practice and development of bargaining and, correlatively, must remove obstacles which impede, as well as prohibit, fruition of federal labor policy. Union security has an essential function to perform before labor and management can acquire continued successful collective bargaining. Congress undermines every effort to promote effective bargaining by endorsing provisions which permit state prohibition of union security.

Repeal of Section 14(b) is imperative. It should be replaced with a stipulation denying validity to state action more restrictive than federal union-security regulation. National uniform policy would prevent state obstruction of collective bargaining. Purely local bias could not impair or destroy the expressed will of the nation. Problems encountered in modern interstate commerce require solution on a country-wide basis, and collective bargaining represents a national solution to national labor-management problems. Interference by the states cannot be tolerated if effective private negotiation is the goal of federal labor legislation.

Congressional apprehension of the serious impairment administered collective bargaining by encouragement of anomalous state prohibitions of union security will surely incite legislative remedy of this labor law paradox. Uniform state laws could produce a partially adequate remedy. But even if the states would agree to repeal their right-to-work provisions, which is not likely, the time essential for individual state action warrants rejection of this possibility.[65] Congress should enact the proposed remedy immediately. Realistic solution of national labor problems requires a foundation of uniform union-security legislation.

VOLUNTARY FALSE CONFESSIONS: A NEGLECTED AREA IN CRIMINAL ADMINISTRATION

Exclusionary rules relating to criminal confessions find their basis in a single premise, insulation of the adversary system of jurisprudence from introduction of false and unreliable evidence. Such false testimony, when undetected, can only result in a fraud upon society—conviction of the innocent and freedom for the guilty.[1] Justifiable concern is ex-

65. Such a remedy would only be partially adequate because judicial interpretation commonly destroys the uniformity of identical statutes.

1. "There has been no careful collection of the statistics of untrue confessions, nor has any great number of instances ever been loosely reported, but enough have been verified to fortify the conclusion, based on ordinary observation of human conduct, that under certain stresses a person, especially one of defective mentality or peculiar temperament, may falsely acknowledge guilt." 3 WIGMORE, EVIDENCE § 822 (3d ed. 1940).

pressed over the plight of the innocent individual incarcerated for committing a crime. Not only does an innocent person suffer needlessly, but society, in whose name criminals are apprehended and punished, bears the brunt of any additional transgressions the actual guilty party may perpetrate. Where murder or rape is the crime, the enormity of the error and its adverse consequences cannot be gainsaid.

In efforts to forestall such distasteful results, the law has provided safeguards against confessions resulting from "involuntary" stimuli, but instances where an innocent party has "voluntarily" professed guilt have not been the subject of similar consideration. An awareness of the problem and suggestions for remedies must precede more detailed appraisal of potential measures designed to alleviate inadequacies in present administration of the law.

I

Lack of sufficient recognition of the false confession problem by law enforcement officials and by courts has resulted in numerous questionable convictions. A notable illustration high-lighting the tangled factual skein characterizing this area is the Lobaugh-Christen-Click series of cases in Indiana. Subsequent to the murder of four women in 1944 and 1945 in the Ft. Wayne area, Lobaugh formally confessed to the murders of Miss Haaga, Miss Kuzeff, and Miss Howard. Initially he denied his guilt in the slaying of Miss Conine.[2] Following frequent repudiations and reaffirmances of his confessions he pleaded guilty to three counts of murder. He was convicted and sentenced to death. When city officials later expressed doubt as to Lobaugh's guilt, Christen, a known molester of women, was arrested and charged with the murder of Miss Howard. He too was convicted and sentenced to death—thus two persons were awaiting execution for Miss Howard's death.

Although defendant Christen was later freed when his appeal was successful,[3] the supply of culprits was not yet depleted. Click, turned over to the police by his wife, admitted killing Miss Haaga, Miss Kuzeff, and Miss Conine.[4] Despite repudiation of his confession, and a letter from Lobaugh admitting guilt in all four murders,[5] Click was convicted

2. It has been claimed that police attempted to persuade him to confess to this murder, informing him that the penalty would be no greater for four murders than for three. Communication to the INDIANA LAW JOURNAL from the Ft. Wayne News Sentinel.

3. Christen v. State, 228 Ind. 30, 89 N.E.2d 445 (1950).

4. It was later claimed by Click that this was done to collect the outstanding reward money. Reply Brief for Appellant, pp. 41, 42, Click v. State, 228 Ind. 644, 94 N.E.2d 919 (1950).

5. *Id.* at 12.

and sentenced to the electric chair for the murder of Miss Conine.[6] *He* was executed. In the meantime the Governor commuted Lobaugh's sentence to life imprisonment.[7] Discovery of the crime for which he is serving occasions no small perplexity.[8]

The consequences of the state's diligence in this case present mute testimony to the significance of false confessions: One man was executed and another is still serving a life sentence for commission of a crime to which both had confessed, while a third, initially convicted of one of the crimes, was freed only because inadequate circumstantial evidence constituted the basis of his conviction.

II

Only partial accuracy rewards attempts to enumerate the motives for falsely confessing to a crime.[9] Even the most complete analysis relegates

6. Conviction upheld on appeal. Click v. State, 228 Ind. 644, 94 N.E.2d 919 (1950).

7. "Grave doubt about Lobaugh's guilt has always been entertained by many of the officers working on these cases but all of them looked upon him as a neurotic and wholly unfit for human society. That he was a sex pervert has been definitely established." Communication to the INDIANA LAW JOURNAL from ex-Governor Henry F. Schricker.

8. Ultimately Lobaugh confessed to all four murders and Click admitted killing all of the women except Miss Howard. On appeal of the Click conviction for the murder of Miss Conine, the supreme court stated: "Of course, it is true the confession of Lobaugh and that of appellant cannot both be true. By his ruling on the motion for new trial, the trial court has determined the appellant's confession is of such probity, that the Lobaugh confession would not prevail against it should a new trial be had." Click v. State, 228 Ind. 644, 653, 94 N.E.2d 919, 923 (1950). Thus the acceptance by the trial court of the Click confession to the Conine murder casts doubt upon the validity of Lobaugh's confession to the Haaga and Kuzeff murders since Click also confessed to them. Moreover, lie detector and truth serum tests indicated Lobaugh was truthful in stating he had not committed these three crimes. (In all fairness it must be added that some lie detector tests showed he was telling the truth in admitting his guilt to all three of the crimes.) From the above one could reasonably conjecture that Lobaugh was guilty of the Howard slaying only. This case is confused, however, since the evidence that Lobaugh killed Miss Howard was practically identical with that later used to convict Christen for the same murder; the two important differences were that (1) the one witness who could identify the civilian with the victim prior to her death stated that Lobaugh was not the man, while he testified on the stand in Christen's trial that Christen *was* the man and (2) Lobaugh confessed to the crime and Christen did not. Yet the Christen conviction for the murder of Miss Howard was reversed because the supreme court felt that there was no evidence from which an inference of guilt could be drawn. The presence of the civilian in the alley with the victim four hours prior to the discovery of the body was held to be insufficient evidence upon which to base a conviction. Obviously this holding would apply to Lobaugh as well as Christen. The additional element, Lobaugh's confession to the killing, is of questionable significance due to the doubt cast upon it by scientific tests coupled with the rejection of his confession to the Conine slaying in the Click case.

9. See 3 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 124 (1827); BEST, THE PRINCIPLES OF THE LAW OF EVIDENCE §§ 559-573 (12th ed. 1922); GROSS, CRIMINAL PSYCHOLOGY 31 (1911); MUNSTERBERG, ON THE WITNESS STAND: ESSAYS ON PSYCHOLOGY AND CRIME 144 (1933).

many cases to the inexplicable category. The ordinary and expected motivation for confessions of guilt is a natural desire to tell the truth and ease the conscience, but other stimuli may overpower this human tendency. Often the factual circumstances manifest the purpose underlying false confessions. But in other cases, despite the confession, factual justification is lacking entirely or is extremely vague. Implicit in the latter situation are various psychological motivations. Accordingly, an examination of attempted classifications reveals the amenability of motives to a dual categorization:[10] those psychological in nature [11] and those based upon some rational objective. As an analytical aid in the study of the problem and of suggested remedies, such systemization seems the most useful.

In the case of confessions with no apparent psychological basis, the confessor may seek no personal benefit, but a plan exists in the party's mind and a specific end is envisaged.[12] Indicative of the importance of the confessor's goal is his willingness to sacrifice his life to achieve it.

Confessions made under expectation of judicial leniency have been common in the annals of judicial history.[13] The suspect perceives that aroused public opinion and circumstantial evidence point a strongly accusing finger at him and, realizing the great possibility of conviction, he may choose to confess falsely in the hope that his cooperation may be rewarded by a sentence less severe than the maximum.[14] Another factor

10. See HUDSON, THE EVOLUTION OF THE SOUL 227 (4th ed. 1912), for an attempted enumeration.

11. "There is however, a different class of cases which occur now and again when the judgment is overthrown, and the mind being in a state of complete subjection and prostration, an untrue confession is made, the person confessing really believing himself guilty. In such cases the story is often fabricated with much ingenuity and tact." ARNOLD, PSYCHOLOGY APPLIED TO LEGAL EVIDENCE AND OTHER CONSTRUCTION OF LAW 335 (1913); see also, BENTHAM, *op. cit. supra note* 9, at 125; MUNSTERBERG, *op. cit. supra* note 9, at 147; 1 WHARTON AND STILLE, MEDICAL JURISPRUDENCE § 804 (3d ed. 1873).

12. See BORCHARD, CONVICTING THE INNOCENT (1932) *passim*. For a collection of cases on witchcraft involving self accusation see BURR, NARRATIVE OF THE WITCHCRAFT CASES 1648-1706 (1914). For a recent example of the practice see BECK, THE RUSSIAN PURGE AND THE EXTRACTION OF CONFESSION 42 (1951), in which it is stated: "A rule to which there were practically no exceptions was that no interrogation could be concluded except with a confession from the accused. The extraction of a confession was thus the essential purpose of questioning."

In a shocking illustration, two women, in order to obtain for the children of one of them the provisions given to an orphan by the law of the country, falsely accused themselves of a capital crime, were convicted, and as a result both died. WIGMORE, SCIENCE OF JUDICIAL PROOF 620 (3d ed. 1937).

13. See note 10 *supra*.

14. See BORCHARD, *op. cit. supra* note 12, especially the *Boorns Brothers* case p. 15. Here the brother-in-law of the Boorns brothers disappeared shortly after he had quarrelled with the two brothers. Circumstantial evidence and public opinion resulted in a grand jury indictment of the two men. Both brothers confessed to the crime and were sentenced to death. An accidental discovery of the allegedly deceased brother-in-law resulted in finding that he had tired of his wife and decided to leave her without

contributing to the number of false confessions is police officials' desire to clear their records of unsolved crimes—a defendant being prosecuted for one crime is encouraged to confess to others. The accused usually agrees since no further harm will result and his cooperation may be rewarded by a lighter sentence.[15] A further motivation for falsely confessing to a criminal act is a desire to aid the actual guilty party.[16] Such an instance occurred when two brothers committed a robbery and a younger, innocent brother contrived to draw suspicion upon himself.[17] The younger boy was arrested, thus ending pursuit of his brothers. But at his trial the boy produced an alibi resulting in acquittal. Meanwhile the guilty parties had fled the country.[18]

Only recently has scientific understanding progressed to the point that it can be stated with certainty that untrue confessions may be of psychological origin. Yet these are perhaps the most common,[19] albeit least understood, of false confessions.[20] Analysis of mental abnormalities reveals a class of persons whose behavior is not characteristic of any particular categorization of abnormality, yet who are not adjusted to normal life. Among this class, termed psychopathic personalities by

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communicating with anyone. Authorities believe the brothers confessed with the hope of escaping the death penalty which had been demanded by the citizens. See also, Jenkins, *A Most Extraordinary Case,* 24 CASE AND COMMENT 222 (1917).

15. "It has come to my attention where a defendant confesses to a crime such as burglary or theft and in order to clear up some 20 or 30 unsolved similar cases, the defendant is asked to confess to a number. Sometimes I have doubted whether or not the defendant is guilty of these other offenses, but in all of these cases, . . . [the defendant too, pleaded guilty] and there has been no contest made of it. This has been done mostly for record purposes, but in my own mind I have doubted sometimes whether or not the defendant committed these offenses. They do not cnter into the punishment meted out to the defendant. . . ." Through the use of the lie detector, hypnosis, and truth serum, six hundred inmates of the state penitentiary in Joliet, Illinois, were administered tests on this subject. The results showed that approximately forty per cent of the prisoners interviewed were not guilty of the crime for which they were sentenced. It should be noted that tests demonstrated that all of these men were guilty of some crime, although not of the one for which they were charged. Communications to the INDIANA LAW JOURNAL from the District Attorney of Dallas, Texas, and Captain Donald L. Kooken, Director of the Institute of Criminal Law Administration, Indiana University.

16. See note 10 *supra.*

17. 1 CHITTY, CRIMINAL LAW 85 (2d ed. 1826).

18. Illustrative of this is a situation recently reported in the Louisville Courier-Journal, Oct. 7, 1952, p. 1, col. 1. In the course of prosecution for another crime it was related that the defendant's older brother had been murdered, and another brother had been accused of the crime. An attorney advised the defendant that the brother might be saved from the dcath penalty if the defendant confessed to the crime. He did this, was found guilty and sentenced to life imprisonment for the murder. He was then pardoned.

19. See note 10 *supra.*

20. Results of examinations of criminals show approximately 10% of them to be psychopathic cases. GUTTMACHER AND WEIHOFEN, PSYCHIATRY AND THE LAW 382-394 (1952).

authorities,[21] are numerous pathological liars and accusers.[22] Pathological accusation has been characterized as ". . . false accusation indulged in apart from any obvious purpose. Like the swindling of pathological liars, it appears objectively more pernicious than the lying, but it is an expression of the same tendency. The most striking form of this type of conduct is, of course, self-accusation. Mendacious self-impeachment seems convincing of the abnormality."[23] Of extreme importance to an intelligent approach to this problem is the realization that the pathological liar is difficult to detect because of his normal outward appearance and his staunch belief in the truthfulness of his utterances.[24] Nevertheless, efficient law enforcement and medical analysis have led to the discovery of numerous pathologically caused confessions.[25] Pathological

21. This term has been said to include those who are fanatics, emotionally unstable, "moral imbecils," vagrants, sadists, habitual criminals, kleptomaniacs, pyromaniacs, sexual perverts, pathological liars, and swindlers. OVERHOLZER AND RICHMOND, HANDBOOK OF PSYCHIATRY 185 (1947).

"Psychopathic personalities appear to be a product of emotional insecurity in early childhood. They are characterized by a complete inability to perceive the character of their acts or to accept responsibility for their misdeeds. They are unable to profit from experience, and will repeat the same or similar acts over and over. They feel no guilt or remorse for their conduct, except that when apprehended they will apologize profusely and beg for another chance." Legislation, 10 U. OF PITT. L. REV. 578 (1949). For material concerning the psychopath generally see Coon, *Psychiatry for the Lawyer: Common Psychiatric States Not Due to Psychosis,* 31 CORNELL L.Q. 466 (1946); Dixon, *Psychopathic Angles of Criminal Behavior,* 14 ORE. L. REV. 352 (1935); Hulbert, *Constitutional Psychopathic Inferiority in Relation to Delinquency,* 30 J. CRIM. L. & CRIMINOLOGY 3, 15 (1939); Lipton, *The Psychopath,* 40 J. CRIM. L. & CRIMINOLOGY 584, 585 (1950).

22. See note 21 *supra.* Pathological lying has been defined as: ". . . [F]alsification entirely disproportionate to any discernible end in view, engaged in by a person who, at the time of the observation, cannot be declared insane, feebleminded, or epileptic." HEALY, PATHOLOGICAL LYING, ACCUSATION, AND SWINDLING 1 (1915). For material concerning the pathologieal lie generally see *id.* at 25; WHARTON AND STILLE, *op. cit. supra* note 11, § 626; GUTTMACHER AND WEIHOFEN, *op. cit. supra* note 20, at 376-7

Pathological accusations are a constant threat in prosecutions for crimes of a sexual nature. A more complete discussion of this phase of the subject is found in 62 YALE L.J. 55, 69 (1952).

23. HEALY, *op. cit. supra* note 22, at 2.

24. *Id.* at 28. In addition it is apparent that the subject gains no individual profit from his lies and therefore external rewards to the confessor are not apparent, making detection of these lies doubly difficult.

25. "Case of a young man of 19, with already a long record of criminalism, who created much trouble for a court where a judge was keenly anxious to do justice. The fellow implicated himself in a sensational murder, but investigation proved this to be untrue. In other ways his word was found most unreliable. The question concerning his sanity could only be answered by stating that he was an aberrational type peculiarly inclined to criminalism and therefore needed segregation, and that he was also given to pathological lying and self-accusation." *Id.* at 233. Better illustrating the situation ". . . was a man of 31 years, a decorative painter by trade, who presented himself at the states attorney's office and stated that in a fit of jealousy he had shot and killed a man. Taking up the case it was soon found that this was quite untrue. . . . the man he claimed to have killed was still alive. . . . His case history showed that he seemed to be unable to discriminate his real and his fancied crimes. . . . He proved to be

liars undoubtedly account for the many false confessions received after the report of every sensational murder.[26]

In addition to the pathological lie, other psychological grounds for untrue confessions, based upon theories of hypnosis and suggestion, have been advanced by several leading authorities.[27] An individual of submarginal mentality may, after entertaining a fanciful notion in his mind, ultimately become convinced of its verity. The new idea becomes so deeply impressed upon the brain that it becomes an accepted fact. The particular applicability of this theory has been advanced in situations involving accusation and subsequent confession to a capital offense.[28] Constant interrogation, resulting in dethronement of reason, coupled with suggestion sufficiently vigorous to implant the belief in the suspect's mind, produces a confession. Many of the early witchcraft confessions

willingly introspective and stated that his inclination to lie was a puzzle to him, and that while he was engaged in prevarications he believed in them. He always was the hero of his own stories." *Id.* at 20. See also, HOAG, CRIME, ABNORMAL MINDS AND THE LAW 106-7 (1923). A striking example of a pathological lie is that of the case of Bratuscha "the cannibal" and his wife. Bratuscha confessed to having killed his 12 year old daughter, burned her, and then part by part consumed her. He implicated his wife as his accomplice. At first the woman denied this; she then went to confession, and later, told the judge the same story that her husband had related. Later it was discovered that the priest had refused her absolution until she "confessed the truth." Both parties had falsely confessed; the girl was alive. "The father's confession was pathologically caused, the mother's by her desire for absolution." GROSS, *op. cit. supra* note 9, at 32 n.1.

26. It has recently been revealed that there have been more than twenty false confessions in the famous "Black Dahlia" murder case in Los Angeles. Communication to the INDIANA LAW JOURNAL from Marcel Frym, J.D., Director of Criminological Research, The Hacker Foundation, Beverly Hills, California.

Shortly after a series of widely publicized slashings and attacks on women in Chicago, Frank Gudis, a fourteen year old boy confessed to police that he had committed the crimes. When he later repudiated the confession, a psychiatrist commenting upon the incident stated that "the emotional immaturity of the boy could cause him to fake a confession to satisfy his ego." It was also revealed that he had falsely confessed to the same type crime a year previous to this incident. Chicago Tribune, Jan. 9, 1953, p. 3, col. 2.

It has been reported that over two hundred persons voluntarily confessed to the famous Lindbergh kidnapping. Communication to the INDIANA LAW JOURNAL from Captain Donald L. Kooken, Director of the Institute of Criminal Law Administration, Indiana University.

27. ". . . [I]t does not require a condition of profound hypnosis to render a subject 'suggestible'; nor is any subject in full possession of his normal faculties when he is suggestible; that is, suggestible in the degree required for the production of the phenomenon under consideration." HUDSON, *op. cit. supra* note 10, at 230; see also ARNOLD, *op. cit. supra* note 11, at 335; GUTTMACHER AND WEIHOFEN, *op. cit. supra* note 20, at 377; MUNSTERBERG, *op. cit. supra* note 9, at 147. A suggestion that hypnosis may be a clue to the recent outbreak of confessions in Soviet purge trials is urged in the Chicago Daily News, Dec. 20, 1952, p. 26.

28. ". . . [I]t is well known to all hypnotists that sudden fright is a potential agency for the induction of the subjective condition. What is more to our present purpose, however, is the fact that a never failing emotional agency for the induction of the subjective condition is the dread or fear of imminent and inevitable personal calamity." HUDSON, *op. cit. supra* note 10, at 232.

seem amenable to this rationalization.[29] Illustrative of the situation is the Chicago murder case of *People v. Ivens,* in which the defendant's conviction and subsequent hanging were based almost completely upon a "voluntary" confession.[30] Dr. T. Sanderson Christison, believing in the defendant's innocence, conducted a thorough investigation of the case.[31] In an effort to substantiate his belief that hypnotic suggestion elicited the confession he requested opinions, based upon his view of the facts, from men then renowned in the fields of psychology and neurology. Agreement with his own belief was virtually unanimous.[32] Customary public reaction to a confession of this nature is not inexplicable. That a party would confess to a crime he did not commit is incomprehensible; there-

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29. "[T]he emotional shock brought it about that the normal personality went to pieces, and that a split off second personality began to form itself with its own connected life story built up from the absurd superstitions which had been suggested to her through the hypnotising examinations. Such confessions were given with real conviction, under the pressure of emotional excitement, or under the spell of overpowering influences. . . ." MUNSTERBERG, PSYCHOLOGY AND CRIME 145-8, as quoted in ARNOLD, *op. cit. supra* note 11, at 336; see also, HUDSON, *op. cit. supra* note 10, at 228; MUNSTERBERG, *op. cit. supra* note 9, at 147; 2 WHITE, A HISTORY OF THE WARFARE OF SCIENCE WITH THEOLOGY 151 (1897).

Here the party is not insane, he is merely under the influence of the questioner due to the intense questioning and probing. A modern day parallel of this is the use of grilling tactics by law enforcement officials. That such practice does exist throughout the country is shown by the leading study on the subject, the Wickersham Report. NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 44-155 (1931). See authorities cited in Ashcraft v. Tennessee, 322 U.S. 143, 150 n.5, 152 n.8 (1944); Chambers v. Florida, 309 U.S. 227, 238 n.11, 240 n.15 (1940). See also 3 WIGMORE, EVIDENCE §§ 833, 851. All persons subjected to this grilling will not react this way, however, "[P]ersons charged with crime are not infrequently of defective or inferior intelligence, and even without the use of formal third-degree methods, the influence of a stronger mind upon a weaker often produces, by persuasion or suggestion, the desired result." BORCHARD, *op. cit. supra* note 12, at xvii.

30. CHRISTISON, THE TRAGEDY OF CHICAGO (1906). This case is commented upon in MUNSTERBERG, *op. cit. supra* note 9, at 163-171.

31. On January 6, 1906, a woman named Bessie Hollister was raped and murdered. Richard G. Ivens, who had discovered the body, was arrested and charged with the crime. He then, according to police, confessed his guilt. At the trial, there was little evidence of consequence against the defendant except his confession. The defendant repudiated his confessions, stating he could not even remember giving them, although the documents were displayed to the court. The defendant produced sixteen unimpeached witnesses to substantiate his alibi, yet he was convicted and later hanged. See CHRISTISON, *op. cit. supra* note 30. For an explanation and an analysis of the suggestion process used here and in other cases, see MUNSTERBERG, *op. cit. supra* note 9, at 166-171.

32. In his letter Dr. Christison explained the facts of the case and asked the opinion of the expert as to whether the confession in the case could be explained through the use of hypnosis and suggestion. Among the many affirmative replies received, were answers from William James, M.D., LL.D., Phil. et Litt. D., Harvard; H. Munsterberg, M.D., Ph. D., LL.D., Harvard; Dr. Max Meyer, University of Missouri; H. A. Parkyn, M.D., C.M., Chicago; Dr. T. S. Clauston, University of Edinburg; David Yellowless, M.D., LL.D., University of Glasgow; Dr. C. Richet, University of Paris; Dr. A. Eulenburg, University of Berlin.

fore, the confessor is guilty.[33] Yet the *Ivens* case exemplifies the tragedy inherent in a hastily revengeful society's disregard of objective thought and scientific knowledge.[34]

A morbid desire for notoriety constitutes a further psychological cause of untrue admissions of guilt.[35] Persons subject to this affliction resort to the most desperate means to achieve their desired end. Another rare motivation is the so-called *toedium vitoe,* an unaccountable propensity to self-destruction.[36] A hint of this is detectable in a letter written by William Heirens, the notorious sex slayer, to his parents while awaiting trial.[37]

That false confessions are not an uncommon occurrence seems open to little question, but the extent to which confessions are discovered to be false is necessarily debatable.[38] Nevertheless, no matter how successful present detection may be, any assumption that there is complete success is unwarranted. Protection afforded the individual by the judicial processes appears inadequate to the task. Examination of present devices and techniques offers substantial justification for this assertion.

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33. "I felt sure from the first that no one was to be blamed. Court and jury had evidently done their best to find the facts and to weigh the evidence; they are not to be expected to be experts in the analysis of unusual mental states. . . . The whole population had been at the highest nervous tension from the frequency of the brutal murders in the streets of Chicago. Too often the human beast escaped justice; this time at least they had found the villain who confessed—he at least was not to escape the gallows." MUNSTERBURG, *op. cit. supra* note 9, at 140.

34. A result differing from that of the *Ivens* incident was reached in a case commented upon in Cummings, *The State vs. Harold Israel,* 15 J. CRIM. L. & CRIMINOLOGY 406 (1924). The defendant had confessed to a murder, and there was substantial circumstantial evidence pointing to his guilt. The states attorney refused to prosecute the case after consulting with physicians, stating: ". . . I ascertained that it was their unanmious opinion that the accused was a person of low mentality, of the moron type, quiet and docile in demeanor, totally lacking in any characteristic of brutality or viciousness, of very weak will and peculiarly subject to the influence of suggestion. It was the opinion of the physicians that any confession made by the accused was totally without value, and they were of the opinion also that if they cared to subject the accused to a continuous and fatiguing line of interrogation, accusation and suggestion in due course he would be reduced to such a mental state that he would admit practically anything his interrogators desired." *Id.* at 416.

35. This is a very common occurence after a particularly bloody or sadistic crime. See note 25 *supra.* See also WHARTON AND STILLE, *op. cit. supra* note 11, § 801.

36. This is suicide by false confession. See Blackwoods Magazine, July, 1860, pp. 54, 59; WHARTON AND STILLE, *op. cit. supra* note 11, § 803; 3 WIGMORE, EVIDENCE § 867 n.1.

37. In referring to the Degnan murder case he wrote: "I had read a lot about it in the papers & I then began to think of it. First I knew I must convince myself I did it & I finally by repeation [*sic*] in my mind & verbally I had completed it. I then planned other things to lead to my conviction & eventually the electric chair." Kennedy, Hoffman, and Haines, *Psychiatric Study of William Heirens,* 38 J. CRIM. L. & CRIMINOLOGY 311, 337 (1947).

38. Pollak, *The Errors of Justice,* 284 ANNALS 115, 123 (1952).

III

The role of the courts in creating devices which lend assistance in this problem area has not been of great significance.[39] For instance, the prescription that the confession must be secured "voluntarily" sans force, duress or abuse, is of little value in the case of a purposeful false confession since such confessions are freely given.[40] But another judicially developed device, the requirement of corroborating evidence, merits more extensive use.[41] Testing the validity of a confession is materially promoted by requiring proof of the corpus delicti and the establishment of independent facts in addition to the confession.[42] Although the corpus delicti rule is followed almost universally, many jurisdictions limit the requirement to facts concerning the corpus delicti, thus excluding other corroborating facts which might aid in validating or excluding the confession.[43] Manifestly, to be of aid in resolving this problem, a liberal construction is preferable.

State and federal statutory provisions have been adopted in attempts to assure the trustworthiness of confessions. Some of these are directed at prompt arraignment and prohibition of third degree tactics while others require confessions to be in writing and signed by the accused.[44] These enactments are of undoubted value in preventing extraction of confessions by violence and coercion but assist here only in that they preclude protracted questioning[45] which may induce a confession by suggestion.[46] Obviously a party so desiring may confess falsely and commit it to writing.

Several states contribute to a resolution of this perplexing problem by permitting appellate review of the facts in capital cases.[47] Scrutiny

39. The basic reason for excluding confessions has been the fear of entering false statements at the trial. The history of confessions shows a cyclical movement running a gamut from almost complete exclusion to a period of little or no exclusion. See 3 WIGMORE, EVIDENCE §§ 817-822.

40. This is so except in the case of a confession produced through suggestion or hypnosis.

41. See Ireton, *Confessions and Corpus Delicti,* 6 DETROIT L. REV. 92 (1935).

42. ". . .[T]o operate in the character of direct evidence, confession cannot be too particular. In respect of all material circumstances, it should be as particular, as, by dint of interrogation, it can be made to be." BENTHAM, *op. cit. supra* note 9, at 126. See also WHARTON AND STILLE, *op. cit. supra* note 11, § 200b.

43. As to the English and American rules concerning uncorroborated confessions see 3 WIGMORE, EVIDENCE §§ 2070-2071 and accompanying footnotes. As to confirmation by subsequent facts, see *id.* § 856 and accompanying footnotes.

44. See statutes cited in McCormick, *Some Problems and Developments in the Admissibility of Confessions,* 24 TEXAS L. REV. 239, 252 n.56-61 (1945).

45. Prolonged questioning is the commonest method of "third degree." See NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 153 (1931); 3 WIGMORE, EVIDENCE § 851.

46. See notes 27, 28, and 29 *supra.*

47. "When the judgment is of death, the court of appeals may order a new

of the record solely for errors of law leaves untouched those cases in which there has been facile compliance with substantive law but which might, upon closer examination, contain facts casting doubt upon the determination of guilt in the lower court.[48] Non-review of findings of fact in the appellate court leaves only a plea for executive clemency to prevent a miscarriage of justice.

Permitting introduction into evidence of confessions of persons not in court, as some states do, would further reduce the danger of convicting an innocent person and of failing to apprehend the guilty party. Such statements are usually held to be inadmissible since they generally are not regarded to be within the recognized hearsay rule exceptions of res gestae, declarations against interest, or dying declarations.[49] However, the traditional safeguards required *of exceptions to the hearsay rules* are present since the statements usually derive from pangs of conscience or are deathbed statements. Commentators make this contention in supporting abolition of such a stringent exclusionary provision,[50] but as yet the majority of courts have failed to adopt this position.[51]

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trial, if it be satisfied that the verdict was against the weight of the evidence or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below." N.Y. CODE OF CRIMINAL PROCEDURE § 528. This power of the court of appeals is apparent in the following statement: "Constitutional provision that jurisdiction of Court of Appeals shall be limited to review of questions of law except where judgment is of death enables Court of Appeals to review facts in capital cases." People v. Crum, 272 N.Y. 348, 6 N.E.2d 51 (1937).

See also, PA. STAT. ANN. tit. 19, § 1187; TEX. CODE CRIM. PROC. ANN. art. 848 (1948); A.L.I. CODE OF CRIMINAL PROCEDURE § 457(2) (1930) and Comments.

For other comments, see BORCHARD, *op. cit. supra* note 12, at xxi-xxiii; ORFIELD, CRIMINAL APPEALS IN AMERICA 87 n.39 (1939); ORFIELD, *Appellate Review of the Facts in Criminal Cases,* 12 F.R.D. 311 (1952).

48. This is only one of the possible methods of factual review. For a more complete analysis see ORFIELD, *op. cit. supra* note 47, at 82. In a New York case in which the above method of review was utilized the defendant had been convicted of murder despite an alibi and testimony of several witnesses who said they could not identify him for certain as the slayer. One witness did accuse the defendant as the slayer. The court of appeals in reversing the conviction stated: "That a record discloses some evidence which constitutes a question of fact which in the first instance must be submitted to a jury, does not permit us to close our minds to the fact that such evidence may not be sufficient to justify a jury in finding the issue in favor of the people beyond a reasonable doubt." People v. Cashin, 259 N.Y. 434, 442, 182 N.E. 74, 77 (1932).

49. Donnelly v. United States, 228 U.S. 243 (1912). See also Notes, 30 KY. L.J. 228 (1942); 16 MINN. L. REV. 437 (1932); 8 TENN. L. REV. 265 (1930).

50. See 1 WHARTON, CRIMINAL EVIDENCE § 438 (11th ed. 1935); WIGMORE, EVIDENCE § 142; MODEL CODE OF EVIDENCE, Rule 509 (1942); Wilder, *Confessions of Third Persons in Criminal Cases,* 1 CORNELL L.Q. 82 (1915).

51. See note 49 *supra.* In the recent case of People v. Lettrich, 108 N.E.2d 488 (Ill. 1952), the court, after restating and approving the accepted hearsay rule excluding the extra-judicial statements of third persons, reversed and remanded the case, stating: "The rule is sound and should not be departed from except in cases where it is obvious that justice demands a departure. But it would be absurd, and

Elevation of the ethical standards of law enforcement officials and prosecutors would necessarily alleviate concern over trustworthiness of confessions. Recognition of the need for reform in these groups is not lacking.[52] Explicit formulation of ethical procedures in police service through utilization of "Rules of Official Conduct" has been advocated by leaders in the field.[53] Prosecutors, possessed of extensive power in the selection of cases to prosecute and of evidence to introduce, should proceed cautiously to assure consideration of possible falsity in a confession.[54]

Scientific techniques have recently been utilized to a limited extent. Truth serum has been administered in some cases, but present knowledge is not sufficient to determine the potential assistance to be derived from this discovery.[55] The lie detector has proved useful only in particular cases.[56] Either the results are inconclusive or they indicate the absence of falsehood when a pathological liar or other abnormal liar is tested.[57] Another innovation, the electroencepholagraph, measures brain wave deviations in the diagnosis of psychopathic personalities.[58] The applicability of

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shocking to all sense of justice, to indiscriminately apply such a rule to prevent one accused of a crime from showing that another person was the real culprit merely because that other person was deceased, insane or out of the jurisdiction. . . .

". . . The State is here relying upon a confession, which the defendant alleges was procured by duress and fear. . . . Where the State is relying solely upon the repudiated confession of the defendant, and that confession in material respects does not conform to the known facts, it seems that justice requires that the jury consider every circumstance which reflects upon the reliability of that confession, and a confession of a third person that he perpetrated the offense is such a circumstance." *Id.* at 492.

52. "The third degree—the inflicting of pain, physical or mental, to extract confession or statements—is widespread throughout the country." "Physical brutality is extensively practiced." "Methods of intimidation adjusted to the age or the mentality of the victim are frequently used alone or in combination with other practices." "Prolonged illegal detention is a common practice." NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, *op. cit. supra* note 45.

53. Kooken, *Ethics in Police Service,* 38 J. CRIM. L. & CRIMINOLOGY 61, 172 (1947).

54. See note 34 *supra.* Recent statements by prosecuting attorneys show that many are becoming aware of their responsibility: ". . . [A] confession is only as good as the law enforcement officer who receives it." The protection against false confession largely ". . . rests on the integrity of the prosecutor and the court. . . ." Communications to the INDIANA LAW JOURNAL from County Solicitor, Dade County, Miami, Florida, and States Attorney, Baltimore County, Baltimore, Maryland.

55. 3 WIGMORE, EVIDENCE § 998; Dession, Freedman, Donnelly, and Redlich, *Drug-Induced Revelation and Criminal Investigation,* 62 YALE L.J. 315 (1953); 12 OHIO S.L.J. 478 (1951).

56. 3 *Id.* § 999.

57. The party actually believes what he says is true. "For these reasons his 'deception' is undetectible by this technique, or, indeed, by any other method short of the interrogator's independent discovery or possession of the actual facts about which the subject is lying." INBAU, LIE DETECTION AND CRIMINAL INTERROGATION 39 (1942).

58. Arieff and Rotman, *Psychopathic Personality,* 39 J. CRIM. L. & CRIMINOLOGY 158, 159 n.5-7 (1948).

these methods to deviations in human behavior is obvious, even though their reliability has not been fully measured.[59]

Increased employment of psychology and psychiatry further reflects the role of other disciplines in resolving problems, which although requiring solution in the context of legal processes, are only incidentally legal in character. Agitation and comment have furthered the use of these specific areas of knowledge in the courts,[60] but the procedures generally concern persons who are, or can be, declared insane; [61] hence, as presently constituted, these measures are of little assistance where the problem concerns individuals in the penumbra between sanity and insanity. Courts seldom, if ever, recognize persons involved in this problem area as insane; consequently, they are not accorded the protections conferred upon the insane. Discovery of the individual's aberration and initiative in securing some type of examination is dependent upon the discretion of prosecutors, parties, or the courts, all of whom are incompetent in such technical matters. When viewed in this light, present utilization of science is far from satisfactory.

An alteration in the evidentiary weight to be given a confession might, at least theoretically, further diminish the danger of a miscarriage of justice. Certainly complete elimination of the confession would accomplish the goal,[62] but it is questionable what good could accrue from giving a confession the highest evidentiary value.[63] Either of these two approaches seems extreme when compared with the obvious remedy—

59. "Every step in the promotion of scientific crime detection is a step towards the abolition of the cruel and ineffective methods of establishing criminal identity, such as the 'third degree,' and also a step towards the realization of a criminal trial unhampered by technical procedure and unreliable evidence. The use of brutality by the police in securing confessions, the reception of flimsy testimony as to identity, and the ineffectiveness of circumstantial evidence may be curtailed by more reliance upon scientific data and less reliance upon individual 'reasoning.'" Baker and Inbau, *The Scientific Detection of Crime*, 17 MINN. L. REV. 628 (1933). See also GUTTMACHER AND WEIHOFEN, *op. cit. supra* note 20, at 367-71.

60. GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 67, 449 (1925); HEALY, THE INDIVIDUAL DELINQUENT 729 (1915); MUNSTERBURG, *op. cit. supra* note 9, at 138 139, 150; Bromberg & Cleckley, *The Medico-Legal Dilemma A Suggested Solution*, 42 J. CRIM. L. & CRIMINOLOGY 729, 730, 737, 741 (1952); Bychowski & Curran, *Current Problems in Medico-Legal Testimony*, 37 J. CRIM. L. & CRIMINOLOGY 16 (1946); Cohen, *The Joint Effort of Law and Psychiatry*, 24 CONN. BAR J. 337, 355 (1950); Glueck, *State Legislation Providing for the Mental Examination of Persons Accused of Crime*, 14 J. CRIM. L. & CRIMINOLOGY 573, 585 (1924); Kahn, *The Lawyer and the Psychiatrist*, 21 CONN. BAR J. 112 (1947); Kinberg, *Forensic Psychiatry Without Metaphysics*, 40 J. CRIM. L. & CRIMINOLOGY 555 (1950); Selling, *Forensic Psychiatry*, 39 J. CRIM. L. & CRIMINOLOGY 606 (1949).

61. Weihofen, *An Alternative to the Battle of Experts: Hospital Examination of Criminal Defendants Before Trial*, 2 LAW & CONTEMP. PROB. 419, 421 (1935); Weihofen & Overholzer, *Commitment of the Mentally Ill*, 24 TEXAS L. REV. 307 (1945).

62. 3 WIGMORE, EVIDENCE § 866 n.1, 2.

63. 3 *id.* § 866 n.3.

more painstaking efforts to assure that the confessions are true. Successful accomplishment in this endeavor could be patterned upon the British system of justice where, as a result of strict judicial control of police practices, few cases of coerced confessions have arisen.[64] A similar advance in the detection of untrue admissions of guilt could be predicated upon an elevation of American law enforcement ethics to a level comparable with those of the British.

It is apparent that available current practices in the United States leave much to be desired. Action of a discretionary nature which leaves initiative in the hands of laymen completely unfamiliar with the technical complexities involved must be replaced by procedures of a more systematic and comprehensive character which would utilize, whenever feasible, the best in science and related knowledge. Awareness of possible courses of action to develop remedial procedures is a prerequisite to progress in successful discovery of false confessions.

IV

Inextricably involved in the search of a desideratum for eliminating the unwanted false confession is a weighing of values—the methods adopted must not only be workable and fair, they must afford both society and the individual an opportunity to ascertain the true state of facts. Since the untrue confession is not a problem present in many cases, law enforcement officials must not be unreasonably hampered in the apprehension of criminals. Yet to ferret out those instances in which false confessions do occur requires formulation of an effective plan. Application of the following suggestions only in cases involving capital punishment promises reconciliation of these conflicting aims. Officials should have little cause for complaint since there are relatively few capital cases, and those involving confessions are even less frequent. Moreover, police officials should not be subject to the gratuitous imputation that they do not desire to bring the actual culprit to justice.

False admissions of guilt with no apparent psychological basis seem to be the least recurring and are easier to detect. Since some underlying motive is usually present in such situations, diligent investigative work will expose the untrue statement. Indeed, the only reason for failure to detect this class of false confessions is lack of persistence in unearthing

64. "In giving evidence of such admissions or confessions it lies upon the prosecution to prove affirmatively to the satisfaction of the judge who tries the case that the admissions were not induced by any promise of favour . . . or pressure by a person in authority." 9 HALISBURY'S LAWS OF ENGLAND § 291n.(m) (2d ed. 1933) and cases cited. See also Note, 43 HARV. L. REV. 617, 618 n.6 (1930).

facts.[65] Primary blame for this laxness is possibly attributable to the public demand that someone be punished for a crime.[65] The police, in reaction to such pressures, attempt to secure a conviction at all costs. Securing a confession is the usual result, since gathering evidence connecting the suspect to the crime is a much more difficult process. The potential evils implicit in such shortcuts seem to underlie most of the movements agitating for complete elimination of confessions. Manifestly, if confessions are to continue to possess evidentiary significance, careful scrutinization as to their truthfulness should be standard procedure in order to avoid the dangers inherent in an improvident treatment of them.[66]

If evidence in addition to the admission of guilt is extremely difficult to obtain, substantiation of the confession may be more readily accomplished by increased utilization of lie detector tests.[67] The invalidity and inconsistency of a confession may be confirmed through comparison of the answers received from the suspect, the results shown by the machine, and the known facts concerning the crime. Adherence to this course not only would tend to eliminate the danger of convicting the wrong person but could result in a conviction of the guilty party without the necessity of introducing the confession into evidence.

Numerous cases in which a confession has been received also embody a plea of guilty, with little or no additional evidence. More than a mere guilty plea should be the basis of criminal convictions, particularly where capital punishment is prescribed.[68] Consequently, legislative action prohibiting imposition of a death sentence based solely upon a plea of guilty

65. See note 33 *supra*, and Ehrmann, *The Death Penalty and the Administration of Justice*, 284 ANNALS 73, 77 (1952).

66. "If a confession is made, all that is perceived in the case may be seen in the light of it, and experience teaches well enough how that alters the situation. There is so strong an inclination to pigeonhole and adopt everything perceived into some given explanation, that the explanation is strained after, and facts are squeezed and trimmed until they fit easily. . . . This is a matter of daily experience in our professional as well as in our ordinary affairs. We hear of a certain crime and consider the earliest data. For one reason or another we begin to suspect A as the criminal. The result of an examination of the premise is applied in each detail to this proposition. It fits. So does the autopsy, so do the depositions of the witnesses. Everything fits. There have indeed been a few difficulties, but they have been set aside, they are attributed to inaccurate observation and the like,—the point is,—that the evidence is against A. Now, suppose that soon after B confesses the crime; this event is so significant that it sets aside at once all the earlier reasons for suspecting A, and the theory of the crime now involves B. Naturally the whole material must be applied to B, and in spite of the fact that it at first fitted A, it does now fit B." GROSS, *op. cit. supra* note 9, at 33.

67. For previous discussion of corroboration, see notes 42 and 43 *supra*.

68. See N.J. REV. STAT. § 2:138-3 (1937). "In no case shall the plea of guilty be received upon any indictment for murder, and if, upon arraignment, such plea should be offered, it shall be disregarded, and the plea of not guilty entered, and a jury, duly impaneled, shall try the case in manner aforesaid." In State v. Smith, 109 N.J.L. 532, 162 Atl. 752 (1932), a conviction was reversed due to evidence of a plea of guilty being entered in the proceeding.

would be an advisable corrective measure. In the course of establishing actual guilt the false confessor may be discovered and released, thus preventing "legalized suicide" and making possible ultimate apprehension of the person who *is* a menace to society.

Although of course no panacea has been discovered, the false confession enigma in the area of non-psychological motivations should be subject to decreasing concern. Concerted efforts by legal reformers and sociologists coupled with United States Supreme Court scrutiny of due process violations in criminal cases has resulted in better and more exacting police and court procedures.[69] Such is not the case, however, with the false confession caused by psychological aberrations. Despite scientific progress in the treatment of psychopathic individuals, utilization of this new knowledge by the courts has been slow.[70]

As contrasted to measures directed toward the insane person, little legislation concerning other than the sexual psychopath, has been enacted.[71] In the usual case the psychopath is held to the same standards as the normal person; therefore, no effort is expended to discover whether or not a person is psychopathic. To the uninformed the psychopath's calm, apparently rational behavior is that of the perfectly normal person.[72] This suggests that officials concerned daily with criminal processes should be apprised of the fact that psychopaths may not be identified as such on sight.[73] Also needed is a wider realization that the psychopathic person may be, among other aberrations, a pathological liar, or for various reasons, extremely amenable to suggestion.[74] The import of these proposals is that a procedure must be developed which will, as a matter of course, discover the psychopathic confessor.

Careful examination of each confessor by competent personnel would adequately accomplish the desired end.[75] Many states have enacted

69. See Ashcraft v. Tennessee, 322 U.S. 143 (1944); Watts v. Indiana, 338 U.S. 49 (1949); Turner v. Pennsylvania, 338 U.S. 62 (1949); Harris v. South Carolina, 338 U.S. 68 (1949); Cogshall, *Are We Buying The Trojan Horse? The Need for Police Respect of Constitutional Rights,* 40 J. CRIM. L. & CRIMINOLOGY 242 (1949).

70. GLUECK, *op. cit. supra* note 60, at 67; Bromberg & Cleckley, *supra* note 60, at 741.

71. See ILL. REV. STAT. c. 38, § 820-5 (1948); IND. ANN. STAT. § 9-3401-12 (Burns 1942 Repl.); NEB. REV. STAT. § 29-2901-7 (1943) (1949) (Cum. Supp.). See also Notes, 40 J. CRIM. L. & CRIMINOLOGY 186 (1949); 60 YALE L.J. 346 (1951).

72. Uninformed persons, which may include the judge and the prosecutor, are more impressed by external symptoms of the traditional raving maniac than by the calm, apparently normal behavior of a pathological liar or a party easily subject to suggestion. Some persons find it very easy and not unjustifiably so, to class most psychopaths as normal upon a cursory examination and subject them to normal standards, usually without even an opportunity for any type psychiatric examination. See Bromberg and Cleckley, *supra note* 60, at 737; Pollak, *supra* note 38, at 121.

73. Bychowski & Curran, *supra* note 60.

74. See note 21 *supra.*

75. Kinberg, *supra* note 60, at 557.

measures providing for examination of suspected insane persons. Among other provisions, the suspect is placed in custody of the state mental hospital for observation, after which a report is made to the court.[76] A suggested Pennsylvania statute would permit any individual, including the district attorney, to request a mental examination of any accused suspected of abnormality.[77] Criminal proceedings in several European countries utilize similar procedures.[78] Adaptation to this particular problem of the principles upon which the insanity statutes operate would present no great difficulty.[79] Nevertheless, under most insanity statutes instigation of an examination is either discretionary, or responsibility for initiating remedial procedures is not squarely placed. Proper resolution of a problem in which society has so great an interest permits no such possibility for laziness or neglect in administration.

One statutory scheme offers hope for ultimate elimination of the false confession problem. Under a Massachusetts law[80] a person indicted for a capital offense, or any person previously indicted and convicted of a felony, *must* be examined by the Department of Mental Health.[81] Subject to a fine for failure to act, the clerk of the criminal court is required to notify the board of review within the Department that a defendant should be examined.[82] The goal contemplated in this legislation, within which the psychopathic false confessor certainly fits, is discovery of the abnormal non-responsible defendant. Apart from such legislation, initiative on the part of the prosecutor could result in action of the type envisaged by the Massachusetts statute.[83] Close cooperation

76. Weihofen, *supra* note 61, at 421.

77. See Legislation, 10 U. of PITT. L. REV. 578 (1949).

78. Aschaffenburg, *Psychiatry and Criminal Law,* 32 J. CRIM. L. & CRIMINOLOGY 3, 7 (1941).

79. It is again suggested that these provisions be applied only in cases of a more serious nature until their effect upon judicial administration can be determined.

80. MASS. ANN. LAWS c. 123, § 100A (1949). For a general history of the "Briggs Law" see Overholzer, *The History and Operation of the Briggs Law, of Massachusetts,* 2 LAW & CONTEMP. PROB. 436 (1935).

81. The object is ". . . to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility." MASS. ANN. LAWS c. 123, § 100A (1949).

82. The probation officer is required to notify the clerk of all past criminal occurences, while the trial judge may also send the defendant to the board for examination.

83. A North Carolina prosecutor recently disposed of a murder case in this manner. One of the suspects for the murder implicated himself seriously in the crime. Thereafter he confessed the crime. After the confession the man was interviewed numerous times by doctors, during which time it developed he was of low mentality. He was sent to a state institution for eight months and was later released. He was never prosecuted for the crime, since careful investigation plus the use of scientific knowledge proved his confessions to be false. Communication to the INDIANA LAW JOURNAL from the Solicitor, Mecklenburg County, Charlotte, North Carolina.

between established psychiatric clinics and court officials would also assist the prosecutor who questions a defendant's mental stability.[84]

Upon adoption of a policy of psychological review it would become a simple matter to direct persons confessing to capital crimes to be examined for possible psychological malfunctioning. Established clinics already at the disposal of the court would need only a slight adjustment in routine to administer such a program. The insignificant effort required could reap rewards in rehabilitation of human lives through more efficient and humane judicial administration.

Manifestly the suggested program should be initiated prior to the trial.[85] The pre-trial conference, already extensively used,[86] would serve this purpose for both psychological and non-psychological confessions, affording the judge an excellent opportunity to delve into the facts of the case in an informal atmosphere.[87] Inquiry into the various motives and circumstances present in most confession cases, as well as a report and interpretation of the psychiatric examination, could be dealt with at this time. The pre-trial provisions of the original draft of the Federal Rules of Criminal Procedure could be readily adapted to this situation.[88] En-

84. See GUTTMACHER AND WEIHOFEN, *op. cit. supra* note 20, at 259-64. A similar proposal was made in the Committee Report of the Psychopathic Laboratory, Police Department, City of New York, December 1917, p. 15, cited in GLUECK, *op. cit. supra* note 60, at 473. "But the clinics for sorting out the mentally unsound offender, especially the socially expensive recidivistic misdemeant, should be attached to the lower courts and the experienced psychiatrists, psychologists, and social workers in charge of this work should be regarded as court officers."

The National Crime Commission in its Report on the Medical Aspects of Crime recommended " . . . that each court have available not only psychiatric service but psychologists and social investigators, the work of this tribunal being furthered by the enactment of a law similar in principle to the Briggs Law of Massachusetts." Patterson, *Psychiatric Aspects of New Procedures in the State of Michigan,* 31 J. CRIM. L. & CRIMINOLOGY 684, 691 (1941). The report of the 52d Annual Meeting of the American Bar Association is to the same effect. *Id.* at 690.

85. ". . . [I]t is more efficient, economical and humane to sort out, *before trial,* those accused persons who are mentally abnormal than to subject such persons to the ordeal of a trial only to be compelled to transfer them early during their prison service to some hospital for mentally ill." Glueck, *supra* note 60 at 573. This same view may be applied to the situation here. See also note 84 *supra;* many of the views expressed there are applicable before the commencement of the trial.

86. FED. R. CIV. P. 16.

87. "The atmosphere being informal, there is much more likelihood of getting to an agreement on many of these matters at such a conference than is possible at an actual trial before an audience. The combativeness engendered by a trial is not present. The necessity of maintaining a position taken, to save face with client or the public, is absent. The conciliatory influence of the court prevails." Note, 26 J. AM. JUD. SOC'Y 106, 109 (1942).

88. Included within the original draft was a provision for consideration of matters related to the disposition of the proceedings. The suggested procedure would obviously fall within this objective. See PRELIMINARY DRAFT, UNITED STATES SUPREME COURT ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE 16 (1943). See also ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 324 (1947); for discussion favoring this proposed rule see Berge, *The Proposed Federal Rules of Criminal Procedure,* 42

couraging comments by judges in various states who used the pre-trial conference in criminal cases manifest the desirability of such a procedure.[89] Concern as to the constitutionality of a mental examination in conjunction with the conference is unwarranted since the tests could do no harm to a defendant who has already confessed.[90] Moreover, the conference and examination could clear him of the charge, thus avoiding the expense and time inherent in the ordinary criminal trial.

By nature the frequency of false confessions is indeterminable. That untrue admissions of guilt do occur is demonstrable, however. The significant effects upon the individual and upon society emphasize the necessity for re-examination of the present haphazard means utilized to prevent injustice. Substantial efforts should be undertaken to acquaint those intimately concerned with the criminal processes that voluntary, untrue confessions do take place and that available measures should be used to avoid the dangers of convicting the innocent. Similar endeavors should be made to enhance the efficacy of the judicial process in detecting the psychopathic individual who is prone to self-accusation. Although increased psychiatric knowledge is needed, measures designed to incorporate presently available techniques, as well as such advances in diagnosis and treatment as occur in the future, constitute an important prerequisite to progress in the administration of criminal justice.

PROTECTION OF THIRD PARTIES UNDER CONTRACTUAL LIMITATIONS OF LIABILITY

If one were to store a fur coat, or to leave his car in a parking lot, the chances are good that the contract governing the transaction would contain a stipulation limiting the liability resulting from any damage

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MICH. L. REV. 353, 364 (1943); Dession, *The Proposed Federal Rules of Criminal Procedure,* 18 CONN. BAR J. 58, 67 (1944); HOLTZOFF, *Reform of Federal Criminal Procedure,* 12 GEO. WASH. L. REV. 119 (1944); for discussion against adoption of the rule see Balter, *Federal Rules of Criminal Procedure,* 20 CALIF. STATE B.J. 91 (1945); Stewart, *Comments on Federal Rules of Criminal Procedure,* 8 JOHN MARSHALL L.J. 296, 299 (1943).

Generally on the advisability of this procedure in cases involving mental incapacity see Cohen, *supra* note 60, at 356.

89. "Experience with pretrial in criminal cases has not been common, but where tried, it has yielded results of great value." Note, 26 J. AM. JUD. SOC'Y 106, 107 (1942); see also Way, *New Technique Facilitates Criminal Trials,* 25 J. AM. JUD. SOC'Y 120 (1941).

90. FED. R. CIV. P. 35 provides for this examination in civil cases. This provision was upheld in Sibbach v. Wilson & Co., 312 U.S. 1 (1940).