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Protecting Society and Defendants Too: The Constitutional Dilemma of Mental Abnormality and Intoxication Defenses

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INTRODUCTION

In a series of cases\(^1\) culminating in *Patterson v. New York*,\(^2\) the United States Supreme Court has held that due process requires the prosecution in a criminal case to prove\(^3\) beyond a reasonable doubt every element in the definition of the crime charged.\(^4\) Stated baldly, the prosecutor’s burden of persuasion seems very demanding indeed. Practically speaking, however, this burden may amount to nothing more than a requirement that the prosecutor’s evidence be logically coherent. Such would be the case, for example, if the defendant put on no evidence whatsoever. On the other hand, if the defendant did present a case, the prosecutor’s evidence would have to be persuasive enough to overcome any doubts raised by the defense documents and witnesses.

Assume, for example, a murder charge that requires the state to prove that the defendant intended to kill a human being. The prosecutor can prove that the defendant aimed a gun at the victim and shot point-blank. If this is the only evidence, the jury will likely conclude beyond a reasonable doubt that the defendant did have the requisite intent. But what if the defendant presents evidence that he was so delusional when he did

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3. "Prove" in this context refers to the burden of persuasion.

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these acts that he thought he was shooting a bear? If the jury finds this evidence convincing, the prosecution will have difficulty proving beyond a reasonable doubt that the defendant intended to kill a human being after all.

Believable defense evidence that is relevant to the mental state element of the crime charged could increase the prosecutor's practical burden of persuasion significantly. Such evidence might involve proof that the defendant was intoxicated or mentally abnormal at the time he committed the criminal act. The defendant, however, generally will not be permitted to put on this proof. Instead, various exclusionary rules will protect the prosecution from an increased practical burden of persuasion.

Evidence of intoxication, for example, may be excluded completely on the issue of mental state, or the defendant may be required to bear the burden of persuasion despite the fact that an element of the crime is at issue. In some states intoxication is only admissible with regard to a specific intent, or when the evidence meets the test for an insanity defense. In many states a defendant may not show that self-induced intoxication prevented his having the culpable mental state of recklessness. While these examples are specific to intoxication, defend-

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5. The term "intoxication" is meant to refer to "a disturbance of mental or physical capacities resulting from the introduction of substances into the body." Model Penal Code § 2.08(5)(a) (Proposed Official Draft 1962). Such substances would include, of course, both alcohol and other drugs. For a history of the common law's approach to intoxication as a defense to crimes, see generally Hall, Intoxication and Criminal Responsibility, 57 Harv. L. Rev. 1045, 1046-54 (1944).

6. Various terms, such as "diminished capacity," "diminished responsibility" and "insanity," have been employed in the criminal law to describe offenses based on mental abnormality. To avoid the confusion caused by these different terms, and by the variations in the use of each one, this article will use the generic term "mental abnormality."


8. See State v. Wilson, 234 Iowa 60, 76-77, 11 N.W.2d 737, 745-46 (1943); Hall, supra note 5, at 1048, 1050. While putting the burden of persuasion on the defense is not, strictly speaking, an "exclusionary rule," it has the similar effect of increasing the difficulty for the defense. If the true exclusionary rules are not permitted, the question remains whether the shift of burden is allowable; on this issue, see infra pt. II.B.3.

9. This Article often will refer to "state" interests. It should be noted, however, that whatever powers or restrictions apply to the states in this context also apply to the federal government as criminal prosecutor.


ants seeking to show that mental abnormality precluded the formation of
the required mental state often encounter similar restrictions. 13

Such bars to the introduction of defense evidence operate despite the
clear relevance of the evidence to the mental state element of the crime
charged, the competence of the defense witnesses and the excellence of
their observations. Rather, the evidence is barred generically: Exclud-
ing consideration of intoxication or mental abnormality is thought neces-
sary to ensure reliable factfinding, efficient factfinding or the
incapacitation of dangerous people. 14

Excluding evidence relevant to mental state probably does not offend
the letter of the Patterson rule. 15 That case could be interpreted as re-
quiring the prosecution to overcome only such evidence as the state al-
 lows a defendant to introduce; if there were no allowable defense
evidence, the prosecution still would have to convince the jury beyond a
reasonable doubt of the persuasiveness of its own evidence on each ele-
ment of the offense, including, of course, mental state. On the other
hand, the Patterson rule and the burden of persuasion are rather hollow if
the factfinder does not hear major relevant evidence in the defense arse-
nal. The spirit of the Patterson rule is that it ought to be difficult to prove
the elements of a crime; this spirit affects any inquiry into the state's right
to exclude defense evidence relevant to such an element.

The following discussion adopts a traditional balancing approach in
examining whether the state constitutionally may exclude mental state
evidence based on intoxication or mental abnormality. Because the pros-
ecution will prove mental state by circumstantial evidence, the defendant
has a particularly strong interest in introducing his refutation. The issue
then becomes whether the state's interests in excluding the evidence are
even stronger. This Article suggests that the state's concern with reliable
and efficient factfinding, while compelling, sometimes actually is
thwarted by exclusion of defense evidence. In addition, state interests
can be served adequately by case-specific application of traditional tech-
niques such as cross-examination and cautionary instructions. Further,
the invocation of unreliability as the basis for exclusion of this evidence
may be a mask to the state's actual underlying concern—that dangerous

of mental abnormality not admissible outside of context of the insanity defense); Johnson
Hoffman, 328 N.W.2d 709, 716 (Minn. 1982) (same); State v. Roman, 168 N.J. Super.
344, 348-51, 403 A.2d 24, 26-28 (1979) (evidence of mental abnormality admissible for
insanity defense and to negative specific intent); State v. Correra, 430 A.2d 1251, 1253-54
(R.I. 1981) (same); Bonnie & Slobogin, The Role of Mental Health Professionals in the
(stating that some states admit evidence of mental abnormality only for insanity defense,
while others allow such evidence to negative specific intent).


15. The Patterson rule requires the prosecution to prove all definitional elements of
the crime beyond a reasonable doubt. See Patterson v. New York, 432 U.S. 197, 206
people ought to be incapacitated. This Article argues that alternative means, such as expanding civil commitment possibilities and redefining crimes, exist to serve this interest. It is questionable, of course, whether these are less drastic than the exclusion of defense evidence and subsequent criminal conviction. If the alternatives are as unworkable, the exclusion of evidence can continue as long as the incapacitation of dangerous people is deemed compelling. Over-emphasizing the need for incarceration, however, carries its own dangers: Such a course could threaten the existence of all rights that might lead to the acquittal of dangerous people, and thus profoundly alter the nature of our criminal justice system.

The problems explored below are brought into focus, if not created, by the juxtaposition of two twentieth-century developments in criminal law: the increased emphasis on subjective guilt as a prerequisite for criminal conviction and the insistence upon prosecutorial proof of the elements of a crime beyond a reasonable doubt. The convergence of these trends, in the short term, may be responsible for some increase in the freeing of dangerous people. The following examination suggests, however, that society may be able to use the criminal sanction more appropriately and still ensure its physical safety by exploring less orthodox approaches to the problem of incapacitation.

I. THE PATTERSON DECISION AND THE DYNAMICS OF DEFENSES

In Patterson v. New York the defendant was convicted of second-degree murder after the state proved beyond a reasonable doubt that the defendant had caused the death of another person and that he had intended to cause that death. The conviction would have been lowered to manslaughter if the defendant had persuaded the jury that he had "acted under the influence of extreme emotional disturbance," a burden he bore under New York law. The United States Supreme Court, faced with the defendant's due process challenge to the allocation of the burden of persuasion on this mitigating factor, condoned placing the burden of persuasion on the defendant, and thus affirmed the conviction. "The death, the intent to kill, and causation are the facts that the State is required to prove beyond a reasonable doubt if a person is to be convicted of murder. No further facts are either presumed or inferred in order to constitute the crime." The issue of extreme emotional disturbance "does not serve to negative any facts of the crime which the State is to prove in order to convict of murder. It constitutes a separate issue . . . ." The state proved beyond a reasonable doubt the elements in the definition of the

17. Id. at 198-200.
18. Id. at 200.
19. Id. at 205-06.
20. Id. at 207.
offense, and thus satisfied due process.\textsuperscript{21}

In arriving at this holding the Court used the term "affirmative defense" to refer to a defense that "does not serve to negative any facts of the crime which the State is to prove."\textsuperscript{22} Another way to state the Court's holding, then, is that the due process clause permits a state to make the defendant carry the burden of persuasion on an "affirmative defense." This use of the term "affirmative defense," however, is slightly different from that which is often found in the literature. Usually that label is given to any defense for which the state has chosen to place the burden of persuasion on the defendant,\textsuperscript{23} irrespective of whether or not that defense serves to negative any facts of the crime which the state must prove in order to convict. To avoid the confusion that might be caused by these inconsistent uses of the term "affirmative defense," this Article uses the term "negativing defenses" for those defenses which, if believed, preclude the existence of elements of the offense.\textsuperscript{24} Arguments that exculpate despite the state's ability to prove all definitional elements will be called "extrinsic defenses." Thus, the label "extrinsic" normally would be given to such defenses as duress, protection of property and self-defense;\textsuperscript{25} mistake of fact and alibi would be classic negativing defenses.\textsuperscript{26} In these terms, then, \textit{Patterson} could be seen as holding that the state must bear the burden of persuasion on negativing, but not extrinsic defenses.\textsuperscript{27}

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  \item \textsuperscript{21} Id. at 206.
  \item \textsuperscript{22} Id. at 207.
  \item \textsuperscript{23} See, e.g., W. LaFave & A. Scott, Criminal Law 152 (1972); Jeffries & Stephan, \textit{supra} note 3, at 1335 n.17.
  \item \textsuperscript{24} From this description, and from the following examples, it may be clear that the term "negativing defenses" is being used for one application of what, in evidence law, is called the rule of logical relevance: Evidence is logically relevant to proving or disproving mental state, for example, if after the evidence is introduced "the existence of [that state of mind appears] more or less probable than it did before the evidence was offered." R. Lempert & S. Salzberg, A Modern Approach to Evidence 142 (1977); see Fed. R. Evid. 401; G. Lilly, An Introduction to the Law of Evidence §10, at 21 (1978). "Negativing evidence," then, is logically relevant evidence that makes the existence of the mental state less probable.
  \item \textsuperscript{25} Note that these defenses would not be "extrinsic" under the broad approach to general intent. See \textit{infra} notes 193-95 and accompanying text. While there may be some constitutional issues involved in the extrinsic defenses (such as whether some specific defenses are constitutionally required by such concepts as proportionality), this Article focuses on problems concerned with the negativing defenses.
  \item \textsuperscript{26} This Article will examine a defendant's constitutional right to present certain defenses that negative the required mental state. A similar analysis could be undertaken with regard to defenses that arguably negative the act element in the definition of a crime. Alibi is such a defense, since a defendant who was elsewhere could not have performed the criminal act. "Involuntary act" may be such a defense if the notion of voluntariness is implicitly part of the definition of the crime, but see the discussion of the nature of the "reasonable person" aspect of objective mental state, \textit{infra} notes 191-92 and accompanying text.
  \item \textsuperscript{27} In \textit{In re Winship}, 397 U.S. 358 (1970), the Court held that the state must prove beyond a reasonable doubt "every fact necessary to constitute the crime with which [the defendant] is charged." \textit{Id.} at 364. There are many ways to interpret this language. A
Evidence of mental abnormality is potentially of either type, depending on the specific facts and the charge involved.28 Assume a murder statute, such as the one in Patterson, in which the crime is defined as intentionally causing the death of another human being. A psychotic who perceived his attacker to be a bear and killed it, only to discover later that he had killed a person, would have a negativing defense: If the jury believed his evidence, the prosecution could not prove "intent to kill a human being." A psychotic who believed that God was commanding him to kill that person, however, would not have a negativing defense: Even if the jurors believed his evidence, they could still conclude that he had the

"procedural" interpretation, see Jeffries & Stephan, supra note 3, at 1333-38, would require the state to prove "not only the presence of every element of the offense but also the absence of justification, excuse, or other grounds of exculpation or mitigation." Id. at 1333. This interpretation has been heavily criticized, mainly on the ground that it would discourage legislatures from experimenting in law reform. See id. at 1344-60; cf. Allen, The Restoration of In re Winship: A Comment on Burdens of Persuasion in Criminal Cases after Patterson v. New York, 76 Mich. L. Rev. 30, 34-35 (1977) (procedural interpretation would invalidate attempts to allocate burden of persuasion to defendant, thus eliminating affirmative defenses from criminal law).

A second interpretation, taking off from this concern, is labeled by Allen the "political compromise" approach. It would permit placing the burden of persuasion on the defendant when "the legislature would have refused to adopt the defense but for the provision imposing the burden of proof on the defendant." Allen, supra, at 50-51.

A third interpretation, labeled "substantive" by Jeffries and Stephan, focuses on the notion of proportionality. It requires the state to prove beyond a reasonable doubt "facts sufficient to justify penalties of the sort contemplated. In other words . . . [there is] a constitutional requirement of proof beyond a reasonable doubt of a constitutionally adequate basis for imposing the punishment authorized." Jeffries & Stephan, supra note 3, at 1365. Thus, the courts should review whether the maximum punishment authorized for a particular crime "is grossly disproportionate to the conduct and culpability proved by the state." Id. at 1381. If the punishment is proportionate, "its adequacy is not impaired by legislative adoption of the more generous scheme of an affirmative defense." Id. at 1382. Allen, agreeing, points out that the state would only be required to disprove an extrinsic defense when "a statute removes from the definition of a crime those elements that make it serious in the first place," adding, in a footnote, "[a]s would be the case, for example, if the defense of entrapment or insanity were viewed as negating intent." Allen, supra, at 52 & n.80.

The most restrictive interpretation of In re Winship is a formalistic or "elements" approach. This interpretation assumes that the state need prove beyond a reasonable doubt only those elements of the offense that it chooses to include in the definition of the crime. See Allen, supra, at 48. While it can be debated whether Patterson adopted a "substantive" or "elements" approach, see Allen, supra, at 48-53, this Article will proceed on the assumption that the most restrictive, "elements," approach was chosen by that case. This assumption will be made because the "elements" approach is the least helpful to defendants wanting to avoid the burden of persuasion of a particular matter, and yet, as will be seen, the defendant nevertheless must be allowed to avoid that burden when his evidence of mental abnormality or intoxication negatives the existence of a required mental state.

28. Whether a defendant's mental abnormality did preclude the formation of a required mental state is a factual question probably only answered with the aid of a psychologist or psychiatrist. This Article is not intended to survey the types of psychological conditions that can cause delusional states, nor to critique the theories and methodologies used by practitioners to diagnose such conditions. Development of a negativing defense would be the task of the defense attorney and experts in each particular case. This Article is intended merely to examine the admissibility of such negativing evidence once it is developed.
intent to kill a human being. He might, however, have an extrinsic defense, depending on the jurisdiction's insanity test. 29

Many jurisdictions refuse to acknowledge this distinction, requiring that negativing evidence of mental abnormality be treated as an extrinsic "insanity" defense rather than as evidence pertaining to the existence of the requisite mental state. 30 This rule, and others like it, 31 will be affected by the balancing considered below.

Evidence of intoxication also is potentially either negativing or extrinsic. 32 Assuming the same statute as above, a defendant whose intoxication made him unaware of how fast or erratically he was driving would not, if he hit a pedestrian, have "intended" to kill a human being. 33 If,

29. The classic M'Naghten test of criminal insanity requires proof that the defendant "at the time of the committing of the act . . . was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." M'Naghten's Case, 10 Cl. & F. 200, 210, 8 Eng. Rep. 718, 722 (H.L. 1843). In a jurisdiction using this test, an extrinsic defense in the noted hypothetical would be the defendant's belief that the act was not wrong because God had commanded it. In a jurisdiction adding a "control test," where "the focus . . . is on mental disease that deprives the individual of the capacity to exercise his will, the capacity to choose whether or not to engage in proscribed behavior," P. Low, J. Jeffries & R. Bonnie, Criminal Law 657-58 (1982), an extrinsic defense would be that the defendant felt powerless to disobey God's command.

30. See supra note 13.
31. See supra notes 7-13 and accompanying text.
32. Whether a defendant's intoxication did preclude the formation of a required mental state is a factual question probably only answered with the aid of an expert on intoxicated states. As the knowledge in this area is limited and the experts few, it is this author's impression that convincing negativing evidence based on intoxication is rarely developed. On the assumption, however, that such development sometimes would be possible, this Article is intended to examine the admissibility of such negativing evidence once it exists.
33. While it commonly is accepted that ingestion of alcohol loosens inhibition, see Paulsen, Intoxication as a Defense to Crime, 1961 U. Ill. L.F. 1, 4 (1961), it also is true that a high level of intoxication can prevent subjective awareness of external reality.

As a matter of logic the fact of acute alcoholic intoxication may ground an inference that the actor did not act with the knowledge or purpose or recklessness required as the element of a crime. Alcohol acts as a depressant and, in large amounts, can seriously interfere with the drinker's perceptive capacity and mental powers. With 0.30 per cent or more of alcohol in the blood (the equivalent of a pint of whisky in the body) a drinker's sensory perception is quite dulled and he has little comprehension of what he sees, hears or feels.

Model Penal Code § 2.08 comment at 3 n.4 (Tent. Draft No. 9, 1959) (citations omitted). Awareness of external reality also can be affected by ingestion of other drugs, such as LSD, see Comment, LSD—Its Effects on Criminal Responsibility, 17 De Paul L. Rev. 365, 366 (1968), or heroin, from which hallucinations are possible during the second, or euphoric, stage of the reaction, which may last from two to three hours, Interview with Dr. Jerry Larson, Physician for Comprehensive Options for Drug Abusers, Inc. (CODA) Drug Treatment Program, in Portland, Or. (Feb. 9, 1984).

Of course, the fact that such negativing evidence theoretically is possible does not mean that it is easy to present the evidence or convince the jury to accept it. For example, "[t]he defendant's assertion that drinking had taken away his capacity to form an intent is often disbelieved because of his glib exculpatory statements to investigating policemen about his actions at the time of the crime." Paulsen, supra, at 9. It is beyond the scope of
however, that same defendant had seen someone he hated walking across the street and purposely had struck that victim with his car, his argument that he would not have carried out that intent if sober would be, at best, an extrinsic defense.

A common aspect of the foregoing examples is that the prosecution was required to prove subjective culpability. In fact, as will be explored further below, mental abnormality and intoxication can be negativing defenses only to subjective mental state requirements: intent, purpose, knowledge, and in some cases recklessness. If the prosecution can convict merely on proof of objective culpability (that is, negligence), mental abnormality and intoxication will be irrelevant.

In summary, when a subjective mental state is an element, the prosecutor must prove it beyond a reasonable doubt. Thus, if the defense is permitted to introduce negativing evidence of mental abnormality or intoxication, and that evidence is believed by the factfinder, the prosecution’s task necessarily will include overcoming whatever doubts the defense evidence has raised about the existence of the required mental state. This approach would, in effect, require the prosecution to disprove the defendant’s evidence, a possibly formidable task. If the prosecutor failed, the consequences could be severe: A person whose mental abnormality or intoxication had resulted in dangerous behavior might be out on the street and capable of again causing harm.

II. THE RIGHT TO PRESENT NEGATIVING EVIDENCE

The dynamic outlined in the previous section assumes, of course, that the defendant has a right to present evidence whenever it would negative an element of the offense. As noted above, the basis for such a defense

34. See infra pt. II.C.1.b.

35. See infra note 184 and accompanying text.

36. This will be so because the evidence will not make the existence of the required elements less probable. See supra note 24 and infra notes 191-92 and accompanying text.

37. Various courts have accepted this logic. See, e.g., People v. Wetmore, 22 Cal. 3d 318, 321-22, 583 P.2d 1308, 1310, 149 Cal. Rptr. 265, 267-68 (1978) (when defendant has evidence that he lacked the specific intent required for burglary because he was under the delusion that he himself owned the burgled apartment, he must be allowed to introduce that evidence on the issue of mental state rather than be forced to treat it as an insanity defense); Ward v. State, 438 N.E.2d 750, 754 (Ind. 1982) (when defendant introduces mental state evidence which would reduce murder to manslaughter, the prosecution bears the burden of proving that that mental state did not exist) (dictum); State v. Stockett, 278 Or. 637, 644-45, 565 P.2d 739, 743 (1977) (unconstitutional to put burden of persuasion of negativing defense on defendant, but harmless error because the defendant’s evidence did not negative any element in the definition of the crime); State v. Correra, 430 A.2d 1251, 1255 (R.I. 1981) (where defendant seeks, under the “diminished capacity” doctrine, to establish the absence of an element of the crime, the state must overcome the effort by proof beyond a reasonable doubt) (dictum).

38. See supra note 15 and accompanying text.
right must be found in sources other than *Patterson v. New York*. 39 There is precedent for the proposition that a defendant has a constitutional right to present evidence. 40 The cases and commentators are unclear regarding the source of that right—whether it is the due process clauses or the sixth amendment. 41 All agree that the right is not absolute, and that a balancing test weighing the competing interests of the defendant and the government should be used to determine whether it is constitutional for the government on any particular occasion to burden the right to defend. 42

There is no clear consensus as to the nature of the balancing test that should be employed. Commentators seem to agree, however, that the test must recognize that the state’s side of the balance can vary not only according to the nature of the interest asserted, but also with the means used to achieve stated ends. For example, Professor Clinton suggests that the government’s interest is weakened to the extent that it has not adopted the least restrictive alternative that will further its goals:

Presumably, as part of the analysis of the governmental interest advanced, some inquiry must be made as to whether the evidentiary or procedural objectives justifying the infringement of the accused’s constitutional rights might not be furthered by means which less drastically undermine the accused’s ability to present a defense. To the extent that less drastic alternatives are available, the governmental interest infringing on the right to present a defense is less compelling. 43

Professor Westen, using much the same language, goes further and asserts that the alternative need only adequately, rather than completely, serve the state’s interest:

The “alternative means” analysis . . . prohibits the state from furthering its interests by burdening constitutional rights where less drastic alternatives adequately serve its interests. A less drastic alternative is adequate by that analysis, even if less effective, if the added effectiveness of the more drastic alternative is insufficient to justify the latter’s

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42. *Id*. Clinton rejects grounding the right in the sixth amendment because, according to his reading of the constitutional history, such grounding would entail reliance on the “penumbras” of that amendment. He favors the due process clauses because of their inherent flexibility, which, he claims, will allow the right to develop with no artificial barriers deriving from the language of the amendment. *Id*. at 794-95.
44. Clinton, *supra* note 41, at 797-800, 810; Westen, *supra* note 43, at 133-46, 156.
45. Clinton, *supra* note 41, at 800 (footnote omitted).
burden on constitutional rights.\textsuperscript{46}

Because the balance demands subtlety, the test in substantive due process analysis is attractive here. It allows both a differentiation between ends and means and a ranking of the asserted modes and interests in each category. The test provides that if an individual's interests are fundamental they can only be outweighed by protecting compelling state interests by necessary means; when an individual's interests are otherwise, the state will be allowed to pursue legitimate goals using any rational method.\textsuperscript{47}

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\item[46.] Westen, \textit{supra} note 43, at 149 (emphasis in original).
\item[47.] J. Nowak, R. Rotunda & J. Young, Constitutional Law 448 (2d ed. 1983). As indicated, see \textit{supra} notes 45-46 and accompanying text, commentators seem to assume the appropriateness of a strict scrutiny test in this area, perhaps because the right to defend is seen as fundamental. If a strict scrutiny test were rejected, of course, a state's decision to limit or exclude negativing evidence would be a "rational" way to achieve its goal. The logical conclusion of this approach, of course, could be conviction upon proof beyond a reasonable doubt of dangerousness.

In Perry v. Rushen, 713 F.2d 1447 (9th Cir. 1983), the court essentially used a substantive due process approach in the context of the defendant's asserted sixth and fourteenth amendment right to introduce evidence that a state court had ruled would necessitate too much time or present the risk of undue prejudice. The Ninth Circuit apparently would refuse to see the defendant's right as "fundamental" if his evidence was cumulative, unreliable or weakly probative. See \textit{id}. at 1452-53. On the other hand, the state's interest in "reliable and efficient trials" was seen as always "compelling," \textit{id}. at 1451, unless the state was utilizing an irrational rule, \textit{id}. at 1451-53. The court did not have to reach the question of the rationality of the state's rule in the \textit{Perry} case, as it found the defendant's evidence to be weak. \textit{Id}. at 1454.

The Ninth Circuit's approach appears quite heavily weighted in favor of the state. Once the court labels defense evidence "cumulative," "unreliable" or "weak," that evidence can be excluded as long as exclusion is rational. The state is never forced to use the least restrictive alternative. Difficulties inherent in convincing a court to label rules of procedure "irrational" also would result in frequent rejection of the defense evidence.

It can be argued that in order for a defendant's right to present a defense to be meaningful, doubts about probative value must be resolved in the defendant's, not the state's, favor. This argument can be made with special strength when the evidence is not collateral, as, for example, would be evidence going to a witness's credibility. It also can be more strongly made when the evidence is negativing rather than extrinsic, since the inability of the prosecution to prove the elements of the crime precludes the need for extrinsic defenses at all. That negativing evidence demands special consideration is reflected in the contrast between the Supreme Court's constitutional treatment of the negativing evidence in Mullaney v. Wilbur, 421 U.S. 684 (1975), and the extrinsic evidence in Patterson v. New York, 432 U.S. 197 (1977). See \textit{infra} notes 68, 127-30 and accompanying text.

One might be tempted to argue that the difference in constitutional importance between negativing and extrinsic evidence is reflected adequately in the state's ability to shift the burden of persuasion on extrinsic defenses to the defendant or to eliminate them altogether. An anomaly would result, however, if this argument were accepted. A court might be more likely to allow low-reliability evidence on an issue where the defendant bears the burden of proof, on the theory that the allocation of the burden will protect the jury from having to rely on such evidence. If that were to happen, evidence of similar reliability would be excluded on the constitutionally mandated defense and admitted on defenses that have not as yet clearly been constitutionally required.

It also should be noted that use of a strict scrutiny test implicates exclusionary rules beyond those discussed here. Assume, for example, that Joe confessed to his lawyer that he had committed the crime with which Mary was charged. If Mary discovered this,
This section will examine first why the defendant has a fundamental interest in introducing evidence of intoxication or mental abnormality to negative mental state. Following will be an exploration of the state interests commonly thought to justify exclusion of such evidence: an interest in reliable and efficient factfinding and an interest in incapacitating dangerous individuals. Each of these latter interests, in turn, will be evaluated on two levels: Is the interest itself compelling? If so, has the state employed a necessary or least intrusive method of furthering the interest? Both questions must be answered affirmatively before either interest may be said to outweigh the fundamental interest held by a defendant.

A. The Defendant's Interest

A defendant’s interest in introducing relevant evidence on the issue of mental state relates directly to the manner in which the prosecution proves criminal charges. An act or result is capable of proof by direct evidence: A witness may testify to having seen the defendant shoot the victim, and the only question will be whether the witness is worthy of should she be allowed to force Joe’s lawyer to testify as to that privileged communication on the grounds that it negatived the act element in the charge against her? Use of the strict scrutiny approach does not, of course, automatically result in an affirmative answer. Other interests may be “compelling,” and exclusion of the evidence may be the least intrusive possible solution. The exploration of the numerous rules that may be implicated by the use of a strict scrutiny test in the current context is beyond the scope of this Article.

48. See J. Nowak, R. Rotunda & J. Young, supra note 47, at 448; see also id. at 592 (similar test used in equal protection cases involving limitations on the exercise of fundamental rights); cf. Clinton, supra note 41, at 814-15 (“the application of the least restrictive alternative doctrine . . . diminishes the government’s asserted interest in reliability” with regard to polygraph evidence).

49. It must be emphasized that the remainder of the Article is limited to defense evidence that actually is logically relevant to the existence of the required mental state. The evidence may be considered irrelevant if it is based on expert testimony that does not meet the minimum standards for accuracy of “novel” scientific evidence. See Comment, The Psychologist as Expert Witness: Science in the Courtroom?, 38 Md. L. Rev. 539, 562 (1979) [hereinafter cited as Expert Witness]. But see Clinton, supra note 41, at 810-15 (even evidence that fails to meet minimum standards for scientific evidence may have to be admitted when proffered by the defendant). Assuming, however, that the evidence meets this threshold or is not subject to it, it will be logically relevant if it shows that “because of intoxication or endogenous causes, [the defendant] lacked the conscious awareness, belief, or intention required by the substantive law.” Bonnie & Slobogin, supra note 13, at 446 (labeling such a defense “diminished capacity”). Negativing evidence does not include facts leading to the argument of “diminished responsibility”—that “a person suffering from severe mental disorder should not be regarded as fully responsible for his offense, even if he is not legally insane and even if he had the mens rea required for the offense.” Id. at 449. Nor will it include proof that a defendant could not control his behavior. It should also be noted that the fact that the evidence is circumstantial does not make it less relevant, especially on the issue of mental state. See supra pt. II.A; cf. Bethea v. United States, 365 A.2d 64, 86 n.46, 87 (D.C. 1976) (psychiatric testimony is of general relevance to issue of responsibility; issue of existence of the required state of mind must be determined by the circumstances of the case), cert. denied, 433 U.S. 911 (1977).
belief. Mental state, however, can never be so proved unless it is admitted by the defendant. The state will of necessity have to argue, for example, that because the defendant pointed a loaded gun at point-blank range at the victim's chest and pulled the trigger, he must have intended to kill that person. Proof will be by circumstantial evidence, frequently consisting only of the fact that the defendant committed the bad act or caused the bad result.50

This sort of proof works because most jurors, like people in general, are willing to assume that a person who acts in a certain way intends both his behavior and whatever results naturally flow from such behavior. This conclusion will be virtually automatic unless something causes the juror to question it in a particular context. If the only context available is that presented by the prosecution's evidence of the act and result, there will be no inclination to question the conclusion that the defendant intended both. Only if the defense is allowed to present an alternative or enriched context, such as the defendant's mental abnormality, will the jury have any reason to explore further the defendant's intent to do the act or cause the result.51

The same point can be made in slightly different terms. Proof of mental state involves using the "reasonable person" as circumstantial ev-

50. Unless the prosecutor meets the burden of production on the act elements of the crime, the case will not go to the jury anyway. Thus, the minimum circumstantial evidence of mental state will be the defendant's acts. It should also be noted that if, in the context of the prosecutor's evidence, the inference that the defendant intended the consequences of his acts is an irrational one, the jury might not be allowed to make that inference. See County Court v. Allen, 442 U.S. 140, 157 (1979). Allen states a rule of logical relevance for inferences and substitutes the word "rational" for the requirement of factual relevance. If evidence is relevant, the jury can hear it; if an inference is rational, its use can be sanctioned openly by the court or prosecutor; in both cases, the factfinder then must decide if the inference proves the element of the crime beyond a reasonable doubt. See id. at 164-67.

51. See Hughes v. Mathews, 576 F.2d 1250, 1254 (7th Cir.), cert. dismissed, 439 U.S. 801 (1978). The court there stated that when the state court instructs the jury that there is a rebuttable presumption that a person intends the natural and probable consequences of his own acts, exclusion of psychiatric evidence on the issue of mental state is unconstitutional. This is so because, despite the defendant's ability to rebut the presumption with other evidence, the exclusion in effect creates a "conclusive presumption which relieves the state of its duty to prove all elements of the crime beyond a reasonable doubt." Id. The court would have reached the same conclusion in the absence of the jury instruction, holding exclusion of the psychiatric evidence per se unconstitutional. Id. at 1255; see also Mullaney v. Wilbur, 421 U.S. 684, 700-01 (1975) (relieving the state of its burden to prove elements of the crime beyond a reasonable doubt could result in conviction of the innocent).

Bonnie and Slobogin go so far as to state that the use of circumstantial evidence to prove mental state has the practical effect of shifting the burden to the defendant to demonstrate that he did not perceive, believe, expect, or intend what an ordinary person would have perceived, believed, expected, or intended under the same circumstances. Restriction of clinical testimony on mens rea thus compromises the defendant's opportunity to present a defense on an issue concerning which he, in reality, bears the burden of proof.

Bonnie & Slobogin, supra note 13, at 477 (footnotes omitted).
idence: If the reasonable person would have been aware that somebody was standing in front of the gun, the defendant must also have had that awareness absent evidence to the contrary. The "reasonable person" test, however, can also be a standard of culpability. In other words, the law can force someone, at his peril, to act as though he had the awareness a reasonable person would have had in the same external circumstances. Such a standard is labeled "negligence"; when it is imposed, the subjective, actual awareness of the defendant is irrelevant.5

The exclusion of negativing evidence on the issue of mental state has the effect of "selectively redefining the offense to apply objective standards to [that particular defendant] and subjective standards to everyone else."54 This is so because the defendant's actual awareness, affected by intoxication or mental abnormality, is deemed irrelevant. The defendant is precluded from showing what he did, in fact, intend, and the jury will hold him to the level of awareness of a reasonable person. Thus, the defendant, despite his mental state, is found guilty on objective standards. Other defendants, unaffected by intoxication or mental abnormality at the time of the offense, also might fail to provide a challenge to the "reasonable person" logic. If so, however, the failure will be because no challenge exists—that is, because they are subjectively liable.

While it may be the case that, upon reflection, the legislature wants to allow criminal liability for negligent behavior,55 "selectively redefining the offense"56 so that an objective standard affects only mentally abnormal or intoxicated actors is a substantially different matter. If nothing else, such concealed redefinition permits the illusion that the defendant was convicted on the basis of a subjective mental state, and so permits the enhanced punishment attendant upon such increased culpability.57

The defendant's interest in introducing negativing evidence also coincides with an institutional interest in ensuring adequate review of police and prosecutorial practices. The administrative process leading up to a decision to charge the defendant is essentially a secret one. Explanations other than the one ultimately adopted by the police and prosecutor either have not been considered at all or have been rejected, perhaps for reasons having nothing to do with the actual guilt or innocence of the defendant.58 The "presumption of innocence" is a systemic check on this ad-

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53. See Model Penal Code § 2.02(2)(d) comment at 126 (Tent. Draft No. 4, 1959).
54. Bonnie & Slobogin, supra note 13, at 479; see Paulsen, supra note 33, at 14-15; cf. Goldstein & Katz, Abolish the "Insanity Defense"—Why Not?, 72 Yale L.J. 853, 870 (1963) ("[A]nother low visibility purpose of the insanity defense . . . is to keep sufficiently ambiguous the consequences of the defense [i.e., incapacitation] . . . so as to prevent at least conscious recognition that the prerequisites of criminal liability have been abandoned.")
55. See infra notes 191-92 and accompanying text.
56. Bonnie & Slobogin, supra note 13, at 479.
57. See infra notes 184-90 and accompanying text.
58. It is commonplace that prosecutors have broad charging discretion that is virtually unreviewable until the defendant has a chance to participate in some court proceed-
ministrative process, directing the state to jump through a certain number of hoops no matter how apparent the defendant's guilt.\textsuperscript{59} Review by an independent factfinder is the major way of examining the administrative decisions of police and prosecutors.\textsuperscript{60} Excluding relevant evidence from the trial precludes adequate review and makes the "hoop" illusory.\textsuperscript{61}

Ineffective public review of administrative decisions is disturbing because it indicates a break in the chain that connects the criminal justice system with society's underlying moral precepts. Herbert Packer has observed that among the unarticulated assumptions underlying the "relatively stable and enduring features of the American legal system"\textsuperscript{62} is the notion that "the alleged criminal is not merely an object to be acted upon but an independent entity in the process who may, if he so desires, force the operators of the process to demonstrate to an independent authority (judge and jury) that he is guilty of the charges against him." Americans, in other words, commonly perceive the punishment of convicted criminals as the last step in a process in which defendants are protected from the unilateral and potentially arbitrary imposition of sanctions by police and prosecutors. As the Supreme Court has pointed out, "to command the respect and confidence of the community in applications of the criminal law . . . [i]t is critical that the moral force of the criminal law
not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." 64

We would not be comfortable, for example, if we were told that our criminal justice system absolutely prevented a defendant from showing that he was in Tahiti at the time the charged crime took place in Des Moines. To put the point bluntly, it is hypocritical, at best, to glory in the confidence that the administrative conclusion of guilt has been reviewed when the outcome of that review is predetermined.

When a mental state element exists, a defendant is not culpable unless he is proved to have the required mental state. 65 Mental state is as important an element, in terms of the moral justification for the criminal sanction, as is the criminal act. 66 If we are uncomfortable about a defendant being precluded from showing that he did not perform the act, there is no reason why we should view defense evidence on mental state any differently. 67

If the defendant’s evidence is excluded, it need not be met; if it is allowed, the prosecution can meet it, at least, by showing that it is unreliable. 68 Unless doubts about admitting the evidence are resolved in the defendant’s favor, too much essentially unreviewable discretion will be allowed to the prosecution, and the “hoop” that makes up a good part of the presumption of innocence will be a mere formality.

To summarize the discussion thus far, the defendant’s interest in introducing evidence that negatives mental state must be deemed fundamental for two reasons. First, a subjective mental state requirement can be meaningful only if the defendant is allowed to introduce negativing evidence. Second, review of administrative decisions is enhanced by consideration of the defendant’s evidence. There is also a third reason: Unless the defendant’s interests are labeled “fundamental,” the weakest of legitimate state interests will outweigh them when the balancing test is ap-

66. See generally, H. Packer, supra note 58, at 103-06 (discussing why conduct alone, without a mens rea, is an insufficient element for criminal liability).
67. It might be argued that acts are more concrete than mental state, and thus are more easily determined by a jury. This is basically an argument that the jury is incapable of sifting through the vagaries of circumstantial evidence and therefore must be protected from too many conflicting interpretations. It is an argument that reveals a profound mistrust of juries and, concomitantly, an extreme trust in the police-prosecutorial administrative process. It is also an argument that overlooks the fact that the state, with its vast resources, is quite capable of meeting defense evidence on mental state directly.
68. There is the chance, of course, that the prosecution might be unable to overcome the defendant’s evidence. In Mullaney v. Wilbur, 421 U.S. 684 (1975), however, the Court rejected the notion that “the difficulties in negating an argument that the homicide was committed in the heat of passion” justified making the defendant bear the burden of persuasion as to the negativing defense. Id. at 701-02. The Court pointed out that, difficult or not, placing the burden on the prosecutor is deemed essential to our criminal justice system. Id. at 701. This is so even on an element, such as “intent,” that “is typically considered a fact peculiarly within the knowledge of the defendant.” Id. at 702.
plied. On the other hand, labeling defense interests "fundamental" will not result in the virtually automatic discounting of state interests. Important state goals will be labeled "compelling," and the inquiry can then focus on the more subtle question of the appropriate means of reaching those goals.

B. The State's Interest in Reliable and Efficient Factfinding

As noted earlier, existing rules often preclude or burden defendants' attempts to introduce evidence of mental abnormality or intoxication on the issue of mental state. Courts frequently explain these rules as necessary to ensure the reliability and efficiency of the factfinding process.

The state surely has a valid interest in exercising enough control over trials to avoid unnecessary confusion of issues and inaccurate results. The state also has a valid interest in promoting efficient trials that avoid waste of valuable judicial and related resources. Conceding these points, however, is not an admission that negativing evidence of intoxication or mental abnormality can be excluded. Two issues arise: Are state interests in reliability and efficiency "compelling," and, if so, what are the least intrusive means of serving them? This Article will explore these issues in turn, and then will balance the results.

1. Is the Interest "Compelling"?

The state's interest in reliable and efficient factfinding is legitimate. The nature of the balancing test used here affords two good reasons to label the interest "compelling" as well. One involves the consequences of failing to do so. Assume, for example, that the defense were to offer, on the issue of mental state, a neophyte psychologist who had "examined" the defendant for five minutes and had never before testified in court. This evidence would be unreliable. The state, however, would not be able to overcome the defendant's fundamental right to introduce this evidence if its own interest in doing so were merely "legitimate." The state would lose control over the trial process whenever a defendant wanted to introduce negativing evidence, however cumulative or unreliable it might be. On the other hand, if the state's interest is deemed "com-

69. See supra notes 7-13 and accompanying text.
71. Perry v. Rushen, 713 F.2d 1447, 1451 (9th Cir. 1983). As discussed earlier, see supra note 47, the Perry court also considered this legitimate interest to be compelling. Perry, 713 F.2d at 1451.
72. See supra note 47 and accompanying text.
73. It will be recalled that, among other reasons, the defendant's right was labeled "fundamental" so that it could compete successfully with the state's noncompelling but legitimate interests. See supra pt. II A.
pelling,” the state will be able to exclude the evidence if exclusion is necessary to ensure the reliability and efficiency of this particular trial.

The second reason involves the fact that resolution of evidentiary matters, and the trial process itself, have traditionally been seen as state concerns; vindication of a defendant’s constitutional rights, on the other hand, is often the concern of the federal courts. This means that there is some delicacy involved in balancing interests in this area. “In our federal system, states have always retained considerable freedom in adopting procedures for their own courts . . . . We ‘should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States.’ ”74 Failure to label the state’s interest in reliability and efficiency as “compelling” could itself be a thorn in the side of federalism. Beyond the slight such failure would connote, however, is the fact that it is easier for the federal courts to “intrude upon”—and in fact to discount completely—state interests labeled merely “legitimate.” Bestowing the label “compelling” will ensure that some means will be found to further the state interests here.

2. The Least Intrusive Means

Although the state’s interests in reliability and efficiency may be “compelling,” they do not justify the blanket exclusion of negativing evidence unless that is the least intrusive means of furthering those interests.75 This Article will now explore the specific nature of the reliability and efficiency interests and what alternative means exist to serve them.

a. Reliability

Courts typically apply the label “unreliable” to evidence of mental abnormality and intoxication whenever it is proffered on the issue of mental state; exclusion of the evidence accompanies the label.76 When

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74. Perry v. Rushen, 713 F.2d 1447, 1451-52 (9th Cir. 1983) (quoting Patterson v. New York, 432 U.S. 197, 201 (1977)) (citations omitted). In Mullaney v. Wilbur, 421 U.S. 684 (1975), the Court’s rationale could have been interpreted to require the prosecution to bear the burden of persuasion on extrinsic defenses. The Court retreated from this position in Patterson v. New York, 432 U.S. 197 (1977). Fletcher sees this retreat, and the Patterson decision in general, as based on principles of federalism rather than as a doctrinal endorsement of placing the burden of persuasion on a defendant. G. Fletcher, Rethinking Criminal Law § 7.3.4, at 551 (1978).

It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government . . . . and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally “within the power of the State to regulate procedures under which its laws are carried out . . . .” Patterson, 432 U.S. at 201 (quoting Speiser v. Randall, 357 U.S. 513, 523 (1958)) (citation omitted).

75. See supra note 48 and accompanying text.

the label is misapplied, the resulting exclusion prevents the jury from hearing reliable defense evidence, and thus is counter-productive of the professed interest itself. Misapplication of the label "unreliable" is increased when blanket exclusions are declared for generic types of evidence. Case-by-case determination of reliability is the less intrusive alternative, and frequently something less than exclusion will suffice to ensure reliability even on a case-by-case basis. These propositions will be examined in turn.

The concern about reliability takes three forms when the issue is negativing evidence of mental abnormality or intoxication. First, the state has an interest in preventing results based on counterfeit evidence. Second, the state has an interest in excluding evidence in which the probative value is outweighed by the risk of prejudice. Third, the state has an interest in reducing or eliminating evidence that might confuse or mislead the jury. In analyzing these interests, the following discussions assume that the state will be able to have its own experts examine a defendant who uses negativing evidence based on mental abnormality or intoxication. Were this not so, the arguments against the admission of the defense evidence would be more compelling.

77. See infra pt. II.B.2.a.i.
78. See infra pt. II.B.2.a.ii.
79. See infra pt. II.B.2.a.iii.
80. The fifth amendment could preclude the state from examining the defendant because "a person who introduces evidence of his mental condition . . . makes no admission of the crime . . . . In such a situation the fifth amendment requires that the State prove its case without compelling the defendant to submit to interviews by those in its employ." State v. Vosler, 216 Neb. 461, —, 345 N.W.2d 806, 813 (1984). A countervailing argument recognizes the state's difficulty in meeting defense expert testimony absent a reciprocal examination of the defendant. See Estelle v. Smith, 451 U.S. 454, 465 (1981). It follows from the latter argument that the defendant can be required to comply with pre-trial notice requirements when he intends to assert such a defense. This approach could serve the interests of both parties by allowing the state's expert to examine the defendant, but forbidding him to testify on any issue save that of mental state. See United States v. Cohen, 530 F.2d 43, 47-48 (5th Cir. 1976) (insanity defense context, in which court assumes sanity is an element of the offense); cf. Estelle v. Smith, 451 U.S. at 468 ("A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statement can be used against him at a capital sentencing proceeding."); Note, Requiring a Criminal Defendant to Submit to a Government Psychiatric Examination: An Invasion of the Privilege Against Self-Incrimination, 83 Harv. L. Rev. 648, 649 & n.9 (1970) (stating that some courts prohibit using information from a psychiatric examination to establish that defendant committed the acts charged) [hereinafter cited as Invasion]. Forensic reports also can be withheld from the prosecution until it is clear that the negativing defense will be used. Bonnie & Slobogin, supra note 13, at 500. It should be noted, however, that there is some disagreement with the notion that lack of reciprocal examinations prevents the state from refuting defense expert testimony on the issue of mental state. State v. Vosler, 216 Neb. at —, 345 N.W.2d at 812; Invasion, supra, at 670-71. If no state examination is allowed, there is, of course, no fifth amendment problem. If, as these sources suggest, traditional litigation techniques will allow the state to meet the defense evidence, a state-sponsored examination could be dispensed with without harm to the state's reliability interests.
i. The Danger of Counterfeit Evidence

In the context of evidence of mental abnormality or intoxication, the interest in reliability is perhaps most commonly expressed in the fear that such conditions are easy to fake. The defendant may so convincingly feign intoxication or mental abnormality at the time of the crime that lay witnesses will testify in court that the condition appeared to exist. The defendant also may be able to fake the debilitating condition after the fact when being examined by forensic experts.

One can question, however, the significance of a concern about manufactured evidence of mental abnormality or intoxication. Ultimately, the focal question is whether the possibility of chicanery is so great that evidence of mental abnormality or intoxication always must be precluded on the issue of mental state.

Reasons exist for answering this question in the negative. Blanket exclusion of the evidence presupposes either or both of two situations: First, that the risk of counterfeiting is greater statistically for evidence of mental abnormality and intoxication than for other types of evidence now evaluated on a case-by-case basis; second, that the consequences of failing to detect fakery are greater here than elsewhere.

Is there greater risk of counterfeited evidence here? One must first ask how easy it is to feign the type of mental abnormality and intoxication that will preclude the existence of a subjectively defined mental state. It seems unlikely that a great number of defendants would be able to fake such conditions convincingly. It has been observed that such pretense would require two qualities that are rare among criminals: superior acting ability and forethought. In addition, success would depend on feigning the type or degree of impairment that would preclude the existence of subjective awareness; impairments that merely loosen inhibitions would not qualify. Of course, there may in fact be some defendants who have the necessary foresight and acting skills, and there may be forensic experts who have a tendency to resolve doubts about the existence of

82. Lay testimony was at issue in Bethea v. United States, 365 A.2d 64 (D.C. 1976), cert. denied 433 U.S. 911 (1977), in which "lay witnesses testified that appellant's behavior on that day appeared somewhat irrational." Id. at 68. Lay witnesses also testified for the government. Id. at 69.
83. Simulation of intoxication to avoid responsibility for a crime presupposes... high intelligence, histrionic ability, and careful calculation. Even a superficial survey of the cases shows that the inebriate offenders typify the very opposite qualities—they are weak, impulsive, and frequently diseased. In light of these various considerations, the persistently voiced fear of deception suggests the presence of influences other than the reasons that are expressed.
Hall, supra note 5, at 1048; see G. Williams, Criminal Law: The General Part § 178, at 559-60 (2d ed. 1961); Paulsen, supra note 33, at 6.
debilitating conditions in favor of the defendant.\textsuperscript{85} It would seem, however, to be at least as easy for a defendant to counterfeit alibi evidence, or for either party purposely or accidentally to alter eyewitness testimony by the manner of interviewing witnesses.\textsuperscript{86} There is, however, no similar blanket exclusion of alibi or eyewitness testimony. On the contrary, such evidence is evaluated on a case-by-case basis, and by the jury, not the court.

Does this difference mean that it is easier to detect counterfeit alibi or eyewitness evidence than feigned evidence of mental abnormality or intoxication? An affirmative answer implies that the classic techniques of thorough investigation, cross-examination and impeachment do not work where evidence of mental abnormality or intoxication are concerned. Yet it would seem that the standard litigator's tools would continue to be effective with regard to the evidence at issue here. There is no reason why lay observations would be more difficult to discredit in this realm than in any other.\textsuperscript{87} Further, defense experts always can be impeached with a critique of their methods or professional and forensic history.\textsuperscript{88} Standing against these observations is the argument that the jury would be so overwhelmed by the emotional content of the defense evi-

\textsuperscript{85} Some psychiatrists will continue to dig up excuses for criminal behavior . . . even though some such 'excuses' may border on the ridiculous and be totally lacking in scientific reliability. Unfortunately, some members of the judiciary will join them in accepting these excuses.” Commonwealth v. Walzack, 468 Pa. 210, 224, 360 A.2d 914, 921 (1976) (Eagen, J., dissenting).

\textsuperscript{86} See generally, E. Loftus, Eyewitness Testimony 14-19, 175-77 (1979) (discussing how the witness' 'likeableness' and manner of speech, and the way attorney asks a question can influence jury's perception of the evidence). One commentator has noted: [T]hat drunkenness can be readily feigned, may be disposed of at once. No reason has been advanced why determination of this fact presents any greater difficulty than do those raised by "mistake," "legal provocation," "insanity," or many others; indeed, the contrary seems more probable when it is considered that the history of the defendant and the events preceding his wrongful act are examined in greater detail in the drunkenness cases than is usual.

Hall, \textit{supra} note 5, at 1047-48.

\textsuperscript{87} If a lay witness is not credible for some reason, the jury can reject his testimony. This is, in fact, a sacrosanct jury privilege, and judicial pre-screening of "reliability" in this context poses the additional danger of invading the jury's prerogative to judge the credibility of witnesses.

\textsuperscript{88} Bonnie and Slobogin suggest that where reliability of psychiatric evidence is a concern, experts should be examined not so much about their "formal training and licensing," but on "the witness's relevant experience and . . . on the adequacy of the witness's evaluation procedure.” Bonnie & Slobogin, \textit{supra} note 13, at 457. Such experts should be required to have forensic experience, and to know the legal, as well as clinical, significance of their observations. \textit{Id.} at 457-61. These criteria, of course, presuppose a case-by-case application. \textit{Id.} at 466.

The imprecision of an expert's concepts, and the possible shortcomings of his evaluative techniques, may be explored through direct examination and cross-examination, and in arguments by counsel concerning the weight of his testimony. The court can confine the expert to his sphere of specialized knowledge, and exclude opinions on ultimate issues involving moral judgments. Cautionary instructions also are available.

\textit{Id.}
dence that it would fail to pick up the danger signals produced by traditional litigation techniques: The jurors would pity the defendant, or they would identify with him. These feelings could make detection of fakery more difficult. Of course, similar problems could exist when attractive victims or eyewitnesses fabricate testimony. In any case, the issue is closely related to that involving the prejudicial effect of true-but-affecting evidence, to be considered next.

ii. Excluding Prejudicial Evidence

There is a danger that the jury would acquit because it felt particularly sorry for the mentally abnormal person or identified closely with the intoxicated defendant. Equally worrisome is the possibility that the jury would automatically adopt a defense expert's opinion. Concerns such as these could result in blanket exclusion of evidence if they led to the conclusion that the probative value of the evidence always was outweighed by the risk of prejudice from the jury focusing on improper factors.

The premise that juries always defer to experts can be questioned, as can the notion that jurors will agree to the release of dangerous individuals because they feel sympathy or identification. In addition, jurors' emotions of deference and sympathy can work both ways: The prosecution undoubtedly will offer its own expert for the deferential juror's adulation,

89. See Expert Witness, supra note 49, at 590-93.

90. See Fed. R. Evid. 403. "'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Fed. R. Evid. 403 advisory committee note.

Concern about prejudicing the jury sometimes is expressed as a desire to exclude expert testimony on an "ultimate issue" in the case. See, e.g., Bethea v. United States, 365 A.2d 64, 89 (D.C. 1976), cert. denied, 433 U.S. 911 (1977); State v. Lecompte, 371 So. 2d 239, 243 (La. 1979). Bonnie and Slobogin point out that the "ultimate issue" often has normative as well as empirical aspects (for example insanity or extreme emotional disturbance) and that expert witnesses should be precluded from expressing value judgments. Bonnie & Slobogin, supra note 13, at 456. However, testimony regarding the nature and relative severity of a defendant's psychological dysfunction, and informed estimates of what a defendant may have known, perceived, or intended at a particular time, lie within the expertise of mental health professionals. The factfinder, if alerted to the limitations of the expert's knowledge and methodology, can profit from such testimony.

Id. at 456-57.

91. See, e.g., James, Jurors' Evaluation of Expert Psychiatric Testimony, 21 Ohio St. L.J. 75, 95 (1960) (reporting on 68 experimental jury resolutions of a case). One commentator summarized James' findings as follows:

The defense presented two experts who had examined the defendant while the state relied on lay testimony except for one expert who had never seen the accused before the trial. Of the sixty-eight juries, only 13% found the defendant not guilty by reason of insanity. 71% rejected the defendant's experts' testimony and found him guilty. The other 16% could not reach a unanimous verdict.

Invasion, supra note 80, at 668 n.132.
and no doubt it will be able to muster a fair amount of sympathy for and identification with the hapless victim.

iii. Avoiding the Presentation of Confusing Evidence

Courts also may exclude expert evidence on the subject of mental abnormality if they consider such evidence inherently confusing or misleading. Blanket exclusion on such grounds is common for expert evidence that is based on unproven scientific techniques. The courts, however, do not seem to question the techniques underlying the evidence in the cases discussed here. On the contrary, courts that have excluded evidence on the issue of mental state allow use of the same evidence for other litigation purposes in which a jury might be equally confused.

It is the use of the evidence to disprove mental state, not the evidence itself, that some courts find inherently confusing; these courts think such

92. Experts on intoxication are not now widely used in criminal cases. Were they to be used more frequently, it is likely that similar objections would be leveled at their evidence.

93. See Fed. R. Evid. 403. It should be noted that if the evidence is indeed inherently confusing, detecting counterfeiting or mistake, considered supra pt. II.B.2.a.i, will be more difficult.

94. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), states the most common of the court-adopted special rules for admissibility of scientific evidence. This rule makes general acceptance by the relevant scientific community a condition to admissibility. See id. at 1014. Among the attributes favorably cited for this test is the fact that “an appellate decision accepting a scientific development would establish precedent binding in subsequent trials, at least until the scientific community changed its position.” McCormick, Scientific Evidence: Defining a New Approach to Admissibility, 67 Iowa L. Rev. 879, 883 (1982) (discussing a test applied in People v. Kelly, 17 Cal. 3d 24, 30, 549 P.2d 1240, 1244, 130 Cal. Rptr. 144, 148 (1976)) (footnote omitted). Even here, however, some commentators “questioned the necessity for any special rule governing the admissibility of scientific evidence. They believed the legitimate concerns of the Frye proponents could be met adequately through careful application of traditional relevancy and expert testimony rules.” Id. at 885 (footnote omitted). In fact, the traditional analysis has been increasingly preferred by courts. Id. at 886.

95. There is some support for the proposition that courts should re-evaluate whether psychiatric evidence is sufficiently reliable for use in trials at all. See Expert Witness, supra note 49, at 562-89. Because expert witnesses have been little used with regard to evidence of intoxication, it is likely that their evidence would have to pass each jurisdiction’s test for the admission of “novel” scientific evidence.

96. In Commonwealth v. Walzack, 468 Pa. 210, 360 A.2d 914 (1976), the Pennsylvania Supreme Court reversed a conviction where the trial court had excluded evidence of mental abnormality that negated the specific intent requirement of murder. It noted the many other “areas in criminal law where we have accepted a psychiatrist’s opinion: on the issue of whether an accused is competent to stand trial[,] whether an accused was insane at the time of the crime[,] whether an accused acted in the heat of passion[,] whether an accused subjectively believed he was in imminent danger of death or serious bodily injury under his claim of self-defense; whether an accused was capable of making a detailed written confession; [and] at the penalty stage of trial.” Id. at 219-20, 360 A.2d at 918-919 (footnotes omitted). Accord, Hughes v. Mathews, 576 F.2d 1250, 1257-8 (7th Cir.), cert. dismissed, 439 U.S. 801 (1978); State v. Correra, 430 A.2d 1251, 1254 (R.I. 1981). It should be noted that the Walzack approach leaves the trial court the opportunity to exclude psychiatric testimony in a specific case.
usage requires the jury to make unduly subtle distinctions. In Steele v. State the court noted that exclusion of psychiatric testimony on the issue of mens rea is "a pragmatic recognition of the limits of jury tolerance for distinguishing angels on the heads of pins," and that the "judge and jury ought not to be required to identify, classify and evaluate all categories and classifications of human behavior beyond the establishing of the fact of sanity." Another state supreme court believes that "psychiatric evaluation as to subtle gradations of mental impairment is highly subjective and not within the common experience of the layman juror." In other words, the evidence might be sufficiently reliable for the jury to make gross assessments such as "sanity" or "insanity," but it is not reliable enough to use in determining whether someone had a conscious awareness of the external situation in which he was acting.

Courts expressing these views are saying, then, that the speculative and imprecise nature of psychiatric evidence makes it admissible on the issue of the insanity defense but not on the issue of mental state. This is curious in that some commentators derive the opposite conclusion from the same criticism: They would admit the evidence on mental state but do away with the insanity defense. In addition, evidence of intoxication can be quite speculative and imprecise, yet such evidence is used relatively widely by both defense and prosecution. Thus, the exclusion

97. See Steele v. State, 97 Wis. 2d 72, 96-97, 294 N.W.2d 2, 13 (1980) (application of the insanity defense is basically a moral determination that "requires no fine tuning. It is, rather, a gross evaluation that a person's conduct and mental state is so beyond the limits of accepted norms that to hold him criminally responsible would be unjust. This is a far cry from accepting testimony which purports to prove or disprove a specific intent . . . ").

98. 97 Wis. 2d 72, 294 N.W.2d 2 (1980).
99. Id. at 89, 294 N.W.2d at 9 (quoting Note, Criminal Law—First Degree Murder—Evidence of Diminished Capacity Inadmissible to Show Lack of Intent, 1976 Wis. L. Rev. 623, 639).
100. Id. (quoting Curl v. State, 40 Wis. 2d 474, 485, 162 N.W.2d 77, 83 (1968), cert. denied, 394 U.S. 1004 (1969)).
103. See Bonnie & Slobogin, supra note 13, at 434 & n.15.
104. See id. at 435-41. The District of Columbia Court of Appeals has rejected the argument that evidence of mental abnormality should be admitted on the same basis as is evidence of intoxication. Intoxication, the court claims, is susceptible to some degree of "quantification or objective demonstration, and to lay understanding." It is part of human experience that factfinders can understand and apply, in contrast to esoteric psychiatric evidence. Bethea v. United States, 365 A.2d at 88. Bonnie and Slobogin, however, point out that "reconstructive inquiries regarding the degree of a person's intoxication due to alcohol . . . and the nature of any associated functional or behavioral impairment, are notoriously speculative and imprecise." Bonnie & Slobogin, supra note 13, at 435-36. It may be the case that because more people drink or take drugs than are judged "insane," people have the illusion of being more familiar with intoxication. In addition, purported unfamiliarity with mental abnormality will not necessarily stop ju-
of evidence of mental abnormality on grounds of confusion seems illogical. Beyond that, however, the position reflects a profound mistrust of juries. It fails to consider either their ability to make factually complex decisions on other issues, or their potential resistance to expert-based defenses in criminal cases. Finally, the position ignores the possibility of a case-by-case exclusion of evidence where, in the context of a particular lawsuit, the chances of confusion do exceed the possibilities of guidance through careful cross-examination, jury instructions, and oral argument.

iv. Implications of the Case-by-Case Analysis of Reliability

The discussion thus far has concerned the question whether the risk that evidence of mental abnormality or intoxication is unreliable is so great that such evidence always must be excluded on the issue of mental state. Westen suggests that rules about reliability raise such "serious constitutional problems" that evidence should be excluded only when it "is so inherently unreliable that it cannot rationally be evaluated." Clinton, however, suggests that the Constitution might compel even the introduction of "evidence with no extrinsic indicia of reliability . . . if the evidence is of critical importance to the accused." While Clinton's position might be accurate in theory, it is unlikely that a court will afford such extreme deference to defense evidence that is so strongly surrounded with as many bugaboos as is the evidence under discussion. Both authors agree, however, that the defense evidence must be evaluated and balanced against the state's interests on a case-by-case basis and that the least drastic alternative that will ensure reliability must be used. The discussion thus far has revealed few, if any, persuasive reasons why a case-by-case analysis cannot ensure sufficiently reliable factfinding. In a particular situation, reliability may demand total exclusion of the evidence. But there may be a number of occasions in which

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105. State v. Correra, 430 A.2d 1251 (R.I. 1981), suggests that "judicial skepticism . . . regarding psychiatric science is best resolved through the factfinder's determining the credibility and weight to be given the expert's testimony instead of resolving the uncertainty by a total exclusion . . . , [which] implies a distrust of the jury." Id. at 1254.

106. "Even if the defense has offered the only psychiatric testimony, the natural skepticism of the jurors, coupled with [cross-examination, closing arguments, and cautionary instructions], should virtually eliminate the danger of the jury abdicating its factfinding role." Bonnie & Slobogin, supra note 13, at 466.


108. Id. at 157.

109. Clinton, supra note 41, at 808-09 (discussing hearsay evidence) (footnote omitted).

110. Id. at 800, 809-10; Westen, supra note 43, at 156-57.
reliability can be equally well assured by effective cross-examination, jury instructions and oral argument. In the latter situation, in fact, reliability would be lessened by exclusion, because the jury would not hear probative, relevant evidence on a major issue in the case.111

These observations bring the discussion to the second premise underlying the blanket exclusion of evidence of mental abnormality or intoxication: the assumption that the consequences of unreliable testimony are greater here than in other areas.112 The consequences, of course, are that a person who truly had subjective awareness is acquitted altogether or is convicted of a less serious crime requiring only objective fault. The consequences are the same when any type of unreliable evidence is introduced. For example, failure to detect chicanery could be regarded as more serious only if vastly more defendants successfully feigned mental abnormality or intoxication, or if the persons who were successful were for some reason more dangerous than those successfully feigning other defenses. This reasoning reveals that the focus here is not so much on the reliability of factfinding per se, but on the incapacitation of dangerous individuals resulting from reliable factfinding. The articulated concern about reliability masks a deeper concern about dangerous people being free to commit further crimes, a concern that will be examined in the final section of this Article.113

b. Efficiency

States have an interest in avoiding the inefficient use of judicial and community resources, and thus in precluding the use of unduly time-consuming evidence.114 Defense evidence that negatives mental state has been excluded under this rationale. For example, in refusing to allow expert evidence of mental abnormality to be introduced on the issue of mental state, the Louisiana Supreme Court noted that “[t]he real danger in permitting psychiatric evidence of mental or emotional disorders short of insanity to negate intent is [in part] to . . . clutter practically every trial with some sort of expert opinion evidence as to whether the defendant possessed the requisite intent to commit the crime charged.”115

The admission of negativing evidence, however, need not lead to a field day for experts. Before the expert could testify on mental state, the defense would have to show that the evidence was logically relevant to the existence of the required mens rea. As noted above, the number of de-

111. Where defense evidence on mental state is excluded, the jury’s skepticism of a defendant’s claim that he did not have a normal person’s awareness will prevent it from adequately scrutinizing the prosecution’s evidence. See Bonnie & Slobogin, supra note 13, at 477. “For this reason, we believe the only limitations on admissibility of mens rea testimony by mental health professionals should be relevance and the normal requirements for expert opinion.” Id.
112. See supra pt. II.B.2.a.i.
113. See infra pt. II.C.3.
114. See Fed. R. Evid. 403 & advisory committee note.
fendants afflicted with qualifying psychological disorders or intoxication presumably would be small, and so the number of cases in which defense experts would force the issue into litigation would be minimal. Moreover, when proposed evidence in a particular case was unnecessarily lengthy or cumulative, the court could exercise its power to make the evidence more manageable.

The problem of inefficiency may appear to be more acute in the context of a bifurcated trial in which the extrinsic defense of insanity is raised only after the elements of the crime have been found by the jury. If psychiatric evidence on the issue of mental state were also relevant to an insanity defense, the jury might have to hear the same evidence twice. The California Supreme Court recognized this problem, but suggested that its solution lay in changing the nature of bifurcated trials or in abolishing them completely. The Wisconsin Supreme Court, however, concluded that the duplication problem should be avoided by the exclusion of the negativing evidence in the first stage of the bifurcated trial; in other words, the state's interest in a "practical and convenient method of disposing of the whole case" outweighs the defendant's interest in introducing negativing evidence.

On the other hand, an argument may be made that if the state must choose between allowing a negativing defense and an extrinsic defense, the extrinsic defense must be jettisoned: Under Patterson, the state is not compelled to permit the extrinsic defense at all. This argument would force the conclusion that Wisconsin had to allow the psychiatric evidence in the first stage of the trial and preclude it in the second. It is questionable, however, whether Wisconsin would have to make such a choice in the first place. The court perceived that defense experts would have to appear twice to give identical testimony if both defenses were allowed. Yet even if there were some duplication in evidence, total exclusion of the evidence in the first stage of the trial is not the least drastic solution to the problem of redundancy. In the first stage, the defendant could fully examine the expert, as he would in a nonbifurcated trial, and in the second stage the jury could hear or read a transcript, or view a videotape. The effect of a bifurcated trial also could be achieved through the use of a single proceeding with special interrogatories.

116. See supra notes 28-29, 32-33 and accompanying text.
117. See Fed. R. Evid. 403.
119. Steele v. State, 97 Wis. 2d 72, 85-86, 294 N.W.2d 2, 8 (1980).
120. Id. at 86, 294 N.W.2d at 8 (quoting Bennett v. State, 57 Wis. 69, 78, 14 N.W. 912, 916 (1883)).
121. Id. at 90-91, 294 N.W.2d at 10-11.
122. "Special interrogatories" are a mechanism whereby a jury is to answer specific factual questions in conjunction with a general verdict of "guilty" or "not guilty." Special interrogatories normally are disfavored in criminal cases. Courts fear that special interrogatories might "'catechize' a reluctant juror away from an acquittal towards a seemingly more 'logical' conviction." Heald v. Mullaney, 505 F.2d 1241, 1245 (1st Cir.
In sum, blanket exclusion of defense evidence is not the least intrusive method of ensuring efficiency in criminal trials. When the threat to efficiency is real, courts possess methods of saving time on a case-by-case basis.

3. Reliability and Efficiency in the Balance

As concluded above, it probably is valid to label as “compelling” the state’s interest in reliable and efficient factfinding, but a word of caution is in order about including efficiency in that description. The discussion thus far has presupposed case-by-case determinations of whether evidence is, in fact, negativing, whether proper techniques were adequately followed in developing the evidence, and so forth. This case-by-case evaluation is, in itself, a time-consuming and inefficient process. By contrast, virtually no time is expended under an across-the-board exclusionary rule, because few defendants would offer the evidence and courts could, without hearing an offer of proof, reject whatever was offered. It therefore should be recalled that efficiency per se is not the goal of the criminal justice system. If it were, we would use an administrative rather

1974), cert. denied, 420 U.S. 955 (1975). That is, the jurors might ignore their traditional right to acquit against the facts or law. See United States v. Spock, 416 F.2d 165, 182 (1st Cir. 1969). There is, however, no strict constitutional rule against use of special interrogatories, and they commonly are accepted for some limited purposes, as where determination of a particular fact (such as the value of stolen property) is crucial to sentencing the defendant. Spock, 416 F.2d at 182 n.41; see Jalbert v. United States, 375 F.2d 125, 126 (5th Cir.), cert. denied, 389 U.S. 899 (1967); 3 C. Wright, Federal Practice and Procedure § 512, at 8-9 (2d ed. 1982). It should also be noted that, even in the context of the insanity defense, bifurcated trials also have been justified for their aid in “separating the guilt and disposition portions of criminal proceedings.” Steele v. State, 97 Wis. 2d 72, 87 n.5, 294 N.W.2d 2, 8 n.5 (1980).

When sentencing is not directly the issue, special interrogatories nevertheless may be acceptable. In the Spock case, the First Circuit disfavored “a progression of questions each of which seems to require an answer unfavorable to the defendant.” 416 F.2d at 182. In contrast, however, “certain questions may plainly lack any capacity to catechize, color or coerce the jury’s decision making.” Heald v. Mullaney, 505 F.2d at 1246 (footnote omitted). The Heald court approved two questions worded in terms of whether the defendant was acquitted because he was constructively, not actually, present at the crime, and whether the acquittal was based on the state’s failure to prove the elements of the crime beyond a reasonable doubt. Id. at 1243-44. Special interrogatories similarly could be fashioned asking whether the defendant was acquitted because the state failed to prove the required mental state beyond a reasonable doubt, and whether the acquittal was because, while the defendant had formed the required mental state, he was insane. In this context, it may be true that “because of the exigencies of the particular case, the special findings [have] the purpose of benefiting the defendant,” Spock, 416 F.2d at 182, who otherwise might have to forego one or another defense under the rule followed in Steele.

The above arguments assume that the defendant has no right to a pure general verdict in the situation in which he wants to assert mental abnormality as both a negativing and an extrinsic defense. If the defendant does, in fact, have a right to an unfettered general verdict, he presumably would be free to waive that right and allow special interrogatories if the waiver were properly advised. See Spock, 416 F.2d at 182-83. It might be proper, under these circumstances, for the state to demand that the defendant accept special interrogatories or else choose one or the other of his defenses.

123. See supra pt. II.B.1.
than an adjudicative method of resolving criminal charges. The state, it would seem, has a compelling interest in avoiding only undue waste of time, as would be the case if marginally probative evidence on a collateral matter were admissible.

In addition, while an across-the-board exclusion of the evidence might result in more "efficient" trials, such an exclusion would detract from the state's interest in reliable trials. There may be instances in which time-consuming evidence reliably would show that the defendant lacked the required mental state. Because, presumably, a verdict based on incomplete defense evidence would be as unreliable as a verdict based on incomplete prosecutorial evidence, this approach can be said to work against, rather than for, the state's interest in reliable trials. If the interest in efficiency is deemed "compelling," therefore, it is important to be sure that this is not translated into a mandate for efficiency at all costs. The state must be forced to use means less intrusive than blanket exclusion of defense evidence, even if this permits some inefficiency to creep in around the edges.

In sum, then, while the state's interest in reliability and efficiency may be deemed "compelling," there are less intrusive means than blanket exclusion to ensure those ends effectively. The reliability and efficiency of the evidence must be determined on a case-by-case basis. While evidence could be excluded after such individualized consideration, this solution should be adopted only after adequate assessment of the value of cross-examination, rebuttal evidence and cautionary jury instructions.

It might be protested that there are alternatives to both the exclusion of evidence and cautionary instructions. For instance, it could be argued that placing the burden of persuasion on the defendant would increase the probability that only reliable evidence would be the basis of a verdict of acquittal. There are, however, some problems with this alternative. Chief among them is that the Supreme Court has precluded it. The Patterson Court, recognizing that an interest in reliability might cause a state to put the burden of persuasion on the defendant, condoned that practice for extrinsic defenses. In contrast to this was the Court's treatment of defenses that negatived the existence of the elements that the state had chosen, after all, to include in the definition of the offense. Earlier, in Mullaney v. Wilbur, the Court held that there were no interests that would allow a shift of the burden of persuasion for such defenses.

125. An example of such evidence is hearsay testimony on a witness' reputation for truth and veracity.
128. Id. at 207-09.
130. Id. at 701-02. Rivera v. Delaware, 429 U.S. 877 (1976) (dismissed for lack of substantial federal question), does not stand for the proposition that the state sometimes...
Assuming that this shift were constitutional, however, it still would be undesirable in other respects. There is no real proof that putting the burden of persuasion on the defendant increases the reliability of the verdict.\footnote{\textsuperscript{131}} Even if it does, shifting the burden of persuasion would not address the other state interests. Efficiency, for example, would not be increased, as the jury would hear the evidence as completely in any case. In addition, such a shift would not necessarily satisfy the state's interest in incapacitating dangerous individuals,\footnote{\textsuperscript{132}} as a defendant might meet his burden and, though dangerous, be freed. The fact that the restriction would at best support only one of the state's interests makes it an unattractive option.

At bottom, then, assuming that the state's interest in reliability and efficiency is compelling, the state will have to serve that interest through a case-by-case assessment of the problems presented and by using the least restrictive alternative capable of solving the problems in each case. It might, of course, be questioned whether, after \textit{Patterson}, a state's interest in reliability and efficiency can support even such a case-by-case exclusion. The answer is that the states must be free to assert such rules if they are to avoid being flooded with pointless evidence, and if the nation as a whole is to avoid the constitutionalization of the law of evidence in the criminal context. On the other hand, it would be reasonable to assume that \textit{Patterson} should be read as mandating increased deference to the defendant's negativing evidence; at the appellate level, errors in excluding negativing evidence should never be deemed harmless.\footnote{\textsuperscript{133}}

Finally, it may be observed that reliability and efficiency are traditional can shift the burden of persuasion on mental state. This is because it is not clear that the insanity defense at issue was being used in a negativing or an extrinsic manner. \textit{See Rivera v. State}, 351 A.2d 561, 563 (Del.), \textit{appeal dismissed}, 429 U.S. 877 (1976). Furthermore, it is apparent that in recent cases the Supreme Court has viewed insanity as a totally extrinsic defense. \textit{See Mullaney v. Wilbur}, 421 U.S. 684, 705-06 (1975) (Rehnquist, J., concurring); \textit{compare} \textit{Leland v. Oregon}, 343 U.S. 790, 798-99 (1952) (requiring defendant to prove insanity beyond a reasonable doubt does not violate basic standards of justice) \textit{with Davis v. United States}, 160 U.S. 469, 487-88 (1895) (prosecution must prove beyond a reasonable doubt that defendant was not insane).

\footnote{\textsuperscript{131}} "Burdens of proof do not enhance the rationality of the decision-making process. Rather, they simply allocate the risk of errors to one party or the other." Allen, \textit{supra} note 27, at 45 n.60; \textit{see also id.} at 47 n.65 (without knowing how many factually innocent people would be convicted under "preponderance of evidence" standard, cannot ascertain how much more reliable the "reasonable doubt" standard is).

\footnote{\textsuperscript{132}} \textit{See infra} pt. II.C.

\footnote{\textsuperscript{133}} \textit{Cf.} E. Cleary, McCormick's Handbook of the Law of Evidence 533 (3d ed. 1984) ("American courts quite early rejected the proposition that any trial error would require the granting of a new trial, thus giving rise to the doctrine of 'harmless error' which identifies those errors not requiring such relief. The rationale for regarding some errors as harmless, of course, rests largely upon considerations of economy and judicial efficiency. If it is sufficiently clear that another trial conducted without committing a particular error would lead to the same result, using judicial resources to conduct that retrial is obviously inefficient." (footnotes omitted)).
criteria of "legal relevance."\textsuperscript{134} Courts express their concerns about negativing evidence of mental abnormality and intoxication in terms of these legal-relevance criteria, and then they apply the criteria in illogical and inadequate ways. Evidence that is reliable enough to be used in other contexts is excluded when offered to negative mental state. Proof is precluded on grounds of "inefficiency" when efficient ways exist to hear crucial and reliable evidence. In fact, the inconsistencies between the treatment of expert testimony in this and other contexts would seem to imply that the concerns worded in terms of the traditional legal-relevance criteria really mask deeper and different anxieties—that is, anxieties about incapacitating dangerous people.\textsuperscript{135} Allowing courts to sidestep these real issues through the "legal relevance" approach does a disservice not only to individual defendants, but also to the criminal justice system as a whole.

C. The State's Interest in Incapacitating Dangerous Individuals

The discussion thus far has explored the state's interest in controlling the trial process for its own sake. While reliability and efficiency can be assured by measures less drastic than blanket exclusion of negativing evidence, total exclusion of evidence of mental abnormality or intoxication nevertheless has been mandated frequently.\textsuperscript{136} This practice can be explained by a third concern that undoubtedly underlies attempts to justify generic exclusion: the fear of releasing back into society acquitted defendants who continue to be dangerous.\textsuperscript{137} The incapacitation rationale

\textsuperscript{134} Some courts and textwriters have described this process of weighing marginal costs and benefits as a matter of "legal relevancy," in that "legally relevant" evidence must have a "plus value" beyond a bare minimum of probative value. This notion of "plus value" is at best an imprecise way to say that the probative value and the need for the evidence must outweigh the harm likely to result from admission, and most modern opinions do not rely on such potentially misleading terminology.

\textit{Id.} at 548 (footnotes omitted).

\textsuperscript{135} Bonnie and Slobogin see the attack on defense experts as part of a challenge to the increased subjectivism of criminal mental state requirements. Bonnie & Slobogin, \textit{supra} note 13, at 428-29, 431-32. It is, of course, harder to convict and incapacitate when subjective fault must be proved.

\textsuperscript{136} See \textit{supra} notes 7-13 and accompanying text.

\textsuperscript{137} One court expressed this concern quite candidly:

\begin{quotation}
[T]he overriding danger of [allowing psychiatric evidence on the issue of mental state] is that it would discard the traditional presumptions concerning mens rea without providing for a corresponding adjustment in the means whereby society is enabled to protect itself from those who cannot or will not conform their conduct to the requirements of the law.
\end{quotation}

\textit{Bethea v. United States}, 365 A.2d 64, 90 (D.C. 1976) (footnote omitted), \textit{cert. denied}, 433 U.S. 911 (1977). The court contrasted this with the insanity defense, which "avoids a conviction, but confronts the accused with the very real possibility of prolonged therapeutic confinement." \textit{Id.} (footnotes omitted). Goldstein suggests that in order to deal with dangerous mentally abnormal individuals society must find ways either to restrict psychiatric evidence to the insanity defense or to detain or supervise those acquitted because of negativing defenses. A. Goldstein, The Insanity Defense 206-07 (1967).
becomes especially focal with regard to alcoholism and other addictions.\textsuperscript{138}

The logic behind the incapacitation concern goes something like this: The state has an obvious interest in incapacitating individuals who have caused harm to others and might do so again if released. The easiest way of protecting society is to exclude the evidence altogether so that the defendant will be found guilty and incarcerated.\textsuperscript{139} In the case of mental

\textsuperscript{138} One might see a desire to incapacitate dangerous individuals as the rationale behind the Model Penal Code's adoption of the special rule precluding evidence of intoxication to negative recklessness. Model Penal Code § 2.08 (Proposed Official Draft 1962). The drafters acknowledge that an intoxicated offender lacking awareness of risk could be found to have committed the offense of being "drunk and dangerous," Model Penal Code § 2.08 comment at 8 (Tent. Draft No. 9 1959), but such convictions apparently are not as satisfactory as conviction for the crime reflecting the type of damage done by the unaware intoxicated person. The drafters adopted this position mainly because they perceived a moral equivalence between becoming very drunk and committing the proscribed harm:

Awareness of the potential consequences of excessive drinking on the capacity of human beings to gauge the risks incident to their conduct is by now so dispersed in our culture that we believe it fair to postulate a general equivalence between the risks created by the conduct of the drunken actor and the risks created by his conduct in becoming drunk . . . . The actor's moral culpability lies in [becoming so drunk as to destroy temporarily the actor's powers of perception and of judgment].

\textit{Id.} at 9. To put this observation differently, a person who knowingly engages in the risky conduct of drinking large amounts of alcohol is dangerous and should be locked up for as long as the law or legal fiction will allow.

One can question the premise behind the special rule for intoxication. It arguably is inapplicable to sufferers of the disease of alcoholism, who, while the disease is active, cannot control the amount of alcohol they ingest. See infra notes 162-67 and accompanying text. Nonalcoholics who become drunk in order to be able to do something risky or unpleasant are, by definition, outside the scope of concern, as their subjective mental state with regard to that activity will have been formed prior to the drunken state. While it may be well understood that alcohol can decrease inhibitions, uninhibited actors are also outside the scope of concern, as they possess the subjective awareness required for conviction. The problem is limited to the situation in which intoxication produces lack of awareness. One can question the extent to which the general public is aware either of alcohol's ability to have this effect or of the circumstances, including the amount of alcohol, under which the dynamic operates.

Assuming, however, that this "moral" culpability can be postulated, one still can question whether the solution should be the conviction, for a crime requiring awareness of risk, of a person who lacked such awareness. It is noteworthy that the drafters of the Model Penal Code restrict their special rule to intoxicated offenders. A mentally abnormal individual, for example, who knows he must take medication to control dangerous delusions, is equally morally culpable when he fails to take that medication and commits serious harm. Yet his delusional state will qualify as a negativing defense; he will not be convicted for a crime requiring the subjective awareness that he lacked. Model Penal Code § 4.02 (Proposed Official Draft 1962). One can only assume that, under the Model Penal Code scheme, this mentally abnormal person either will be acquitted totally, or will be convicted of a crime with mental state requirements that accurately reflect reality. In either case one can also presume that the sentencing judge or civil commitment authorities will make sure that the offender receives treatment sufficient to reinstate the use of medication or that whatever steps are necessary to ensure public safety will be taken.

\textsuperscript{139} It should be noted that restricting the admissibility of "negativing" evidence to "specific intent" elements may have the same effect as restricting it altogether, in that the defendant might be convicted of a lesser included offense and be incapacitated for at least
abnormality, the evidence can be channeled into the insanity defense causing the defendant to be incapacitated in a "therapeutic" facility.\(^{140}\)

The following discussion will assume, for the time being, that the state's interest in incapacitating dangerous individuals is compelling. Nevertheless, incapacitation often can be achieved by means less intrusive than the exclusion of reliable negativing evidence. These alternative means will be explored below. As will be seen, however, they work imperfectly. In fact, even the most extreme efforts cannot close the gaps. Such efforts are called for, however, only if the state's interest is "compelling," a characterization that will be examined at the end of this Article.

1. Meeting the Need for Safety

The state has two ways to maximize the incapacitation of dangerous individuals without doing violence to a defendant's right to introduce logically relevant evidence. First, it can find other ways to incapacitate dangerous defendants who would be acquitted. Alternatively, it can redefine existing crimes, or create new crimes, such that mental abnormality or intoxication would no longer be negativing defenses. These options will be considered in turn.\(^{141}\)

a. Civil Commitment of the Acquitted Defendant

Defendants who successfully use an extrinsic insanity defense usually are committed to mental institutions until they are no longer a threat to the community.\(^{142}\) Even in jurisdictions where such a result is not auto-

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1. For a general discussion of considerations appropriate to legislative choice among these alternatives, see Goldstein & Katz, supra note 54, at 870-76.

2. See Morris, supra note 140, at 70-71.

Some states view NGI [not guilty by reason of insanity] commitment as therapeutic in purpose and focus on the individual's mental condition. They require that he or she be "restored to sanity," or "cured," or "no longer mentally ill," or "entirely and permanently recovered" in order to be eligible for release. Be-
matic, sub the commitment proceeding that follows such an acquittal generally leads to supervision or outright institutionalization. Those found not guilty by reason of insanity are treated more harshly and given fewer post-commitment procedural protections than are persons civilly committed without prior criminal acquittal. But even commentators favoring an equalization of treatment for criminal acquittees agree that it is reasonable to subject them to some type of commitment hearing and to institutionalization until the threat to the community reasonably is over.

There is no obvious reason why the mechanism of civil commitment could not also be used to incapacitate those whose mental abnormality or intoxication precluded the existence of the required mental state. Most states have civil commitment procedures that easily could be modified, if necessary, to achieve this alternative. For example, the trial cause some mental illnesses, including schizophrenia, can last a lifetime, a requirement that the patient's illness be cured can lead to lifelong confinement. Other states view the NGI commitment as a form of preventive detention and focus on the dangerousness of the individual. They require that he or she no longer be dangerous in order to be eligible for release.

Id. 143. In some jurisdictions, persons found not guilty by reason of insanity are automatically committed. Id. at 67-68. There are, however, good arguments against automatic commitment for people found not guilty by reason of insanity. See id. at 68-70 (acquittal by reason of insanity never need establish whether defendant in fact committed criminal act, allowing defendant to be committed although innocent; defendant automatically committed because "dangerous" although charged with nonviolent crime); id. at 80-86 (committing act insufficient for presumption of dangerousness which might justify automatic commitment; trial finding that defendant was insane at time of act not a finding that defendant still insane for commitment purposes). These arguments would also apply to people acquitted for lack of mental state.

144. Even where commitment is not automatic after a finding of NGI, "indeterminate commitment is often easily achievable under a variety of procedures and standards." Id. at 68. These include a virtual presumption of committability. Id. at 88-90.

145. Id. at 67-80.

146. See generally id. at 80-108 (discussing optional methods of commitment, having rejected mandatory, indeterminate commitment).

147. Jurisdictions that treat NGI acquittees more harshly than people civilly committed without prior criminal acquittal, see id., might be similarly harsh to people criminally acquitted because mental abnormality or intoxication precluded proof of mental state; after all, in both instances the defendant probably committed an act that would have been criminal. See id. at 107. This author agrees with Morris that criminal acquittees who are committable ought to be treated similarly to ordinary civil commitment subjects. Id. at 84-85. People who are civilly committed often can be dangerous. In a sense, the main difference between civil committees and criminal acquittees is that the former were intercepted before their potential for dangerousness reached fruition.

The suggestion that criminal acquittees be treated similarly to civil committees, however, is not intended as a blanket endorsement of civil commitment, a process which is plagued with numerous problems of its own. See id. at 97-98 & n.165. Even so, civil commitment may be a less intrusive alternative than inappropriate criminal conviction.

148. The court in Bethea v. United States, 365 A.2d 64, 92 (D.C. 1976), cert. denied, 433 U.S. 911 (1977), rejected the alternative of civil commitment because of "significant procedural differences." The court did not, however, rigorously examine whether there were ways to address this disparity.
judge could be given authority to initiate civil commitment proceedings for the acquitted criminal defendant, with the attendant pre-hearing custody so that no release would occur in the interim.\textsuperscript{149} The transcripts of the relevant portions of the criminal trial proceedings could be deemed admissible and, if advisable, the same experts could be appointed examiners in the civil proceeding.\textsuperscript{150} Persons could be committable if, because of mental disease or defect, they posed a significant threat to the property as well as the person of others.\textsuperscript{151}

There are, of course, certain problems involved in civilly committing persons acquitted on the basis of a negativing mental-state defense. For one thing, the jury may have had a reasonable doubt about the existence of the required mental state;\textsuperscript{152} that fact may not mean that the state is able to meet the requirements for civil commitment.\textsuperscript{153} Of course, the state's requirements can be eased, for example by lowering the standard of proof. When a criminal defendant is acquitted on the basis of evidence of mental abnormality, such acquittal could be made a rebuttable presumption of present mental illness and dangerousness. These solutions, however, carry obvious threats to the civil liberties of those undergoing commitment proceedings. In any event, some acquitted persons might nevertheless avoid being committed.

Another problem with the civil commitment approach is that most states allow civilly committed persons to be released at the discretion of hospital officials without court review.\textsuperscript{154} The public is likely to perceive that, in making release decisions, doctors focus on the therapeutic needs of a patient, not the safety of the community.\textsuperscript{155} Such a perception would reduce public trust in the ability of the civil commitment system to protect society from those who are so dangerous that they are now treated criminally. While the problem could be lessened by the creation


\textsuperscript{150} This would, of course, be different from \textit{presuming} that the criminal acquittee is committable. See Morris, \textit{supra} note 140, at 88-90.

\textsuperscript{151} See, e.g., Wash. Rev. Code § 71.05.020(3), -.05.150 (Supp. 1984-85).

\textsuperscript{152} This might be the case when the prosecution bears the burden of persuasion on mental state. When the defendant carries the burden of persuasion (for example, on insanity, as he does in about half the states, Morris, \textit{supra} note 140, at 68), a defense verdict is an actual finding that the defendant was mentally abnormal at the time of the offense. \textit{Id.} at 82-83.

\textsuperscript{153} Compare this situation with the one where the verdict of not guilty by reason of insanity was an actual finding that the defendant was mentally abnormal at the time of the offense, see \textit{supra} note 152. Even there, however, there is no assurance that the defendant will be found mentally ill at the time of the civil commitment hearing. \textit{Id.} at 68-69 & n.8, 90.

\textsuperscript{154} \textit{Id.} at 72-74.

\textsuperscript{155} Therapists are likely to be more cautious about releasing civilly committed people if there is an increase in lawsuits against doctors who fail to confine dangerous patients. \textit{Cf.} Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 437-39, 551 P.2d 334, 344-46, 131 Cal. Rptr. 14, 24-26 (1976). It should be noted, however, that under California law the defendant therapists in \textit{Tarasoff} were not open to liability for releasing their patient, but for failing to warn a known potential victim.
NEGATIVING DEFENSES

of a release/supervision system similar to Oregon's Psychiatric Security Review Board, this would, of course, entail additional changes in state laws and administrative organization. The civil commitment route also poses problems in dealing with those whose acquittal for lack of mental state was based on intoxication. Unless the intoxication had been long-term, resulting in permanent brain damage, it is unlikely that such an acquittee could be civilly committed under existing statutes which require the predicate of "mental disease or defect." On the other hand, it is not beyond society's ability to create civil commitment procedures for alcoholics or alcohol abusers. The State of Washington has done just that. Its approach, however, would

156. See Or. Rev. Stat. §§ 161.319-.351 (1981) (amended by 1983 Or. Laws chs. 430, 800, at 818-19, 1541-44). In Oregon, some defendants found "guilty except for insanity" (formerly "not guilty by reason of insanity") are, after additional findings, placed under the jurisdiction of the Psychiatric Security Review Board (PSRB) for a period equal to the maximum sentence that would have been available upon conviction. If the acquittee, immediately or after institutional treatment, is "conditionally released" into society, the PSRB directs and reviews the supervision of that individual on release. The PSRB can set the release conditions, and it receives monthly reports from the direct supervisors. The PSRB can terminate conditional release by returning the individual to a treatment institution or by discharging the individual altogether. Various procedural rights, including hearings and appointment of counsel, accompany these provisions. Id. There is no obvious reason why such a supervised release system could not be instituted for civil commitment subjects who are, under appropriate criteria, considered dangerous.

157. An objection might be that increasing civil commitments would put pressure on already overburdened mental health facilities and social service budgets. One might answer that proportionally fewer people would be using prison facilities, leading to savings in that area. In addition, treatment arguably is a better long run use of funds than is incarceration, at least for those offenders whose conditions are treatable. While some treated persons may nonetheless repeat criminal behavior, more incarcerated-but-un-treated addicts and mentally ill people are likely to do so. Thus, while it must be acknowledged that the proposed alternative will likely have economic consequences, this alone should not defeat the proposal.

158. Regarding the difference between an alcoholic and an alcohol abuser, see infra notes 162-67 and accompanying text.

159. See Wash. Rev. Code Ann. § 70.96A (1975 & Supp. 1984-85). The Washington scheme allows a person to be committed after investigation shows him to be incapacitated as a result of alcoholism or shows him to be a threat to the safety of others. Id. § 70.96A.140(1) (Supp. 1984-85). This conclusion is warranted when "as a result of the use of alcohol, [an individual] has his judgment so impaired that he is incapable of realizing and making a rational decision with respect to his need for treatment and constitutes a danger to himself, to any other person, or to property." Id. § 70.96A.020(7) (emphasis supplied). The petition must allege that the person is an "alcoholic," which means that he or she "habitually lacks self-control as to the use of alcoholic beverages, or uses alcoholic beverages to the extent that his health is substantially impaired or endangered or his social or economic function is substantially disrupted." Id. § 70.96A.020(1). Commitment shall not be ordered unless the court "determines that an approved treatment facility is able to provide adequate and appropriate treatment for [the alcoholic] and the treatment is likely to be beneficial." Id. § 70.96A.140(4) (Supp. 1984-85).

With regard to the ability of an individual to recognize his need for treatment, it should be noted that "middle-" and "late-stage" alcoholics exhibit a symptom called "denial," in which they are unable to acknowledge the existence of an alcohol problem, to understand that the problem stems from disease, or to respond appropriately to the offer or experience of remedial programs. "Denial" may result in part from deterioration of mental
have to be modified to deal with the incapacitation of persons acquitted of crimes because intoxication precluded formation of the required mental state. For one thing, such persons could have been "intoxicated" on drugs other than alcohol. While it might be easy to add such persons to the list of those amenable to commitment, alternative criteria would have to be added to take into account the different signs diagnostic of other types of drug addiction. In addition, the scheme presupposes the existence of facilities to treat drug addiction and alcoholism adequately and professionals knowledgeable and skillful enough to evaluate persons subject to commitment. While it may be tempting to assume that current mental health professionals and treatment facilities could do the job, experts in the fields of alcoholism and other drug addictions have cogent evidence that these problems are physical, rather than mental, diseases\textsuperscript{160} and that treatment by mental health professionals frequently exacerbates rather than cures the conditions.\textsuperscript{161}

There is, however, a more serious drawback to the use of civil commitment to incapacitate those whose mental state was lacking because of intoxication. It concerns the increasingly understood difference between simple drug and alcohol abusers and those who are truly addicted to such substances. It is common knowledge that there are recreational drug users who avoid addiction. Similarly, there is a distinction between a problem drinker and an "alcoholic."\textsuperscript{162} The former is someone who, because of emotional or social factors, occasionally drinks to excess; such a person's body metabolizes alcohol in a normal manner. In keeping with the modern view that alcoholism is a physical, rather than mental, processes from toxic poisoning and physical impairment. \textit{See} J. Milam & K. Ketcham, Under the Influence 87-88, 97 (1981). Recent evidence shows that chronic ethanol abuse can lead to neuronal damage, resulting in functional mental impairment and cerebral atrophy, but that that impairment and atrophy can be reversed upon cessation of alcohol ingestion. Carlen, Wortzman, Holgate, Wilkinson & Rankin, \textit{Reversible Cerebral Atrophy in Recently Abstinent Chronic Alcoholics Measured by Computed Tomography Scans}, 200 Sci. 1076-78 (1978). This study is criticized and further discussed in Hill & Mikhail, \textit{Computed Tomography Scans of Alcoholics: Cerebral Atrophy?}, 204 Sci. 1237-38 (1979). Certainly "denial" has social and psychological components as well. G. Vaillant, \textit{The Natural History of Alcoholism: Causes, Patterns, and Paths to Recovery} 172-73 (1983).


161. The better view holds that alcoholism is exacerbated when mental health professionals attempt to teach true alcoholics how to "drink responsibly." This is so because any amount of alcohol ingested into the body will further the progression of the disease. Thus, total abstinence is the only alternative for the true alcoholic. \textit{Id.} at 14, 124-52. In order to treat an alcoholic patient effectively, medical doctors usually must acquire special knowledge rarely taught at medical school. \textit{Id.} at 116. Even after the American Medical Association recognized in 1956 that alcoholism is a disease, most physicians continued to view it as a psychological inadequacy; treating the disease in this manner has been estimated to cut recovery rates by at least half. \textit{Id.} at 129-31. Finally, many physicians and psychiatrists treat the alcoholic patient with drugs that will produce the effects of cross-addiction and cross-tolerance. \textit{Id.} at 156-57, 160-61.

162. There may also be nonalcoholics who have biochemically abnormal reactions to even small amounts of alcohol. Paulsen, \textit{supra} note 33, at 16-17.
an "alcoholic" is defined as one having an enzyme malfunction such that his body metabolizes alcohol to produce substances that cause physical addiction. Such a person begins drinking for the same reasons as most drinkers in our society, and then becomes progressively more physically dependent on the substance. At some point, he is unable to control when or how much to consume to avoid the physical discomfort (some would say "pain") of lacking the substance. Alcoholics can avoid the progressive worsening of their physical condition only by totally and forever abstaining from alcohol; alcohol abusers, presumably, could become responsible drinkers if they learned to control their use of the drug. Diagnostic procedures exist to distinguish alcoholics from problem drinkers.

The civil commitment scheme used by the State of Washington is aimed at treating true alcoholics. While problem drinkers would benefit, of course, from total abstinence, it may not be necessary to their functioning as nondangerous human beings. Furthermore, they likely would not meet the criteria for civil commitment. The same problem would occur with a civil commitment scheme aimed at drug "addicts." Thus,

163. See supra notes 160-61 and accompanying text. The modern view is that alcoholism is a primary physical disease. Most alcoholics, like any diseased person, develop secondary mental and social problems. See J. Milam & K. Ketcham, supra note 159, at 31-32, 88.

164. Id. at 32-34. A recent work, by a doctor resistant to acknowledging the physical basis of alcoholism, discounts in passing the metabolic analysis, but does not deal directly with the analysis or with the primary sources supporting it. See G. Vaillant, supra note 159, at 5. Dr. Vaillant's own data, however, strongly support a hereditary and physical explanation for predisposition to alcoholism. See id. at 102 (Table 2.18), 311. Dr. Vaillant makes no attempt to analyze how the genetic differences manifest themselves in the body's reaction to alcohol. Cf. State ex rel. Harper v. Zegeer, 296 S.E.2d 873, 875 (W.Va. 1982) (recognizing alcoholism as a disease).


166. See supra note 161 and accompanying text. See also the discussion of the "denial" symptom in "middle-" and "late-stage" alcoholics, supra note 159.

167. There is no one factor that is diagnostic of alcoholism. "Alcoholism is a unitary syndrome but one defined by the number, not by the specificity, of alcohol-related problems." G. Vaillant, supra note 159, at 42. The factors indicative of alcoholism can be generalized into four groupings:

First, the diagnosis should imply causative factors that are independent of the presence or absence of social deviance. Alcohol addiction is often a necessary and sufficient cause for such social deviance as is observed, and alcohol dependence is significantly more likely when biologic relatives have also been alcoholic. Second, the diagnosis should convey shorthand information about symptoms and course... [T]he diagnosis of alcoholism predicts that a whole constellation of symptoms are present. [T]he diagnosis of alcoholism implies a disorder that lasts for several years. Third, the diagnosis should be valid cross-culturally and not dependent on mores or fashion. Finally, the diagnosis should suggest appropriate medical response for treatment. Alcoholism, to the extent that it involves physical dependence, often requires detoxification in a medical setting, and specific treatment is often required in order to maintain sustained abstinence from alcohol.

Id. at 44. For examples of questions that should be asked in an attempt to diagnose alcoholism, see id. at 295-98.
mere alcohol and drug abusers who are not true addicts would slip through the cracks: They would be acquitted of the criminal charges for lack of mental state, and they would not be civilly committed for failure to meet the criteria.

One answer might be to establish standards for committing and treating those who are not true addicts. While this might be possible, it is unlikely that such treatment would differ vastly from the type of psychological counseling given to other slightly disturbed or immature people in society. It is questionable whether such counseling requires or justifies institutionalization. If it does not, the need for safety is, arguably, unmet until the outpatient counseling is successful. On the other hand, there is one justification for at least short-term institutionalization: to get the abuser's attention. The fact that the abuser has caused results that would have been criminal had he not lacked mental state might justify such an attention-getting device. The theory is that the abuser should be institutionalized just long enough to ensure that he took his problem seriously and would continue with outpatient supervision and treatment.

The above discussion indicates that it is possible to alter and enlarge the civil commitment system to provide incapacitation and treatment for people whose mental abnormality or intoxication precludes conviction on criminal charges. The question remains whether this method of incapacitation is really "less intrusive" than inappropriate criminal conviction. Individually, the question is particularly acute with regard to persons who are untreatable for one reason or another.168 Societally, the question arises because expanding the government's civil commitment options may entail a threat to civil liberties.169 Discussion of these issues will be enhanced by the consideration in the next section of the state's other option for incapacitation.

b. Redefining Offenses

An alternative to expanding the civil commitment system is to redefine offenses such that evidence of mental abnormality or intoxication can never be negativing. This could be done by changing the definitions of existing offenses or by creating new offenses.

i. Redefining Existing Offenses

The most obvious way to eliminate negativing evidence is to remove

168. Commitment becomes mere warehousing when there is no known "cure" for a condition, or when the jurisdiction is unable or unwilling to make available the funds necessary for adequate treatment. Conditions in the commitment institution may be less attractive even than conditions in a penitentiary. Commitment also may be indeterminate in length and difficult to end. Under these conditions, an individual might not find commitment a less onerous alternative than inappropriate criminal conviction. As Packer points out, "[t]hirty days in jail for disorderly conduct is much less unpleasant than a lifetime in the locked ward of a state mental hospital." H. Packer, supra note 58, at 25.

169. See infra note 213 and accompanying text.
from the definition of the crime any element potentially negatived by that evidence. For example, mental abnormality or intoxication certainly could not "negative" mental state if there were no mental state requirement in the offense. It has been suggested that mental state should be eliminated as a requirement of culpability and considered only on the issue of punishment. While the Supreme Court has indicated that states constitutionally are limited in their power to reduce prosecutorial burdens by tinkering with definitions, it has not actually held that there is a constitutional requirement of a mental state element.

Nevertheless, it is a drastic solution to apply "strict liability" to all crimes, and there are reasons why a jurisdiction would not want to do so. It will be assumed for purposes of discussion that most jurisdictions would want to retain a mens rea element in the definition of all true crimes. Those same jurisdictions, however, might want to define the

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170. See B. Wootton, Crime and the Criminal Law 65-86 (2d ed. 1981) (mental condition of defendant relevant not to determination of culpability, but to the choice of treatment most likely to discourage him from offending again).


172. Allen argues that "Patterson, [if it is viewed as embracing the proportionality concept,] provides the method to determine whether a state's definition of a crime is constitutionally permissible." Allen, supra note 27, at 48. "Constitutional acceptance of a requirement of culpability, however, is at best uncertain." Jeffries & Stephan, supra note 3, at 1374; cf. Packer, Mens Rea and the Supreme Court, 1962 Sup. Ct. Rev. 107 (paraphrasing the position of the Supreme Court as maintaining that "mens rea is an important requirement, but it is not a constitutional requirement, except sometimes").

173. The paradigm case of liability without fault is a penal statute that punishes conduct without reference to any state of mind indicative of blameworthiness. For example, a law might condemn as criminal the sale of impure food without requiring that the actor know of the impurity or even that he be aware of facts giving reason to know. Liability with respect to the impurity would be strict—that is, it would not depend on proof of any mental attitude with respect to that element of the offense. Thus, the actor could be convicted even though he believed his products to be pure and had done all that could have been done to ensure purity.

Jeffries & Stephan, supra note 3, at 1373; see United States v. Dotterweich, 320 U.S. 277, 278, 284-85 (1943) (upholding conviction for introducing into commerce misbranded and adulterated drugs, despite lack of any conscious wrongdoing).

174. To punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of criminal conviction without being morally blameworthy.

Packer, supra note 172, at 109; accord, Jeffries & Stephan, supra note 3, at 1373-74. In addition, "liability without fault [generally] is confined to so-called 'regulatory' or 'public welfare' offenses," Jeffries & Stephan, supra note 3, at 1373. Allowing conviction of "true" crimes on a strict liability basis would be an extreme innovation, and presumably would require motivations more profound than a desire to incarcerate a small number of people who would otherwise be acquitted. This is because everyone could be convicted on a strict liability basis, not just mentally abnormal or intoxicated persons. Thus, a great premium would be placed on prosecutorial discretion in issuing charges and on judicial discretion in sentencing.
mental state element in such a way that mental abnormality and intoxication would not negative its existence. Many jurisdictions with this goal would first have to rationalize, clarify and define the mental state elements in their existing crimes. It has been observed that the traditional approach of courts and legislatures to the mental state requirement in crimes has produced "variety, disparity and confusion," a lack of clarity, and "obscurity." This state of affairs is attributable in part to the crazy-quilt proliferation of "mental state" words, in part to the fact that these words are frequently ill-defined, inconsistently defined, or not defined at all, and in part to the fact that courts and legislatures often fail to indicate which physical elements are to be considered in light of which mental state requirement. Imagine, for example, that a defendant wants to introduce evidence that his intoxication precluded him from forming the mental state of "wantonness." Unless the meaning of that word is clear, a court will not know whether the evidence is negativing or extrinsic. Before a state can preclude negativing defenses based on mental abnormality or intoxication, it must have a clear understanding of the nature of the existing mental state requirements.

While the challenge may exist for certain "special" mental states, such as "wantonness," it is particularly acute with regard to the mental state labeled "general intent." Defining "general intent" in some juris-

177. Words used to define mental state include, for example, "intent," "specific intent," "general intent," "corruption," "malice," "scienter," "wilfullness" and "wantonness." See generally R. Perkins & R. Boyce, Criminal Law 831-80 (3d ed. 1982) (discussing the meanings of the above terms); Jeffries & Stephan, supra note 3, at 1363 & n.113 (as of 1970, federal penal statutes used 78 different words and phrases to describe mental states); id. at 1372 n.131 (citing cases illustrating the different meanings attributed to "wilfully").
178. In part, the lack of clarity in the definition of mental state words may derive from the sub silentio evolutionary attachment of modern meanings to common law terms. See Jeffries & Stephan, supra note 3, at 1363 & n.113, 1372 n.131; Sayre, Mens Rea, 45 Harv. L. Rev. 974, 1017-19 (1932).
179. Model Penal Code § 2.02 comment at 124 (Tent. Draft No. 4, 1955) (draft attempts to define the kind of culpability which will arise with respect to the elements of: The nature of the forbidden conduct; the attendant circumstances; and the result of the conduct, to dispel obscurity which has followed terms such as "mens rea" and "general criminal intent").
180. See R. Perkins & R. Boyce, supra note 177, at 879-80.
181. "General intent" has been viewed in two general ways, which are reviewed and discussed in the following pages. Both interpretations, however, present some problems in conjunction with the most restrictive reading of In re Winship, 397 U.S. 358 (1970). This reading requires the prosecution to prove only elements overtly in the definition of the offense. See supra note 27. It is often the nature of general intent that no mental state words appear in the definition of the crime, but are assumed to exist. Under Patterson, then, does the prosecution have the burden of proving general intent?

It seems that this would be an issue of legislative intent. Cf. Morissette v. United States, 342 U.S. 246, 261-63 (1952) (congressional silence as to mental elements in a statute adopting common law concept of crime may have different meaning than silence when creating an offense new to general law). If the legislature did not intend a strict liability crime, see supra note 174, there would only be two possibilities: Either the prose-
dictions involves identifying "particular states of mind [which are then] attribute[d] to each of the material elements"\textsuperscript{182} making up the actus reus of the offense.\textsuperscript{183} The particular state of mind identified is usually a subjective awareness—intent, knowledge or recklessness\textsuperscript{184}—about the criminal act.\textsuperscript{185} For example, in \textit{People v. Hood}\textsuperscript{186} the court stated:

When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent.\textsuperscript{187}

The common law takes a similar approach to "specific intent," as does
the Model Penal Code to most mental state elements. Negativing defenses would operate the same way for all of these subjective mental states: Appropriate intoxication or mental abnormality could preclude the existence of the required mental state.

A jurisdiction cannot both retain subjectively defined mens rea and eliminate mental abnormality and intoxication as negativing defenses. To exclude those defenses it has to discard subjective awareness as a mental state requirement and allow all convictions to be based on objective culpability; this is usually known as a "reasonable person" standard of negligence. A simple hypothetical demonstrates that this is so. Assume the jury believes that the defendant shot a human being with a gun and also that the defendant was delusional and thought he was shooting a bear. If the prosecutor must prove that the defendant was aware his target was human (subjective mental state) the prosecutor will fail, as the delusion will negative the element. But if the prosecutor merely has to prove that a reasonable person would have been aware that the target was human (objective mental state) the prosecutor will succeed. Since the standard is not "the reasonable delusional person," the cause of the defendant's failure to perceive the nature of his target is irrelevant.

But is there, in the logical progression of the objective approach, an unspoken premise that the defendant is a reasonable person? If so, evidence of intoxication or mental abnormality might negative that characterization of the defendant. Does Patterson force the prosecution to prove the defendant's reasonableness beyond a reasonable doubt? The answer is that the objective approach is generally signified by the word "negligence." The offense does not literally include as an element that the defendant be a reasonable person, and so the prosecution does not have to prove that he is; any evidence to the contrary is what we have labeled "extrinsic." In other words, the objective approach does not assume that the defendant is a reasonable person; it merely indicates that

189. For example, Paulsen states that intoxication could, theoretically, negative such subjective mental states as purpose, knowledge, premeditation and deliberation. Paulsen, supra note 33, at 9-11. He adds, in his discussion of "specific intent," that "[i]f purpose or knowledge are not present, the cause for the lack is not important. The policy served by requiring these elements of culpability will obtain whether or not their absence is established by proof of extreme intoxication or any other evidence." Id. at 11.
190. "If negligence is sufficient to justify criminal liability, the negligent actor should not be freed merely because of his intoxication." Id. at 5.
191. Even using the Model Penal Code definition of "negligence" the prosecutor is not required to prove that the defendant is a reasonable person:
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 purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.
society will demand that he act like one. If he does not, for whatever reasons, he must bear the consequences. The expectation of reasonable behavior is either analogous or equivalent to the presumption of sanity in criminal law: It is a premise that underlies all prosecutions, but one which the law does not require the state to prove unless the state specifically includes "sanity" in the definition of the offense; a defendant may prove that he is not sane, but this is extrinsic evidence.\textsuperscript{192}

So far, the discussion has focused on approaching "general intent" as a limited, specifically defined concept. "General intent," however, is sometimes equated with the notion of criminal responsibility in the broadest sense.\textsuperscript{193} Thus, "general intent" is whatever mental state exists when the defendant commits the act and no excusing or, perhaps, justifying conditions pertain. A leading proponent of this approach is H.L.A. Hart, who commented:

\begin{quote}
For some centuries English law . . . has made liability to punishment for serious crime depend, not only on the accused doing the outward acts which the law forbids, but on his having done them in certain conditions which may broadly be termed mental. These mental conditions of responsibility are commonly referred to by lawyers as \textit{mens rea}. This has meant that . . . liability to punishment is excluded if the law was broken unintentionally, under duress or by a person judged to be below the age of responsibility or to be suffering from certain types of mental disease.\textsuperscript{194}

To put it differently, "a man who kills another is guilty of murder, unless he did not kill intentionally or recklessly, or unless he believed that his life was in danger . . . . In this analysis, the mental element is perceived as relating exclusively to matters of justification, excuse, or mitigation."\textsuperscript{195}
\end{quote}


It should be noted that a jurisdiction that defines mens rea as a specific subjective state is already limiting the ability of mental abnormality or intoxication to provide negativing defenses. This is because in very few individuals will reality perception be so impaired as to prevent accurate processing of data from the surrounding world. Few defendants will be able to show a disability that is logically relevant to the required subjective mental state. Contrast this with a situation where mens rea is equated with criminal responsibility in the broadest sense, discussed \textit{infra} notes 193-98 and accompanying text.

193. This approach to general mental state has been labeled "normative," G. Fletcher, \textit{supra} note 74, § 6.2.1, at 398-99, and "negative," H. Packer, \textit{supra} note 58, at 106-07; see also R. Perkins & R. Boyce, \textit{supra} note 177, at 831-32 (combining the two types of approaches to mental state).


195. H. Packer, \textit{supra} note 58, at 106 (emphasis in original). Courts that use this approach tend to speak of "general intent" as the "capacity" to form a culpable mental state or as the "presumption" of sanity, adulthood, lack of duress, and so forth. For example, in United States v. Currens, 290 F.2d 751 (3d Cir. 1961), the court decided that the defendant had met his burden of producing evidence "sufficient to dissipate the presumption of [his] sanity or sound mental health," \textit{id.} at 761, and thus that "the burden was shifted to the United States to prove beyond a reasonable doubt that [the defendant] possessed the necessary mental capacity, the guilty mind or \textit{mens rea}, to be guilty of the
ativing defenses.

When the definition of the offense involves "general intent" in such broad terms, the range of negativing defenses cannot be controlled by allowing the prosecution to prove "general intent" objectively. Consider the psychotic defendant who, killing a person, thought he was shooting a bear. The state could prove that he was objectively liable for homicide if the reasonable person in that situation would have been aware that the target was a human being. But, under current approaches to the insanity defense, the defendant would still have the negativing argument of excuse. The state would have to eliminate mental abnormality and intoxication as excuses altogether to prevent them from negativing general intent.196

It may be, however, that there are some "excuses" a state cannot eliminate.197 For example, the notion of proportionality between the punishment and the offense may demand that some debilitating conditions be inquired into at some phase of the guilt inquiry.198 A jurisdiction using the narrow approach to general intent could lessen the impact of this requirement somewhat by allowing that inquiry only in the context of an extrinsic defense with the burden of persuasion on the defendant. Such flexibility, however, would be precluded in a jurisdiction taking a broad approach to general intent, because this approach regards all excuses as negativing.

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196. Adopting the broad approach to mens rea would appear to be functionally equivalent to adopting the "procedural" interpretation of In re Winship, 397 U.S. 358 (1970). See supra note 27.

197. See Wales, An Analysis of the Proposal to "Abolish" the Insanity Defense in S. 1: Squeezing a Lemon, 124 U. Pa. L. Rev. 687, 702-04 (1976) (discussing insanity defense). Fletcher points out that "the posture of English and American law toward guilt as a moral precondition of just punishment is highly ambivalent." G. Fletcher, supra note 74, § 7.3.1, at 537-38. A less ambivalent jurisprudence would require the state also to bear the burden of persuasion on extrinsic defenses. See id. §§ 7.3.1-2, at 533-45.

Once aware of the dynamics traced above, a jurisdiction wishing to eliminate mental abnormality and intoxication as negativing defenses would adopt the narrow approach to mental state, treating excuses as extrinsic defenses, and permitting conviction for all crimes on proof of objective culpability, or negligence. However, a jurisdiction validly might hesitate to adopt this approach. Such a broad net would sweep in people who were negligent for reasons other than intoxication or mental abnormality. There is considerable scholarly commentary that liability based on negligence is inconsistent with the moral bases of our criminal law.\textsuperscript{199} While the authors of the Model Penal Code recognize that there might be utilitarian reasons for basing criminal liability on negligence, they “agree that [negligence] should not be generally deemed sufficient in the definition of specific crimes, and that it often will be right to differentiate such conduct for the purposes of sentence.”\textsuperscript{200} While the Model Penal Code commentary does not specifically endorse the concept, it mentions the notion that “education or corrective treatment not punishment is the proper social method for dealing with persons with inadequate awareness, since what is implied is not a moral defect.”\textsuperscript{201}

A jurisdiction that views negligence as an ethically inadequate basis for serious criminal liability will suffer two consequences: First, it seldom will be willing to use negligence as a mental state requirement in crimes; second, when it does allow criminal liability on proof of negligence, it will be unwilling to impose severe punishment. Few people will be convicted on the basis of negligence, and those who are will not be incapacitated for long. From this standpoint, the civil commitment alternative seems superior. It allows the state to incapacitate dangerous mentally abnormal people, drug addicts and alcoholics for lengthy periods of time

\textsuperscript{199} See, e.g., Fletcher, supra note 198, at 435-37; Hall, Negligent Behavior Should Be Excluded From Penal Liability, 63 Colum. L. Rev. 632, 635-42 (1963). But see Hart, The Aims of the Criminal Law, 23 Law & Contemp. Probs. 401, 415-17 (1958); Riesenberg, Negligent Homicide—A Study in Statutory Interpretation, 25 Calif. L. Rev. 1, 21-28 (1936); Wechsler & Michael, A Rationale of the Law of Homicide: I, 37 Colum. L. Rev. 701, 749-51 (1937). In any case, “[n]egligence as an occasion for penal sanctions tends to be reserved for conduct that the law-abiding citizen would be especially anxious to avoid—e.g., causing the death of another.” Jeffries & Stephan, supra note 3, at 1372-73. Objective liability is also inconsistent with the modern trend toward individualization of criminal culpability. See generally Bonnie & Slobogin, supra note 13, at 429, 432-35 (discussion of the criticisms of the subjective approach). Goldstein notes that the trend toward subjective liability, in fact, is directly responsible for the dilemma under consideration in this Article. While the insanity defense was the sole vehicle for psychiatric evidence where liability was objective, this is no longer true where subjective liability obtains. “If [the fact of mental illness becomes relevant to defenses other than insanity], difficult problems will be presented . . . for the courts . . . . Chief among them will be the divergence between ‘guilt’ and dangerousness, for a subjective theory tends to treat some of the most dangerous among us as the least guilty.” A. Goldstein, supra note 137, at 191.

\textsuperscript{200} Model Penal Code § 2.02 comment at 127 (Tent. Draft No. 4, 1955). The commentary goes on to state that “negligence ought to be viewed as an exceptional basis of liability.” Id.

\textsuperscript{201} Id. at 126 (citing J. Hall, General Principles of Criminal Law 245 (1st ed. 1947)).
under conditions where rehabilitation, not punishment, is the principle goal. Criminal sanctions would then be reserved for people whose culpability, expressed through the mental state requirement, is sufficient to warrant ignominy and punishment.

In summary, changing the mental state requirement of existing crimes is an inadequate way to ensure that dangerous people will be incapacitated. Such a change would require that criminal liability be imposed on proof of mere negligence. This would either seriously alter the nature of the criminal law in general, or result in such minor sentences that the interest in incapacitation would not be well served.

ii. Creating New Offenses

A jurisdiction might want to retain a subjective mental state requirement for crimes and nevertheless convict those whose abnormality or intoxication cause delusions and attendant harm. To do this, the jurisdiction would have to create an offense with a subjective mental state element that could not be negatived by those conditions. In other words, conviction must be based on a defendant's awareness of something that occurred when he was not mentally debilitated.

Such an offense could be created based on the following premise: If a person knows that he suffers from a condition that, if not controlled, would lead to delusions, society has a right to demand that he take steps to exercise such control. He must take his medication, avoid drugs, voluntarily submit to supervision or do whatever else is necessary. Assuming he is not delusional when he chooses to ignore such safeguards, he arguably will have a subjective mental state with regard to that decision. Thus, he can be prosecuted for harm resulting from ensuing delusional behavior.

Such a statute would have certain appealing qualities. It would punish

202. While the common law has imposed criminal liability for negligence, it has not done so on a broad scale nor accompanied it with severe punishment. Jeffries & Stephan, supra note 3, at 1372-73. "More commonly . . . criminal liability is confined to some variety of conscious wrongdoing. Thus, the minimum culpability most widely found in the penal law is recklessness—a requirement of conscious disregard . . . ." Id. at 1372.

203. It may be necessary to medicate or detoxify adequately an individual before he is in a state of mind capable of understanding his problem and how to control it. While there may be people who cannot be brought to such a nondelusional state, these might not be proper subjects for release from involuntary commitment, and thus would not be in a position to be affected by the statute.

204. It is likely that a statute such as the one under discussion would not be unconstitutional under the doctrine of Robinson v. California, 370 U.S. 660 (1962). In Robinson, the Court held unconstitutional a statute criminalizing the mere status of being a drug addict, rather than the acts of possessing or using the drugs. Id. at 667. The statute under discussion would not punish a person for being mentally abnormal or alcoholic; it would punish him for failing to perform a known (perhaps statutory) duty to control such conditions. Cf. Powell v. Texas, 392 U.S. 514, 531-32 (1968) (constitutional to punish arguably alcoholic person for failing to control impulse to be drunk in public). According to dictum in Robinson, "a State might establish a program of compulsory treatment for those addicted to narcotics. Such a program of treatment might require periods of
individuals for morally culpable behavior—that is, the failure to take precautions.\textsuperscript{205} It also would permit grading the severity of the offense according to the offender's degree of culpability for such failure. Thus, a person who purposely omitted to take his medication, or who purposely drank alcohol would be more culpable than one who had lapsed recklessly. Certain limitations, however, should be incorporated into the scheme.

First, as implied by its moral premise, the statutory scheme should permit the prosecution only of an offender who has had the opportunity to learn about the nature of his illness and how to control it.\textsuperscript{206} Methods of control might include drugs, abstinence from other drugs, or voluntary restriction of activities. Given an offender who had been taught such methods, the statutory scheme would punish him when his failure to put the methods into effect led to socially harmful results.

In addition, only significant harm—bodily injury or property damage\textsuperscript{207}—should lead to punishment. Apart from any moral support for this limitation, practical considerations of overcrowded prisons and jails, congested courts, and burgeoning prosecutorial and defense expenses argue for a minimal creation of new crimes.

Finally, the new offense ideally should be aimed only at dangerous individuals whom society cannot adequately incapacitate in another fashion. Many mentally abnormal offenders, for example, are properly ac-

\begin{footnotes}
\item Sayre points out that the conception of mens rea has changed over time along with the goals set for the criminal justice system. "Our modern objective tends more and more in the direction, not of awarding adequate punishment for moral wrong-doing, but of protecting social and public interests. To the extent that this objective prevails, the mental element requisite for criminality, if not altogether dispensed with, is coming to mean not so much a mind bent on evil-doing as an intent to do that which unduly endangers social or public interest." Sayre, supra note 178, at 1017 (footnotes omitted).

\item The offense under discussion in this section differs from Hall's suggestion that voluntary intoxication should not excuse criminal conduct if the defendant "had such prior experience as to anticipate [his] intoxication and that [he] would become dangerous in that condition." J. Hall, supra note 185, at 556. As Paulsen points out, it would be difficult to litigate the defendant's previous experience with alcohol. Paulsen, supra note 33, at 16. The offense being discussed here would not require such litigation. Rather than base culpability on prior experience of being dangerous while drunk, this offense bases culpability on prior diagnosis and treatment of alcoholism or alcohol abuse. Such prior events are easily documented and could be made known to the prosecution by means of a discovery requirement accompanying a defendant's notice of intent to rely on intoxication as a defense to a criminal charge. Upon such notice and discovery, the prosecution could determine whether to charge this new offense in place of or in addition to the crime already charged.

\item Degrees of culpability under the statute could vary with regard to the type or extent of damage caused. But see Paulsen, supra note 33, at 15 ("The penalty for [an offense of being 'drunk and dangerous'] would not be heavy lest the legislation be nullified in all but the cases of great harm. If the offense of 'drunk and dangerous' were punished by a heavy penalty and if the crime were prosecuted only when the harm caused by the drunkenness was great, the result would be very similar to that reached under the present law [equating recklessness in getting drunk with recklessness about the harm caused]").
\end{footnotes}
quitted (and treated) after an insanity defense. This statute would not be intended to permit a prosecutorial end-run around such an acquittal. The insanity defense could be preserved if the new statute applied only to offenders who were “mentally abnormal” in the sense that they lacked normal perceptions about the physical world. In other words, a person would be susceptible to conviction under the new offense only when his condition provided a negativing, rather than extrinsic, defense to another crime.

The problem is more complex with regard to intoxication. The statute could limit the definition of “intoxication” to alcohol- or drug-induced impairments that precluded the existence of subjective mental state. Ways would have to exist, however, to prevent the conviction of people who were morally blameless for being intoxicated in that way. One such person might be “involuntarily” intoxicated in the sense that another individual had literally held him and poured a drug down his throat. This person should be able to defend himself successfully using the “voluntary act” doctrine. A more difficult problem arises with the individual who, for example, became intoxicated as a result of mixing prescription drugs with other drugs or alcohol after the labels or the prescribing physician had failed to warn against the mix. Such a person arguably would be morally blameless if he truly were not at fault for mixing the drugs. The circumstance of innocent mixing could be made an extrinsic defense. This would, of course, carry the option of putting the burden of persuasion on the defendant.

It is possible, then, to create an offense to convict and punish at least some people whose lack of subjective awareness prevents conviction under traditional crimes. While the offense can be created, however, problems of detection and proof may make it impractical to enforce. In addition, even assuming enforcement, there are objections and limitations to such an approach as a less intrusive alternative to the exclusion of negativing evidence. These, along with the problems inherent in the previously discussed options, will be explored in the following sections.

2. The “Least Intrusive” Method of Incapacitation

The preceding discussion has identified three ways in which people who lack subjective awareness under traditional offenses can be allowed to introduce negativing evidence to such criminal charges and nevertheless be incapacitated: The state can civilly commit them once acquitted; it can alter the mental state requirement of crimes such that the evidence is no longer “negativing”; or it can create a new offense which the evi-

208. For a review of the nature and history of the doctrines concerning “involuntary” intoxication, see Hall, supra note 5, at 1054-55. Hall concludes, however, “after close study of the cases, . . . that involuntary intoxication is simply and completely nonexistent.” Id. at 1056 (emphasis in original). Paulsen agrees that, although examples of involuntary intoxication can be hypothesized, “cases in which the defense is successful simply do not exist in the books.” Paulsen, supra note 33, at 18.
dence could not negative. It remains to be seen, however, whether, from
the point of view of the rights of the individual, these methods are really
less intrusive than exclusion of the negativing evidence in the first place.

The third option, creating a new offense, still results in the individual
being punished and stigmatized criminally.209 In fact, he may be pun-
ished as severely as if he had been convicted of the traditional offense.
Yet there is one way in which it can be said that this approach intrudes
less on his rights. Under the new offense sketched above, a person can-
not be convicted unless he first has had the opportunity of learning ways
to control his delusional behavior. In other words, he is given a chance
to live responsibly before the criminal sanction attaches. In contrast,
under the approach that exists in many jurisdictions today, negativing
evidence is excluded from consideration and the defendant is convicted,
regardless of whether he had any prior awareness of his delusional
condition.

The second option, altering the mental state requirement of existing
crimes to allow for objective fault, also would result in conviction and
punishment. This approach arguably is as intrusive on the defendant's
rights as the blanket exclusion, in that in both cases punishment is im-
posed without proof of subjective awareness. There is, however, a major
difference. If a person is convicted of negligence, the maximum sentence
may be slight,210 but if he is inappropriately convicted of subjective
fault,211 he may be punished quite harshly. Thus, if jurisdictions lower
the sanctions when they alter the mental state requirement of existing
crimes, alteration will be a less intrusive alternative. If the punishment
remains harsh, however, alteration would be as intrusive as exclusion of
evidence. In the latter case, the balancing test would allow the state to
continue to exclude negativing evidence, assuming that the state's inter-
est in incapacitation was "compelling."

Option one involved the civil commitment of persons who were acquit-
ted because their evidence precluded proof of mental state. This
approach seems less intrusive on individual rights in that the incapacitation
is not accompanied by "punishment"212 or the stigma of a criminal con-
viction. In addition, by not introducing the negativing evidence, the de-
fendant can "choose" prison over the mental institution. The approach

209. A defendant's interest in avoiding the particular stigma of criminal conviction has
been treated as seriously as his interest in avoiding incapacitation per se. Mullaney v.
210. See supra pt. II.C.1.b.i.
211. See supra notes 49-51 and accompanying text.
212. Packer points out that treatment is commonly seen as less detrimental than pun-
ishment. He suggests that the difference between treatment and punishment "resides in
two related considerations: (1) the difference in justifying purposes; (2) the larger role of
the offending conduct in the case of Punishment." H. Packer, supra note 58, at 25. The
treated individual may be empirically worse off than the punished individual, but "justifi-
cation for Treatment rests on the view that the person subjected to it is or probably will
be 'better off' as a consequence." Id.
could be seen as equally intrusive, however, in that fewer rights attend civil commitment than criminal proceedings.\textsuperscript{213} In addition, as is well known, civil commitment often results in warehousing rather than treatment, especially when no truly effective treatment methods are known.\textsuperscript{214}

Thus, all three alternatives present problems that arguably prevent their being less intrusive than the exclusion of negativing evidence. In addition, they are all open to attack on the basis that they will not result in the incapacitation of all people acquitted for lack of subjective mental state. Some people will fall through the cracks. They will not be civilly committed for some reason. They will be released too soon.\textsuperscript{215} They will be found to be non-negligent. They will not have been previously treated and so be incapable of conviction under the new offense. It might be argued that, as to these people only, the state could exclude negativing evidence. That solution, of course, poses insurmountable practical problems. It would be impossible to know, at the beginning of the criminal trial, whether or not the defendant will fit into one of these categories and so be ineligible to present his negativing evidence. Because there is no way that these three options will incapacitate all dangerous delusional people, it might be argued that they are not viable options at all.\textsuperscript{216}

To the extent that the three options discussed are not seen as less intrusive routes to incapacitation than is the exclusion of negativing evidence, the characterization of the state’s interest becomes a focal concern. If that interest is compelling and the other options are not less intrusive, the state arguably can continue to exclude negativing evidence. The final section of this Article will discuss just how “compelling” the state’s interest in incapacitation really is. To some extent this discussion will be informed by societal, as opposed to individual, objections to the three potentially less intrusive options that have been discussed.

3. How “Compelling” is the State’s Interest in Incapacitation?

According to the balancing test discussed above, a compelling state interest sometimes can outweigh a defendant’s interest in exercising fundamental rights.\textsuperscript{217} Thus, the stakes involved in the labeling game are


\textsuperscript{214} See supra note 168.

\textsuperscript{215} It probably can be accurately charged that, at least in some states, civil commitment is a “revolving door” system in which people are treated, released, and re-committed endlessly. Thus, the claim may be made that the system does not ensure safety from dangerous individuals who will be released “experimentally” until they once again show that they are unsafe. Of course, the same “revolving door” criticism can be leveled at the criminal justice system. On the other hand, it could be said that in the latter system, at least society has the satisfaction of expressing its moral displeasure over the defendant’s behavior.

\textsuperscript{216} See supra note 46 and accompanying text.

\textsuperscript{217} See supra note 47 and accompanying text.
high. By terming the state interest "compelling," a court potentially allows the exclusion of probative, reliable and crucial defense evidence.

But is the label valid here? The state wants to incapacitate dangerous individuals. This is an obvious, important and popularly supported state function. Yet there are cogent reasons why such an interest cannot be labelled "compelling" for purposes of the balancing test.

These reasons begin with an examination of the connection between the desire to incapacitate dangerous people and the desire to exclude expert testimony regarding mental abnormality or intoxication. Labeling such evidence "unreliable" or "inefficient" masks the underlying fears about handing real control of a trial's outcome over to a scientific community whose concerns may not reflect those of the general community. The connection, in other words, involves popular mistrust and misapprehensions: first, about the extent to which the scientific community controls the outcome in cases in which experts are used and, second, about the frequency with which expert testimony provides the basis for acquittals. It certainly is true that such fears have been one of the causes of the current reaction against the insanity defense. Alcohol experts probably have not been used often enough to create similar fears in the lay community, but it can be predicted that increased use would have that effect, especially because people tend to see intoxication as a voluntary condition to which moral stigma can attach.

While popular fears may not be the strongest reason for determining rules of law, courts naturally would hesitate to release dangerous individuals on grounds widely perceived as insufficient or unwise. Judges in most state courts are, to some degree, popularly elected, and even federal judges are sensitive to the role that public acceptance plays in legitimatizing their authority. These fears and misapprehensions lead to labeling the interest in incapacitation as "compelling" because such la-

218. See Morris, supra note 140, at 67 & nn.5-6. It is possible that the lay community does not understand the ethical connection between mens rea and culpability, and thus would object to the exculpatory effect of even well-restricted evidence on that issue. If there were a popular demand for "strict" or objective culpability, however, the appropriate response would not be to reduce the criteria sub rosa for selected defendants. Rather, the legislature either should abolish mens rea and allow that step to be tested constitutionally in the courts, or should educate the public about why it refuses to do so.


220. See Hall, supra note 5, at 1047, 1051; Paulsen, supra note 33, at 4-5, 15. Where alcoholics are concerned, acceptance of the disease model of alcoholism shifts the locus of the moral stigma from drinking per se to drinking after having been detoxified and educated about the nature of and cure for the disease. Alcohol, of course, is legally available, and its use is encouraged in our society. An interesting question arises as to where to place the moral stigma involved in being addicted to a drug (such as heroin) whose first use was illegal.


belong is the only way the interest can outweigh defense rights that might prevent incapacitation. If incapacitation is "compelling" and the presentation of negativing evidence would lead to freedom, the evidence will be excluded even if the resulting conviction is factually illogical.

Of course, it might be asked whether there is anything inherently wrong with illogical jurisprudence, especially in the face of an historic tradition of "fudging" criminal law principles to take care of social problems. While "logic for logic's sake" might be enough of an answer for some, there are other points to add. For one thing, society still seems to put some emphasis or credence in the notion that there is something special about the criminal sanction. In other words, only those who are "evil" as well as dangerous should be labeled as criminals. From this point of view, illogic might be tolerated if it served the end of separating the blameworthy from the blameless. Perhaps the state's interest in incapacitation should be deemed "compelling" only when directed at those who are responsible for their disabilities.

This solution has surface appeal. Criminal law has traditionally considered intoxicated offenders as more blameworthy than mentally ill offenders. If we could rely on these broad categories, and prevent only the intoxicated from presenting logically relevant evidence, we might not be disturbed at all by the way "illogic" was made to serve social ends. There is an argument to be made, however, that the broad categories are not trustworthy. As noted elsewhere, mentally ill offenders can be considered blameworthy if they previously have been treated and choose

223. See, e.g., Regina v. Prince, 2 L.R.—Cr. Cas. Res. 154, 171-72 (1875) (opinion of Blackburn, J.) (when statute prohibits taking unmarried girl under age of 16 against will of father, fact that defendant believed her older and thus did not knowingly commit a crime is irrelevant, because legislature's intent was to protect father's "legal right to the possession" of the child until the age of 16); id. at 173-75 (opinion of Bramwell, B.) (same); W. LaFave and A. Scott, supra note 23, at 545-61, 594-602 (charting history of felony-murder rule from its creation in England, where it applied regardless of how dangerous the felony was, to the present, when it no longer exists in England, and exists in America only with regard to certain felonies; also charting similar history for "unlawful-act manslaughter" rule).

224. The Supreme Court seems to have put a great deal of stock in logical jurisprudence in distinguishing Mullaney v. Wilbur, 421 U.S. 684 (1975), from Patterson v. New York, 432 U.S. 197 (1977). According to the dissent in Patterson, "[l]he Court [in distinguishing the two cases] manages to run a constitutional boundary line through the barely visible space that separates Maine's law from New York's. It does so on the basis of distinctions in language that are formalistic rather than substantive." Id. at 221 (Powell, J., dissenting); accord, Jeffries & Stephan, supra note 3, at 1381. It might be noted in passing that if the Supreme Court actually meant to elevate logic to the exalted position implied in the cases, it may have bought itself more problems than it bargained for. Even without the worries of the negativing defense discussed here, the federal courts may now have to engage in the type of analysis involved in redefining offenses discussed supra pt. II.C.1.b.i. As has been noted, see Packer, supra note 172, at 107, the federal courts have been loathe to embark on this endeavor.


226. See W. LaFave and A. Scott, supra note 23, at 341-51.

227. See supra pt. II.C.1.b.ii.
not to take the precautions necessary to prevent a recurrence of delusional states. Intoxicated offenders arguably are not blameworthy if they are undiagnosed alcoholics. If blameworthiness is analyzed in terms of current understandings, the illogical jurisprudence may not, after all, be successful in sorting the evil from the merely dangerous; or, more accurately, the sorting will only occur by embroiling courts in case-by-case inquiries into the nature of the defendant's condition before the evidence can be introduced.

There is, moreover, another reason not to label as "compelling" the state's interest in incapacitation. Even if that interest is so labeled, the state cannot be totally successful in serving this interest if any defense rights are allowed at all. Even where negativing evidence is excluded in a criminal case, some dangerous people will be acquitted for other reasons. If convicted, some will be released from prison before they are "safe." If society's interest in incapacitation were compelling in the sense that all dangerous people should, by hook or by crook, be put away, that interest would always outbalance all defense rights that lead to freedom.

If the state interest were "compelling" in this sense, trial (if permitted at all) would look very different. The first order of business would be a judicial determination of whether the individual would be dangerous to others if released onto the streets. If so, the defendant would not be allowed to put on any evidence, on any element, since that might lead to acquittal and freedom. The defendant might not even be allowed to cross-examine prosecution witnesses. But if this were the case, why even bother to proffer criminal charges? Why not just have a determination of "dangerousness" and let it go at that?

These rhetorical questions might seem far-fetched, but if the state's interest in incapacitation is "compelling" in this sense, there is no principled way to draw lines between the defendant's constitutional rights that

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228. Dangerous individuals whose negativing evidence is excluded on the element of mental state may nevertheless be acquitted because of, inter alia, suppression of prosecutorial evidence on fourth, fifth or sixth amendment grounds, the jury's belief of alibi evidence, the jury's belief that the defendant was acting in self defense or the jury's reasonable doubt about the prosecution's case. "Restraint cannot be attributed to potential 'dangerousness' associated with the crime charged, no matter how serious, for that kind of 'dangerousness' is characteristic of defendants whose defenses prevail." Goldstein & Katz, supra note 54, at 866.

229. This is especially so because of the lack of effective treatment in prisons.

230. This prediction was fulfilled in Bethea v. United States, 365 A.2d 64 (D.C. 1976), cert. denied, 433 U.S. 911 (1977), where, in upholding exclusion of negativing evidence, the court stated that

the rules by which we apply the principles of responsibility must serve simultaneously the legitimate concerns of the community for its security and the proper administration of its criminal justice system as well as the interests of the individual defendant . . . . Where the interests of the individual conflict with those of society, the security of the community must be considered the paramount objective.

Id. at 90 n.55 (citations omitted).
remain and those that can be outweighed. Allowing defense rights will always open the possibility of the defendant's freedom regardless of dangerousness. In fact, the existence of constitutional rights can be seen as a recognition that the state's interest in safety from danger is not all-encompassing. Allowing such an interest to outbalance defense rights would increase state control to such an extent that the fundamental nature of our society would be affected.

Labeling the state's interest as "compelling" can lead to excessive state control in another way as well. The previous section of this Article labored to find additional methods of institutionalizing citizens. These contortions were necessary because the state's interest in doing so was labeled "compelling." Central to the discussion was the expansion of the civil commitment approach to incapacitation. Such an expansion is relatively unthreatening to those whose alternative is exclusion of negating evidence and consequent incarceration when found guilty of a crime. These people will be institutionalized in one way or the other. But an increase in methods of institutionalization could affect individuals other than those acquitted of crimes for lack of mental state. The threat is especially strong with regard to civil commitment. Unless criteria are defined so that a condition precedent to commitment is performance of an act that would have been a crime, increasing the grounds for commitment will expand considerably the state's power to institutionalize deviant citizens who are merely bothersome. Unless civil commitment procedures are made as demanding or nearly as demanding as criminal procedures, there will be little an unwilling citizen can do to prevent such institutionalization. For many, these possibilities evoke the aura of "Big Brother" and totalitarian adjustment of social nonconformists.

The question of labeling the state's interest in incapacitating dangerous people thus leads straight into a major conundrum of modern life: Do we prefer the threats to our safety to come from our government or from individuals? As mentioned above, it can be argued that those who

231. See United States v. United States District Court, 407 U.S. 297, 314-15, 321 (1972) (government's interest in protecting itself from alleged domestic threat to national security did not justify the government in ignoring citizens' rights to be free from unreasonable search under the fourth amendment); Baxstrom v. Herold, 383 U.S. 107, 110 (1965) (fact that penitentiary inmate was considered "dangerous" if released back into society did not justify state in giving him fewer protections than nonincarcerated civil commitment subject when determining whether to retain him in a mental institution when his penal sentence expired). In his concurring opinion in United States v. United States District Court, Justice Douglas quoted from United States v. Robel, 389 U.S. 258, 264 (1967): "'[T]his concept of "national defense" cannot be deemed an end in itself, justifying any . . . power designed to promote such a goal. Implicit in the term "national defense" is the notion of defending those values and ideals which set this Nation apart . . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of . . . those liberties . . . which [make] the defense of the Nation worthwhile.'" 407 U.S. at 332 (Douglas, J., concurring).

232. See supra note 231 and accompanying text.
ratified the Constitution and its amendments have made the choice for us.

CONCLUSION

In modern criminal practice, a prosecutor frequently is required to prove beyond a reasonable doubt that the defendant was subjectively guilty of the offense charged. When this is so, the defendant may want to introduce negativing evidence that he acted unintentionally, unknowingly or nonrecklessly because of intoxication or mental abnormality. If he is allowed to do so, the prosecution's burden will require disproving as much of such evidence as the factfinder may believe.

Negativing evidence of this sort plunges the courts into a dilemma of great proportions. If the evidence is excluded, these defendants alone will be convicted on the basis of objective liability, arguably a profound violation of their rights. If the evidence is allowed, potentially dangerous people will be freed.

Courts and legislatures can obviate the dilemma by redefining crimes to call for objective rather than subjective fault. As noted previously,233 there are reasons why objective fault is not an acceptable basis for conviction of a serious crime. To the extent that normal subjective liability remains the standard, the dilemma persists.

A great number of American courts have attempted to resolve the problem by labeling as generically "unreliable" or "inefficient" all evidence of intoxication and mental abnormality outside the few, highly restricted contexts, such as the extrinsic insanity defense, which lead to coerced treatment or incapacitation. Such an approach may provide the superficial appearance of respecting defense rights, in that no party has a right to introduce substandard evidence, but the evidence may not, in fact, be substandard, and in that case injustice persists. As has been seen,234 it is unlikely that the "solution" of generic exclusion is constitutional. At most, the Constitution may support a case-by-case evaluation of the reliability and efficiency of evidence and permit exclusion only where the state can show that less drastic, traditional safeguards fail to protect the factfinding process.

Recognition of the unconstitutionality of the restrictions now commonly placed on the introduction of "negativing" defense evidence will result in an increase in the use of such evidence and, most likely, an increase in the number of people acquitted of criminal charges. These acquittees, of course, will avoid the incapacitation or coerced treatment attendant upon conviction.

Fear of such a result may make it tempting to justify exclusion of evidence as necessary to further a state interest in safety. Such an approach, however, would be tantamount to abolishing all defense rights that could

233. See supra notes 199-201 and accompanying text.
234. See supra notes 107-10 and accompanying text.
lead to the acquittal of dangerous offenders. Unless the courts are, in essence, ready to rewrite the Constitution to bestow rights only upon the harmless, this approach, too, is unworkable.

Rejection of the exclusionary approach does not, however, mean that the state is helpless to protect society from drug and alcohol abusers, addicts or mentally abnormal people who are acquitted of crimes. While it may be impractical to refocus offenses, legislatures can revise civil commitment schemes so that most criminally acquitted offenders will be institutionalized nevertheless. In addition, legislatures can ensure that the standards for commitment and release, and the type of treatment and supervision afforded, adequately serve the civil rights and medical needs of those individuals who cannot or will not provide for their own and others' safety. Libertarian concerns may create some ambivalence concerning the wisdom of civil commitment as a solution, despite the possibility of procedural protections against unwarranted expansion of the institution. The threats to civil liberties here, however, are obvious enough that there may be a natural check on expansion of civil commitment to the merely bothersome. Even today, civil commitment procedures may be abused by friends or family with a sick loved one and no place else to turn. Development of better community resources to help nondangerous people with mental health and addiction problems would eliminate some incentive for use of the civil commitment option. Finally, in the cases in which it is clear that some form of incapacitation is warranted, it is likely that civil commitment affords more hope of treatment and re-integration into society than does any form of criminal incapacitation. This likelihood provides some reason for attempting to cope with whatever other dangers civil commitment presents. Of course, civil commitment will not solve completely the problem of dangerous people. But then, neither does the criminal law, even with rules that exclude defense evidence.

While the above discussion has proceeded in constitutional terms, the same points can be raised outside of the constitutional context. Indeed, the tensions that have emerged are the precise tensions that underlie the classical debates in substantive criminal jurisprudence: Should we allow defenses that will increase the ethical integrity of the criminal law when doing so will impair the ability of that law to control those who act dangerously? Posing the question in light of the civil commitment alternative, and recognizing that modern society will incapacitate a dangerous person when possible, we can ask whether we should label such a person "bad" or "sick." Even without a constitutional mandate, states can rethink the wisdom of their exclusionary rules in these terms.

Viewed in this light, the exclusionary rules under discussion may seem even more perplexing. Why do these rules persist if ethical integrity and social control both can be achieved by using civil commitment to inca-

235. See discussion supra pt. II.C.1.b.
pacitate? Some, of course, may question the premise. Ethical integrity may be seen as lacking when society institutionalizes noncriminals it cannot cure. On the other hand, it is arguable that we are more likely to seek cures for those who are merely “sick,” knowing that we are safe from them in any case.

The continued existence of the exclusionary rules is better explained by the fact that use of the label “sick” deprives us of the catharsis accompanying ritual application of the label “bad.” Undeniably, the persons under discussion here will have caused fear, trauma and loss to some innocent victim. The society that still feels the need for retribution against the offender may well be the society that has not yet accepted meaningfully the notion that addicts and mentally abnormal people are not responsible for their conditions.

It may be that, should society ever adopt that notion, we will want to change our whole concept of mens rea to reflect the new ethic. Clearly, the time for doing so is nowhere near at hand, and this author does not support such a change. On the contrary, this Article merely argues that society should finally live up to the ethic already reflected in the criminal law as it exists today. This may be an area where the law must lead, rather than follow, the sentiments of the crowd.