debated.[84] One view is that taken by the New Jersey Supreme Court in *State v. Whitlow*.[85] The court stated that all relevant information should be put before the trier of fact; any prejudicial effect of testimony covering incriminating statements can be cured by proper instructions.[86] The court noted that reliance solely upon the expert's medical conclusion would lead to undue influence of the expert over the jury with no rational basis for a jury decision.[87] On

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82. *Id.* at 69, 258 A.2d at 823. (The state's examining statute had been enacted prior to the decision in *Miner* but was not yet in effect).

83. For the full text of the statute see note 29 *supra*. Since the Vermont Supreme Court has not yet directly ruled on the use of limiting instructions in admitting incriminating statements, it may be helpful to compare Vermont's examining statute with the federal statute on court-ordered examinations. 18 U.S.C. § 4244 (1970). In light of the adoption of the *Oakes* test by the *Lapham* court for interpreting the patient's privilege, whatever course the Vermont Supreme Court follows for the state's examining statute will most likely be followed for the patient's privilege. Title 18, section 4244 of the United States Code, as Vermont's examining statute, prohibits the defendant's statements obtained in a court-ordered psychiatric examination from being admitted in evidence against the defendant on the issue of guilt. In United States v. Bennett, 460 F.2d 872, 878-79 (D.C. Cir. 1972), the court stated that the evident purpose of the statute was to permit statements of the accused to be admitted into evidence only on the issue of sanity and not on the issue of whether the defendant committed the acts charged. The court noted that the statute does not clearly determine the admissibility of incriminating statements where the defendant has not conceded commission of the act in question; and although the court seriously questioned the effectiveness of limiting instructions, it stated that at a minimum instructions would be required in such a situation.

It is likely that when commission of the act is not an issue at trial, with the use of limiting instructions the admission of incriminating statements used by the psychiatrist in forming his opinion would not violate the language of Vermont's examining statute or the standard outlined for it by *Oakes*. Arguably, even when commission of the act is an issue, the use of limiting instructions would also be permissible. Furthermore, in light of the adoption of the *Oakes* test by the *Lapham* court, use of limiting instructions would be consistent with the patient's privilege as well.

84. *See* MODEL PENAL CODE § 4.09, Comment (Proposed Official Draft No. 1, 1962).

85. 45 N.J. 3, 210 A.2d 763 (1965).

86. "[R]eception of evidence for a limited purpose is not an uncommon or unsanctioned practice. And we accept, as we must, the fact that jurors can and do obey the court's restrictive instruction with respect to such evidence." *Id.* at 22-23, 210 A.2d at 773.

87. *Id. See also* Rollerson v. United States, 343 F.2d 269, 270-71 (D.C. Cir. 1964).

the other hand, some courts express the belief that the jury is "unable to compartmentalize abstract legal determinations such as guilt and insanity";[88] and therefore, a defendant should be shielded from juror misuse of limited purpose incriminating statements. The Vermont Supreme Court's shift from determining the proper evidentiary use of incriminating statements to determining their admissibility may be based on exclusionary-type considerations predicated upon the type of evidence that a jury can be trusted with rather than any policies of confidentiality or treatment that the physician-patient privilege has traditionally safeguarded.[89]

The possibility of juror misuse of psychiatric testimony for an insanity defense that was tantamount to the defendant's confession of commission of the act charged was recognized by the United States Circuit Court of Appeals for the District of Columbia in *United States v. Bennett.*[90] In *Bennett,* the court suggested that a defendant's entire defense could be prejudiced by the intermingling of the issue of sanity and a defense on the merits when the testimony of a psychiatrist on the issue of sanity is in effect an admission of the defendant's commission of the act charged. The court noted that even the most conscientious juror would have enormous difficulty disregarding a confession when turning from the issue of insanity to the issue of commission of the act and thus a limiting instruction may be an unsatisfactory solution.[91] Furthermore, the court stated that because limiting instructions would not effectively dispel any prejudice it was advisable for the trial court to hold a hearing prior to trial in order to determine whether statements by the psychiatrist

88. *See* Note, *Protecting the Confidentiality of Pretrial Psychiatric Disclosures: A Survey of Standards,* 51 N.Y.U.L. REV. 409, 422 (1976).

In speaking of the effectiveness of limiting instructions, Judge Hand described them as a "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else." Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932).

89. In response to the problem of ineffective limiting instructions regarding psychiatric testimony of a court-ordered examination, the Model Penal Code permits admission of the defendant's statements as evidence of mental condition "unless such statement constitutes an admission of guilt of the crime charged." MODEL PENAL CODE, *supra* note 84, at § 4.09. The identical result was reached by the *Lapham* court in its interpretation of the patient's privilege.

90. 460 F.2d 872 (D.C. Cir. 1972).

91. *Id.* at 880.

would affect the defense on the merits, and if so, then a bifurcated trial should be held.[92]

D. *Bifurcated Trial*

A possible judicial or legislative solution to the problem of incriminating statements recognized in *Lapham* would be the holding of a bifurcated trial when the defendant does not concede commission of the act charged and also pleads insanity.[93] This would require two separate trials to be held—one to determine if in fact the defendant committed the act in question, and if so, another trial to determine whether the defendant was sane at the time he committed the offense.

Although a bifurcated trial may solve the problems of prejudice from the ineffectiveness of limiting instructions, bifurcation has come under attack on due process grounds. Such attacks have been based on the fact that the issues of guilt and mental condition are inseparable.[94] In order to find a defendant guilty of the offense charged, it must be proved that he possessed the requisite mental state. Because insanity or diminished responsibility may negate the requisite mental state required of a particular charge, it has been argued that to exclude evidence of the defendant's mental condition at the guilt stage of a trial is a denial of the right to challenge an

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92. *Id.* at 881. The court emphasized, however, that the failure to order a bifurcated trial was not reversible error, but that it would have avoided significant prejudice.

93. Although the ordering of a bifurcated trial without an enabling rule would be a major step for a Vermont court to take, it would arguably be within its discretionary powers. In Holmes v. United States, 363 F.2d 281, 283 (D.C. Cir. 1966), the court noted that the power of courts to control the order of a criminal trial and the submission of issues to the jury has its roots in common law. The court not only has broad discretion in considering bifurcation, but also in determining its procedure, its instructions to the jury, the admissibility of evidence at different stages of the trial, and even the impaneling of a second jury to hear the second stage of the trial if it appears necessary in order to eliminate prejudice. The *Holmes* court noted that these discretionary powers are in no way inconsistent with Rule 57(b) of the Federal Rules of Criminal Procedure which authorizes courts, "[i]f no procedure is specifically prescribed by rule . . . [to] proceed in any lawful manner not inconsistent with these rules or with any applicable statute."

Rule 57(b) is similar to Rule 57 of the Vermont Rules of Criminal Procedure which provides in full: "When no procedure is specifically prescribed, the court shall proceed in any lawful manner not inconsistent with the Constitution of the United States, the Constitution of the State of Vermont, these rules, or any applicable statute."

94. *See* Comment, *Due Process and Bifurcated Trials: A Double-Edged Sword*, 66 Nw. U. L. Rev. 327, 328, (1971). *See also* Louisell & Hazard, *supra* note 60, at 806 n.2.

element of the crime.[95] In a first degree murder charge, it becomes an impossible task to separate evidence tending to show the required mental state for a charge of first degree murder and evidence tending to prove insanity. As a result, the defendant may be prohibited from establishing a lesser offense than the one charged.

Such due process problems arise from a rigid procedural application of the bifurcated trial system which creates an inflexible distinction between the issues concerning the basic elements of a crime and insanity. In this situation only evidence relating to the specific elements of a crime are admissible in the first stage of the trial and only evidence of insanity is admissible in the second stage of the trial.

A rigid distinction between the type of evidence that is admissible at each stage was held to be a denial of due process in *Becksted v. People,*[96] because it foreclosed a defendant charged with first degree murder from offering evidence aimed at lowering the degree of the crime. The Colorado Supreme Court concluded that evidence regarding the defendant's mental condition can also be admitted in the guilt stage of the trial.[97] Although the reasoning of the court in *Becksted* has been followed by other courts recognizing the due process problem,[98] the *Becksted* decision has been criticized. Such criticisms center on the problems of duplication and additional ex-

95. *See* State v. Shaw, 106 Ariz. 103, 113, 471 P.2d 715, 724-25 (1970), *cert. denied,* 400 U.S. 1009 (1971), where the court stated that to comply with due process a bifurcated trial must permit admission of all evidence rebutting intent, premeditation and malice in the guilt stage of a trial for first degree murder. A denial of this opportunity would foreclose the defendant from establishing a lesser degree of the crime.

96. 133 Colo. 72, 292 P.2d 189 (1956).

97. *Id.* at 82, 292 P.2d at 194.

98. In the recent case of Boyd v. Green, [1978] 22 CRIM. L. REP. (BNA) 2520, the Florida Supreme Court invalidated its bifurcated system on due process grounds. The court stated:

> Under the bifurcated system established by our Legislature, no evidence of insanity is admissible during that phase of the trial in which guilt or innocence is determined. Sanity is, in effect, presumed, giving rise to an irrebuttable presumption of the existence of the requisite intent. Thus, the State is relieved of its burden of proving each element of the offense beyond a reasonable doubt because the defendant is precluded from offering evidence to negate the presumption of intent.

Id. See also State v. Shaw, 106 Ariz. 103, 113, 471 P.2d 715, 724-25 (1970), *cert. denied,* 400 U.S. 1009 (1971); People v. Wells, 33 Cal. 2d 330, 349, 202 P.2d 53, 64-65 (1949).

pense[99] caused by the defendant's offer of the same psychiatric evidence at both stages of the trial. At the guilt stage of the trial the defendant may offer psychiatric testimony to show lack of the required mental state for the particular crime charged and also at the second stage in order to prove insanity. The *Becksted* decision can also be criticized for subjecting the defendant to the possibility that incriminating statements would be elicited from the psychiatrist testifying as to the defendant's mental state in the guilt stage of the trial. Thus, the problem of prejudice remains, and the distinction drawn in *Oakes* and *Lapham* is still necessary to prevent the admissibility of incriminating statements. Furthermore, the jury would still not receive all of the information used by the psychiatrist in forming his opinion.

An approach that would avoid due process objections and also solve the problem of incriminating statements elicited from a psychiatrist has been suggested by at least one commentator.[100] The trial could be bifurcated on the issues of the physical commission of the act and the defendant's state of mind, rather than on the distinction of commission of the offense charged and insanity.[101] At the first stage of the trial, in this proposal, the trier of fact would only determine whether the defendant committed the act in question. The verdict rendered at this initial determination would be final only with respect to the physical commission of the act; no determination would be made as to the degree of culpability or mental competence. If it is determined that the defendant committed the act which is the basis of the offense for which he is charged, then, at the second stage of the trial, psychiatric testimony would be admissible on the issues of culpability and mental competence. At this second stage, the danger of incriminating statements being misused to prove commission of the act would not be present. In addition, the statements that are presently allowed

99. *See* Comment, *Due Process and Bifurcated Trials: A Double-Edged Sword*, 66 Nw. U.L. Rev. 327, 340 (1971).

100. *Id.* at 344.

101. Such a procedure would have to be drafted with great care. In Sanchez v. State, 567 P.2d 270 (Wyo. 1977), the court held that a statute based on this idea failed to provide sufficient guidance as to what constituted an "act" and what type of evidence was admissible at each stage of the trial. The court described the system as "a hybrid-type of bifurcated trial procedure filled with lofty ideals, but replete with practical ambiguities," and therefore impermissibly vague and violative of due process. *Id.* at 275.

into evidence under the *Lapham* distinction would be admitted into evidence at the stage when they are least prejudicial since commission of the act would already have been determined. This procedure would avoid the balancing process that the Vermont Supreme Court apparently engaged in to reach a determination of admissibility under the state's examining statute and the patient's privilege, and would permit the jury to receive all the relevant data that the psychiatrist uses in forming his opinion as to sanity. This procedure would also avoid due process problems because after the first stage of the trial where only the commission of the act in question is determined, the defendant, in the second stage, would be given a full opportunity to present evidence aimed at lowering the degree of the offense. Bifurcation would also minimize any jury confusion that may result when a defendant is forced to present a defense on the merits and a defense of insanity together in one trial.[102]

CONCLUSION

In an effort to put the defense and the prosecution on an equal footing regarding the ability to acquire a full disclosure psychiatric examination, the Vermont Supreme Court has taken a diverse course in its interpretation of the physician-patient privilege. In creating a test for admissibility of statements made to a psychiatrist, the court has drawn a distinction between evidence that explains the basis of the psychiatrist's opinion and evidence that tends to prove the commission of the offense charged. This is potentially a very fine line and the possibility exists that the court may in the future be persuaded by the prosecution to use limiting instructions in order to present the trier of fact with a full picture of the defendant's mental condition. The use of limiting instructions, however,

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102. *See* Holmes v. United States, 363 F.2d 281, 282 (D.C. Cir. 1966). In referring to the risk that the defendant faces when pleading not guilty by reason of insanity the court stated:

> This court has recognized that substantial prejudice may result from the simultaneous trial on the pleas of insanity and "not guilty." The former requires testimony that the crime charged was the produce of the accused's mental illness. Ordinarily, this testimony will tend to make the jury believe that he did the act. Also, evidence of past anti-social behavior and present anti-social propensities, which tend to support a defense of insanity, is highly prejudicial with respect to other defenses. (Citations omitted).

may result in misuse of evidence and prejudice. The best alternative to a fair, full disclosure trial would be the use of a bifurcated system to first determine commission of the act and then the degree of culpability and mental competence of the defendant.

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