

DRUG-INDUCED REVELATION AND CRIMINAL INVESTIGATION

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SCIENTIFIC and technological advances become irrevocable traits of the culture—however drastic the problems of assimilation and adjustment they engender, and however disturbing the value choices they pose. This is true not only of major advances like Freud's concept of the role of the unconscious in human behavior but also of less seminal developments like the drug-induced interview (narcoanalysis),¹ which has become an implement of psychiatry and with which we are here concerned. Our goal is to further understanding of the proper conditions and limitations of its use, and of its potentialities for abuse. We attempt to appraise narcoanalysis from three points of view: (1) What is it; (2) Under what conditions, if any, will its use (voluntary and involuntary) promote the best interests of the community (which is to say, of all individuals); and (3) How adequate is existing law to facilitate its appropriate use and discourage its misuse?

This inquiry is occasioned by the fact that the potentialities of narcoanalysis are as tempting to the police investigator, the medical expert, and the person accused² who reaches desperately for a way of corroborating the truth of his testimony, as they are disturbing in their threat to the self-

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1. While we have adopted the term narcoanalysis, the procedure is also referred to by such terms as narcosynthesis, narcohypnosis, or pharmacohypnosis, all indicating a state of partial consciousness induced by drugs and an interview with the patient in this condition.

2. The problem to which this article is addressed is not confined to the field of "criminal" investigation proper. The "accused" in the world of today (meaning one threatened with severe negative sanctions which in fact are "punitive" in character) increasingly faces the possibility that he may be moved against in any one of a host of executive or administrative proceedings aimed at curtailing his privilege of participation in the life of the community, or in a legislative investigatory proceeding, as well as in a traditional "criminal" proceeding.

determination and privacy of the individual. This is a problem which, as we shall see from the precedents to be examined in this article, is already with us to the point of urgency. It has also come to be so recognized abroad. A recent European episode illustrates one of the more common forms it may assume.

In 1948, Raymond Cens was on trial by a French Court for collaboration with Nazi occupation forces. He claimed to have suffered an apoplectic stroke which rendered him incapable of remembering and using verbal expressions—a condition commonly referred to as aphasia. The court appointed a board of eminent psychiatrists to examine him. In conducting their examination, the psychiatrists, without express objection by Cens, administered sodium pentothal. While under the drug, Cens gave distinct answers to the questions propounded. The psychiatrists were permitted, over vigorous objection, to testify at the trial regarding the results of the test and to express an opinion that Cens' memory was unimpaired and his aphasia feigned. Cens was convicted. Thereafter he brought a suit against the psychiatrists, charging them with assault and battery, illegal search, and violation of professional secrets. In deciding in favor of the psychiatrists, the court emphasized that they had only employed routine psychiatric procedures necessary to answer the limited question put to them by the court, namely, whether or not Cens was malingering.

The *Cens* case provoked widespread discussion throughout Europe and prompted the Paris Bar Association to adopt a resolution opposing the use of drugs during interrogation. The Association criticized the psychiatrists on four grounds: (1) Violating the article of the Penal Code binding doctors to professional secrets; (2) Violating the provision forbidding the questioning of an accused outside the presence of his advisers; (3) Violating the article forbidding assault and battery; and (4) Artificially depriving the defendant of his free will.³

The contradictory views provoked by this case seem to have stemmed from misapprehensions concerning the legal and psychological implications of narcoanalysis as well as from the conflicting value systems of the participants. In any event the *Cens* case suggests a host of medical and legal problems, problems which pose a difficult and complex challenge for American criminologists.

MEDICAL ASPECTS OF NARCOANALYSIS

The use of pharmacological agents as aids in the study of personality structure is neither new nor unique to psychiatry. The Greeks and Romans

3. The Resolution of the Council of the Bar Association of Paris is set out in 39 J. CRIM. L. & CRIMINOLOGY 665 (1949). The *Cens* case is discussed in Gagnieur, *The Judicial Use of Psychonarcosis in France*, 40 J. CRIM. L. & CRIMINOLOGY 370 (1949); and Muehlberger, *Interrogation Under Drug Influence*, 42 J. CRIM. L. & CRIMINOLOGY 513, 527 (1951).

Following this case, the Egyptian delegate to the United Nations offered a resolution to include a prohibition against the use of "truth serums" in the draft covenant on Human Rights. His attempt was unsuccessful. N.Y. Times, April 1, 1950, p. 3, col. 1.

knew that *in vino veritas*; and before them many primitive groups were familiar with the self-revelation which followed the ingestion of drugs like peyote, opium, cannabis, and henbane. The chief claim that medical psychology can make is that it has been attempting to use scientific methodology to observe and understand the behavior of individuals under the influence of drugs.

In developing his investigative and therapeutic skills, the medical psychologist has shifted his interest from the purely physiological aspects of human behavior to those psychological areas which can be investigated primarily by means of verbal communication with his patient. This trend is illustrated in his use of drugs. Formerly utilized as a form of biochemical therapy, they are presently employed to induce physiological alterations as a means for modifying behavior through verbal psychotherapeutic efforts. Such drugs as scopolamine and the barbiturates (sodium pentothol and sodium amytal) have been administered in an effort to alter the metabolism of the central nervous system and the psychological adjustment of the patient. Since barbiturates are relatively non-toxic and produce fewer unsatisfactory side effects than scopolamine, they have recently been used with greater frequency. They act as a central nervous system depressant, primarily on the cerebral cortex—the highest level of the nervous system—and on the diencephalon or “between-brain,” and their pathways. Referred to in the popular press as “truth-serum,” the drug used is not a serum and, as will appear, people do not always tell the “truth” under its influence. Nor does an understanding of the pharmacological action of the drug itself explain its mechanism of action in any given case. The particular type of behavior manifested under the influence of amytal is a complex resultant of the interaction of the personality of the subject, his specific physiological and bio-chemical reaction to it, and what is happening to him at the time.

Hypotheses concerning the mechanism of action of these drugs generally stress the diminution of fear and anxiety, the decreased “pressure upon the ego,” the opportunity for abreaction, the process of talking about and “reliving” the foci of emotional disturbance. Early studies disclosed that by using barbiturates verbal responses could be elicited from previously non-communicative catatonic patients.⁴ During World War II, medical officers effectively used barbiturates to speed psychotherapy in a large number of cases of combat neurosis.⁵ Similar reports emanate from Korea. And a recent study emphasizes the opportunity provided in a permissive milieu for relearning socially desirable habits while the fear mechanism is weakened by drugs.⁶ However, theories concerning the mechanism of action which are applicable to psychotherapy are not necessarily relevant to legal investigation, where the role and

4. Bleckwenn, *Narcosis as Therapy in Neuropsychiatric Conditions*, 15 A.M.A.J. 1168 (1930); Lindemann, *Psychopathological Effect of Sodium Amytal*, 23 PROC. SOC'Y EXPER. BIOL. & MED. 601 (1943).

5. GRINKER & SPIEGEL, *MEN UNDER STRESS* (1945).

6. DOLLARD & MILLER, *PERSONALITY AND PSYCHOTHERAPY* (1950).

goal of the interrogator may be quite different and the subject's psychological "set" (or attitude) and responses correspondingly affected.

The first reported attempt to use drugs in criminal interrogation stemmed from observations of a mild type of anesthesia known as "twilight sleep" used in obstetrical practice. In 1922, Dr. Robert House, a Texas physician who had used scopolamine as an anesthetic in obstetrical cases and had observed that women frequently made extremely candid and uninhibited statements, injected this drug into two convicted criminals in the Dallas County Jail and interviewed them. He established to his satisfaction that they were innocent.⁷

One of the medical authors has employed sodium amytal in investigating the personalities of men accused of various civilian and military anti-social acts. These subjects ranged, diagnostically, from character disorders and neuroses to psychoses. Their acts included mild delinquency as well as murder. Rarely could the information obtained under the influence of the drug be interpreted directly in the light of its manifest content. It was useful only when integrated into the fabric of the patient's conflictual tendencies and anxieties. The verbalized material was valued neither as representative of proven deeds nor as demonstrated facts, but simply as psychological data—meaningful and helpful only in the context of the clinician's knowledge of the patient.

One study,⁸ conducted by faculty members of the Yale Department of Psychiatry and Yale Law School, attempted to determine whether subjects could maintain artificial lies in a sodium amytal interview. Nine subjects were selected at random from a volunteer group of university students and professional persons. Before drugs were administered the subjects revealed shameful and guilt-producing incidents of their past and were then requested to invent false self-protective stories about these incidents. Thereafter they were given sodium amytal intravenously, and a second experimenter tried to prove the falsity of the "cover story" while the subject attempted to maintain his lies. The results, though not definitive, indicated that "normal" individuals (*i.e.*, persons who perform adequately in their various functions, have good defenses and no highly pathological characteristics) are less likely to confess. "Neurotics" are more likely to break down and, what is of equal importance, to substitute fantasy for truth. These fantasies were understandable only in the light of an intimate knowledge of the subject's un-

7. House, *The Use of Scopolamine in Criminology*, 18 TEX. STATE J. MED. 259 (1922), reprinted in 2 AM. J. POLICE SCI. 328 (1931).

Later developments are traced, with extensive citations to the medical literature, in Muehlberger, *Interrogation Under Drug Influence*, 42 J. CRIM. L. & CRIMINOLOGY 513 (1951); and Despres, *Legal Aspects of Drug Induced Statements*, 14 U. OF CHI. L. REV. 601 (1947).

8. Redlich, Ravitz, & Dession, *Narcoanalysis and Truth*, 107 AM. J. PSYCHIATRY 586 (1951).

conscious processes. Like dreams and day dreams, they tended to have a highly symbolic character. It was the neurotic individual, therefore, and especially the person with strong feelings of depression, guilt, and anxiety, who confessed under sodium amytal. These persons, with strong unconscious, self-punitive tendencies (moral masochists, potential and actual depressives) not only tended to confess more easily but even to confess to crimes never actually committed.

The obvious and subtle manifestations of the subject's pre-narcoanalysis relationship with the doctor remain operative after drugs are given. Besides reducing anxiety, the drugs facilitate temporary regression to less mature levels of personality integration and identification with the interrogator. This may be evidenced by increased suggestibility. However, when the subject is resistive the reduction of anxiety and facilitation of regression and identification may be less prominent, especially when the drug is administered by a person who might be considered an adversary.

The conclusions drawn from these two studies are supported by the results of other research projects. For example, careful investigation has shown that in therapy the psychological processes of repression, dissociation, and synthesis operate while the patient is under the influence of drugs.⁹ An analysis of confessions obtained during narcoanalysis found that fantasies and delusions which frequently could not be distinguished from reality significantly limited the credibility of the statements.¹⁰ A study of malingering soldiers found that they persisted in their negativistic attitudes and remained uncommunicative while under drugs.¹¹

In summary, experimental and clinical findings indicate that only individuals who have conscious and unconscious reasons for doing so are inclined to confess and yield to interrogation under drug influence. On the other hand, some are able to withhold information and some, especially character neurotics, are able to lie. Others are so suggestible they will describe, in response to suggestive questioning, behavior which never in fact occurred. Notwithstanding these limitations, a drug induced interview may be a valuable adjunct to an otherwise thorough psychiatric examination. In some instances it may enable a psychiatrist to ascertain more quickly the depth and type of mental illness. But drugs are not "truth sera." They lessen inhibitions to verbalization and stimulate unrepressed expression not only of fact but of fancy and suggestion as well. Thus the material produced is not "truth" in the sense that it conforms to empirical fact. Finally, it is most important to realize that the conduct of the interrogation and the analysis of its verbal

9. Kubie & Margolin, *The Therapeutic Value of Drugs in Process of Repression, Dissociation and Synthesis*, 7 *PSYCHOSOMATIC MED.* 147 (1945).

10. Gerson & Victoroff, *Experimental Investigation into the Validity of Confessions Obtained under Sodium Amytal Narcosis*, 9 *J. CLIN. PSYCHOPATHOLOGY* 359 (1949).

11. Ludwig, *Clinical Features and Diagnosis of Malingering in Military Personnel; Use of Barbiturates as an Aid in Detection*, 5 *WAR MED.* 379 (1944).

and behavioral content are exceedingly complex. The results can be evaluated properly only by trained and experienced experts who are aware of the manifold individual variations in response which occur.¹²

FORENSIC ASPECTS OF NARCOANALYSIS

The preceding section has considered the medical aspects of narcoanalysis and has attempted to evaluate the technique in terms of present scientific knowledge. The courts make ever-increasing use of the results of scientific research and experience. But it is well established that before a scientific discovery or technique is entitled to judicial recognition it must have passed from the experimental to the demonstrative stage by gaining "general acceptance in the particular field in which it belongs."¹³ And, assuming judicial recognition of reliability, questions may arise as to limitations upon its use. This is particularly true of narcoanalysis. Not only is it necessary to consider the reliability of the results but several of the exclusionary rules of evidence obtrude and demand attention. But beyond that, the technique sharply raises pungent questions of law, science, policy, and professional ethics which spring from the constitutional privilege against self-incrimination and the statutory physician-patient privilege. And as a "brooding omnipresence" is the gradually emerging and increasingly challenging problem of the extent to which privacy shall be invaded as truth-extracting procedures of high reliability are developed.

From the standpoint of the criminologist, narcoanalysis has the following present and potential uses, which are listed here without the expression of any value judgment:

1. As an adjunct useful to a qualified psychiatrist who makes a *full* examination of personality structure for any one of the following purposes:
 - (a) Determination of the capacity of an accused to stand trial (present sanity), or of the legal responsibility of an accused at the time of the alleged criminal act (sanity, irresistible impulse, partial responsibility);
 - (b) Determination as to whether a person should be committed to an institution for the custody and treatment of the insane or mentally ill;
 - (c) Determination as to whether a person should be indefinitely committed to either a hospital-type or correctional-type institution under a law permitting commitment of "psychopathic," "psychopathic sex," or "psychiatrically deviate" offenders;

12. For a discussion of somewhat similar limitations upon the effectiveness of the lie-detector, consult Floch, *Limitations of the Lie Detector*, 40 J. CRIM. L. & CRIMINOLOGY 651 (1950); see also INBAU, *LIE DETECTION AND CRIMINAL INTERROGATION* 29-53 (1948).

13. *Frye v. United States*, 293 Fed. 1013, 1014 (D.C. Cir. 1923).

- (d) Estimation of the potentialities of an inmate of a public hospital-type or correctional-type institution for the purpose of classification, prescribing treatment, or determining parole eligibility;
 - (e) Estimation of an individual's loyalty and general security fitness in connection with screening procedures for sensitive public positions;¹⁴
 - (f) Estimation of character whenever this is in issue, *i.e.*, good character of an accused in respect of a given relevant trait or good character of a witness for truth and veracity;
 - (g) Estimation of the potentialities of a convicted offender for the court's guidance in sentencing;
2. As a primary procedure, without an otherwise full examination of personality structure, when used by a qualified psychiatrist for any of the following purposes:
 - (a) To test the veracity of any given material witness by way of corroboration, impeachment, or disqualification;
 - (b) To extract confessions or admissions of suspected or unsuspected crimes, misdeeds, deviational allegiances, indiscretions, or intelligence information of any sort;
 - (c) To extract other evidence or clues usable against the subject or others;
 3. As a primary procedure used by any unqualified person for any of the purposes listed under "1" and "2," above;
 4. As a sole procedure, *e.g.*, when the transcript of statements made under narcoanalysis is offered in evidence as such for any of the foregoing purposes;
 5. As a coercive threat, *e.g.*, where a witness may be deterred from contesting a proceeding or testifying voluntarily because submission to narcoanalysis is attached as a condition to his testifying;
 6. As a prevalent and accepted practice, the existence of which may automatically tend to discredit the testimony of any accused who rejects a challenge to submit to narcoanalysis (much as the claim of innocence of an accused who fails to take the stand and testify fully tends to be discredited today).

14. During World War II the OSS Assessment School developed a system of procedures for revealing the personality structure of OSS recruits. It is not clear whether narcoanalysis was included. Donovan & Jones, *Program for a Democratic Counter Attack to Communist Penetration of Government Service*, 58 YALE L.J. 1211, 1233 (1949). These authors suggest that the President appoint a commission to review the loyalty program and examine into the feasibility of using similar techniques in screening Government employees.

It is apparent that this enumeration of present and possible uses of narcoanalysis presents problems of law and policy which overlap. Some of the problems are new and discrete. Others are facets of older and larger questions such as the conditions under which psychiatric evidence, with or without narcoanalysis, should be considered by a fact-finder. Although problems of the latter sort should be considered in a larger context than narcoanalysis alone, the development of this technique has made more acute and pressing the need for an appraisal and evaluation of evidential doctrines like the opinion rule. For these reasons, the present and potential uses of narcoanalysis will be discussed under the following broad headings: Voluntary narcoanalysis to show insanity; Voluntary narcoanalysis to establish innocence; Effect of stipulation upon admissibility; Involuntary narcoanalysis to show sanity; Narcoanalysis to establish guilt; and Material witnesses.

Voluntary Narcoanalysis to Show Insanity

When a psychiatrist testifies in court as an expert he is required to support his opinion by stating the facts upon which it is based. There is a conflict whether the data must be elicited from him before he expresses his opinion or whether it may be left to the cross-examiner.¹⁵ And if his opinion is based on a hypothetical question the premises must be derived from facts in evidence.¹⁶ Narcoanalysis, as has been shown, is frequently a useful diagnostic adjunct. Suppose that the defendant's psychiatrist has interviewed him while the defendant was under drugs and that the expert's opinion regarding mental illness is based in part upon the narcoanalysis. Should he be permitted to express his opinion? This problem was presented recently to the New York Court of Appeals in *People v. Ford*.¹⁷

The defendant had been convicted of first degree murder. Neither of the two defense psychiatrists believed the defendant legally insane but both thought, as did the psychiatrists called by the prosecution, that he was a "psychopathic personality." Thus the defense was "partial insanity," *i.e.*, incapacity to premeditate or deliberate. One of the defense psychiatrists had interviewed the defendant on three different occasions. He was permitted to testify concerning his observations at the first and third interview but not the second. At the first interview the defendant had told a rambling and incredible story. At the second interview the psychiatrist injected sodium amytal and conducted a two-hour examination. The third interview apparently covered the material gleaned from the second. The trial judge excluded testimony regarding the second interview on the ground of lack of precedent. On appeal the defendant's conviction was affirmed by a divided court. Since

15. See cases collected in 2 WIGMORE, EVIDENCE § 675 (3d ed. 1940); 7 *id.* § 1922. Also see Guttmacher & Weihofen, *The Psychiatrist on the Witness Stand*, 32 B.U.L. REV. 287, 293 (1952).

16. 2 WIGMORE, EVIDENCE § 682 (3d ed. 1940).

17. 304 N.Y. 679, 107 N.E.2d 595 (1952).

the majority entered only a per curiam opinion the basis for decision is not clear. But from the briefs and the dissent of Judge Desmond, it appears that the majority considered the results of drug-induced interviews as insufficiently reliable to be admissible in evidence. Judge Desmond attacked this assumption as follows:

"But whether the courts, or the cases, approve of sodium amytal testing was not the point at all. This psychiatrist, after showing his own qualifications and extensive experience, had described the test as a valid one in common use. Having thus established himself as one whose opinion was acceptable, he was entitled to give, and defendant was entitled to put before the jury, the facts on which that opinion was based."¹⁸

The position of this dissent is preferable. Although the material so obtained is, without competent interpretation, unreliable, and although even expert interpretation without an otherwise complete psychiatric examination (including a comprehensive case history) would be of doubtful value, a psychiatrist may be aided in his diagnosis of mental disorder by a drug-induced interview. For this reason a properly qualified psychiatrist who has made an otherwise full examination of the subject should be permitted to "interpret" and "take into account" the results of an interview under drugs in the process of evaluating a defendant's mental condition. Furthermore, when testifying as an expert he should be permitted to adduce this material as data upon which his opinion is based unless there are other evidential rules that exclude.

Some of the decisions have referred to drug-induced statements as "hearsay and self-serving."¹⁹ Inasmuch as this assertion is put forth as a conclusion without any analysis it is little more than a vituperative epithet concealing the more basic objection that the tests have not as yet attained the scientific recognition needed to justify the admission of expert testimony based on the results of the tests. But the basic objection should be made articulate and the hearsay excrescence removed. Not only does the hearsay rationale have an unjustifiably obstructive effect in situations such as the *Ford* case where the expert should be permitted to take the test results into account, but it may prevent future judicial recognition of new techniques of drug administration and examination or of the results of new drugs.

The "hearsay and self-serving" ritual should be discarded for a number of other reasons. First of all, there is no special principle of evidence excluding "self-serving" declarations. The only rationale needed or pertinent is the

18. *People v. Ford*, 304 N.Y. 679, 681, 107 N.E.2d 595, 596 (1952). Judge Desmond also pointed out that the court had recognized the use of sodium amytal in testing insanity in *People v. Esposito*, 287 N.Y. 389, 39 N.E.2d 925 (1942), discussed in text at note 44 *infra*.

19. *People v. Cullen*, 37 Cal.2d 614, 234 P.2d 1 (1951); *People v. McNichol*, 100 Cal. App.2d 554, 224 P.2d 21 (1950); *Orange v. Comm.*, 191 Va. 324, 61 S.E.2d 267 (1950).

hearsay rule and its recognized exceptions.²⁰ But the hearsay rule is not applicable in the context of the *Ford* case. The theory of this rule is that, when a statement is offered as evidence of the truth of the matters asserted in it, the credibility of the assertor becomes the basis of inference. Thus the assertion can be received only when made from the witness stand and subject to cross-examination. If, therefore, an extrajudicial statement is offered, not as an assertion to evidence the matter asserted, but without reference to the truth of what it contains, the hearsay rule is not applicable. When an expert testifies as to mental condition the statements made under drug influence are not offered assertively but as indicating circumstantially the operations of the subject's mind.²¹ The verbalized material is submitted simply as psychological data, data which from a scientific viewpoint are highly relevant and proper for the psychiatrist to take into account.²²

If an accused consults a psychiatrist with a view to having him testify as an expert regarding the accused's mental condition, the examination may include interrogation under drugs. After such an examination the psychiatrist may be unwilling to testify as favorably as the defendant desires, so he is not called as a witness by the defense. The prosecution then calls the psychiatrist as a witness. Aside from professional ethics, is there any reason why the expert should not be permitted to testify in behalf of the prosecution? Inasmuch as the examination was voluntary and since the hearsay rule is inapplicable, a defendant might invoke the physician-patient privilege.²³ But this

20. Hardman, *Hearsay: "Self-Serving" Declarations*, 52 W. VA. L. REV. 81 (1950).

21. See 6 WIGMORE, EVIDENCE § 1766 (3d ed. 1940); 2 *id.* § 228. District Judge Pollock in *United States v. Roberts*, 62 F.2d 594, 596 (10th Cir. 1932) elucidates the point as follows: "If a man comes into the office of a doctor or a lawyer, and makes utterly irrational statements, the fact that he makes the statements is some proof of a mental disease. Such statements are not admitted as proof of the facts stated; their evidentiary value lies in the fact that they were made. The question is not whether the statements are true, but whether they were made. They are not within the hearsay rule."

In addition to the reason that the lie-detector has not as yet attained scientific acceptance as a reliable and accurate means of ascertaining truth or deception, some courts point out that the admission of the results of lie-detector tests would interfere with the right of cross-examination. *State v. Lowry*, 163 Kan. 622, 185 P.2d 147 (1947); *Bocche v. State*, 151 Neb. 368, 37 N.W.2d 593 (1949); *State v. Bohner*, 210 Wis. 651, 246 N.W. 314 (1933). This rationale overlooks the fact that a lie-detector test merely records physiological reactions and that even the "yes" and "no" answers (which may be dispensed with without materially affecting the test results) are not used testimonially.

22. Even if the statements be considered assertive rather than circumstantial in character, they can be considered as falling within the hearsay exception for statements of a mental condition. 6 WIGMORE, EVIDENCE §§ 1715, 1720 (3d ed. 1940). Nor will the fact that they are made *post litem motam* to qualify a psychiatrist as a witness take them out of the exception since the *post litem motam* limitation is not applicable where mental condition is in question. *United States v. Roberts*, 62 F.2d 594 (10th Cir. 1932). And see Note, 130 A.L.R. 977 (1941).

23. Even in a state where there is no statutory privilege the courts may create one in favor of psychiatrists. A lower Illinois Court recently did just this. *Binder v. Ruvell*, Civil No. 52C2535, Cir. Ct. of Cook County, Ill., June 24, 1952, 47 N.U.L. REV. 384 (1952).

privilege should not apply. The privilege exists only where the physician has been consulted in his professional capacity with a view to curative treatment. Here he was not consulted for that purpose but to qualify him as a witness. Consequently, a number of courts have held that where the physician is consulted for purposes of examination and not for treatment, communications made to him or information acquired by him from the examination are not privileged.²⁴

Voluntary Narcoanalysis to Establish Innocence.

Suppose an accused who has voluntarily submitted to an examination under drugs desires to offer the results to establish that he is innocent, *i.e.*, that he did not commit the act, rather than to show lack of responsibility. Considering the present state of scientific knowledge, as developed in the medical section of this article, a transcript of the interview should definitely not be admissible in evidence. Only the most sanguine of the clinical investigators, unaware of the psychological complexities of material produced under the influence of drugs, have automatically accepted this material as "truth." Furthermore, utterances made while under drugs are frequently thick, mumbling, and disconnected. Both judge and jury would be at a loss to evaluate the material. Here again, the courts invoke the hearsay rule and exclude.²⁵ This is not only unnecessary but delusive. The unreliability of the results and the lack of expert interpretation are sufficient reasons for exclusion. And even should drugs or experimental techniques be developed which assure the trustworthiness of drug-induced statements *offered as truth*, the hearsay rule would not inexorably exclude. Indeed, the reason for the rule would no longer exist. Although each of the numerous exceptions to the hearsay rule rests on some special ground, certain general notions underlie them all. One is that some special situation exists which diminishes the risk of untrustworthiness to such an extent that cross-examination can safely be relinquished.²⁶ In other words, the reliability of the test results becomes, by hypothesis, a substitute for the lack of cross-examination.

Even though the statements made under drugs should not, standing alone, be admissible evidence of innocence, should an expert who has made an otherwise full examination be permitted to consider the statements and testify

24. *Arnold v. Maryville*, 110 Mo. App. 254, 85 S.W. 107 (1905); Note, 52 Col. L. Rev. 383, 393 (1952); Note, 107 A.L.R. 1495 (1937).

25. *Orange v. Commonwealth*, 191 Va. 423, 439, 61 S.E.2d 267, 274 (1950) ("The answers given by the defendant are at times maudlin and at times obviously self-serving and indicative of a conscious purpose to avoid self-incrimination."); *People v. McNichol*, 100 Cal. App. 2d 554, 558, 224 P.2d 21, 24 (1950) ("And as for the argument that the statements made by defendant while in a hypnotic state should in any event be allowed as matter of defense though otherwise inadmissible, even assuming that they would have shown a denial of the making and passing of checks, they would have constituted but hearsay and self-serving declarations, and would not have constituted evidence.").

26. 5 WIGMORE, EVIDENCE § 1420 (3d ed. 1940).

that it is improbable that the defendant committed the act charged? A defendant is always entitled to call character witnesses—one traditionally accepted method of adducing support for the proposition that he does not have a personality structure consistent with the commission of the offense alleged.²⁷ Psychiatric examination (whether drugs are used or not) is simply another—and presumably much more reliable—way of inquiring into personality structure for the same purpose. But the few appellate decisions on the point have excluded, either on the ground of unreliability or on the ground of hearsay.²⁸ On the other hand, a few trial courts have allowed accounts of drug-induced examinations to be presented by a defendant's medical witnesses.²⁹

The same reasons which render the grounds of unreliability and hearsay untenable when the expert testifies as to sanity should likewise eliminate them as objections when the expert offers to testify as to the personality structure of an accused. But, is the opinion rule a bar to admissibility? Two aspects of this rule might be raised in objection. A substantial number of courts have held that a witness is not permitted to give his opinion upon an "ultimate fact in issue." It is said that such testimony "usurps the functions" or "invades the province" of the jury. Following this view, it could be argued that the testimony of an expert regarding the personality structure of the defendant would be an expression of opinion upon the crux of the whole case, namely, that the defendant is innocent. But this argument proves too much. First of all, the expert is doing no more than any other character witness does in a more indirect way. An ordinary character witness may testify to the defendant's reputation in connection with the specific trait relating to the act charged. From his testimony the jury is expected to infer the defendant's disposition for the particular trait. This inference then affords the immediate basis of a second inference as to conduct, *i.e.*, the probability or improbability that defendant did the act charged. On the other hand, when the expert testifies to the defendant's personality structure there is only one inference to be drawn, the first being eliminated.³⁰ Nor is the expert attempting to "usurp" the jury's function. In fact, he could not do so if he desired. The jury may

27. 1 WIGMORE, EVIDENCE §§ 55, 56 (3d ed. 1940). It should be noted that the familiar rules concerning the corroboration or rehabilitation of an impeached witness are not being invoked here. Once a defendant as witness may be considered "impeached" as to character in the course of trial, that will of course afford an additional ground for the admissibility of this type of character evidence. For further elaboration, see section in text marked "Material Witnesses," pages 338-41 *infra*.

28. *People v. Cullen*, 37 Cal.2d 614, 234 P.2d 1 (1951) (hearsay); *State v. Hudson*, 314 Mo. 599, 289 S.W. 920 (1926) (unreliability); *Henderson v. State*, 230 P.2d 495 (Okla. Crim. App. 1951) (unreliability); *cf. State v. Pusch*, 46 N.W.2d 508 (N. D. 1951) (results of hypnosis offered by defendant through expert to establish innocence excluded).

29. Muehlberger, *Interrogation Under Drug Influence*, 42 J. CRIM. L. & CRIMINOLOGY 513, 524 (1951).

30. 3 WIGMORE, EVIDENCE §§ 920, 997 (3d ed. 1940).

still reject his opinion.³¹ Furthermore, courts fail to apply the "ultimate issue" doctrine with consistency. They disregard it without explanation when value, sanity, handwriting, intoxication, and paternity are in issue.³² The criterion governing the propriety of expert testimony or of experiments bearing on a question in issue should be whether or not they might help the jury to ascertain the truth, whether the controverted matter be the ultimate fact or some minor evidential fact.³³

Another feature of the opinion rule that might be urged against the admissibility of expert opinion regarding the character of a defendant is the doctrine that personal knowledge and belief of a witness to character is inadmissible, that community-reputation is all that will be received. This limitation upon the use of character evidence should be abandoned for a number of reasons. It is contrary to the orthodox practice of the common law and has been vigorously condemned by most commentators.³⁴ And some courts have departed from it, as will be shown, in the analogous situation where an attempt is made to impeach the character of a witness by admitting expert evaluation of a witness' character for veracity. There is no reason why a corresponding relaxation should not be recognized when, through experts, an accused invokes his own good character to evidence the improbability that he committed the act charged.

Effect of Stipulation Upon Admissibility

Suppose that the defense and prosecution enter into a stipulation that the defendant shall undergo examination, including narcoanalysis, by a designated psychiatrist, and that the results shall be admitted in evidence without objection on the part of the party adversely affected. The question of admissibility presented is similar to that which has arisen with respect to lie-detectors. The results of lie-detector tests have usually been admitted in civil cases by stipula-

31. The "ultimate issue" doctrine has been exploded by Wigmore, 7 EVIDENCE §§ 1920, 1921 (3d ed. 1940) and abandoned by the MODEL CODE OF EVIDENCE, Rule 401 (1942).

The "ultimate issue" doctrine is occasionally mentioned in the lie-detector cases. *E.g.*, State v. Lowry, 163 Kan. 622, 185 P.2d 147 (1947), where the court, after setting out the testimony of the operator which was admitted by the trial court, stated that he was permitted to testify "not merely as to whether, in his opinion, the tests indicated, generally, truthfulness or falsification . . . but was permitted to give his interpretation of their answers on the essential issue of the case—his answers bearing directly upon the guilt or innocence of the defendant." See also INBAU, LIE DETECTION AND CRIMINAL INTERROGATION 86-90 (2d ed. 1948).

32. McCormick, *Some Observations upon the Opinion Rule and Expert Testimony*, 23 TEXAS L. REV. 109 (1945).

33. Grismore v. Consolidated Products Co., 232 Iowa 323, 5 N.W.2d 646 (1942) (an enlightened opinion adopting this test). And see Notes, 28 IOWA L. REV. 549 (1942), 26 IOWA L. REV. 819 (1941).

34. 7 WIGMORE, EVIDENCE § 1986 (3d ed. 1940): "So far as practical policy and utility is concerned, there ought to be no hesitation between reputation and personal knowledge and belief." See also MODEL CODE OF EVIDENCE, Rule 306 (1942).

tion,³⁵ and by the trial courts in a few criminal cases.³⁶ Very few cases have reached the appellate courts, and the results are inconclusive, although favoring admissibility.³⁷ The only case involving narcoanalysis is *Orange v. Commonwealth*,³⁸ a murder prosecution, in which the defendant sought to introduce the results of a test made pursuant to an agreement with the prosecuting attorney. The court held that the results were properly excluded since the agreement did not provide that the results of the test would be admissible in evidence. If the stipulation or agreement had so provided, the implication is that the court would have held them admissible.³⁹ In general, contracts to alter or waive established rules of evidence are valid and enforceable in the absence of fraud or coercion.⁴⁰ There seems to be no substantial reason why a stipulation for the admissibility of the results of narcoanalysis should not be upheld, providing that the accused had the advice of counsel at the time of stipulation and that the psychiatric examination was otherwise complete and the psychiatrist qualified.

Involuntary Narcoanalysis to Show Sanity

Several techniques have been devised for avoiding the "battle of experts" in criminal insanity cases. Among them are: (1) appointment of impartial experts by the court; (2) commitment of defendants pleading insanity to a mental hospital for observation and study by the hospital staff; and (3) routine psychiatric examination of all persons charged with certain major offenses as provided by the Massachusetts Briggs Law.⁴¹ Suppose a defendant is subjected to one of these procedures; may he lawfully be required to submit to narcoanalysis as part of the general psychiatric examination?

The decisions involving insanity pleas have quite uniformly admitted in evidence the results of psychiatric examinations over the claim of a violation

35. See Note, 30 MICH. B.J. 6 (Feb. 1951).

36. Inbau, *Detection of Deception Technique Admitted as Evidence*, 26 J. CRIM. L. & CRIMINOLOGY 262 (1935); Note, 26 J. CRIM. L. & CRIMINOLOGY 758 (1935).

37. *People v. Houser*, 85 Cal. App.2d 686, 193 P.2d 937 (1948) (properly admitted over defendant's objection); *State v. Lowry*, 163 Kan. 622, 185 P.2d 147 (1947) (court implied that if there had been a stipulation the results would have been admissible); *Le Fevre v. State*, 242 Wis. 416, 8 N.W.2d 288 (1943) (excluded, but court failed to discuss the effect of the stipulation). The latter case is discussed in Note, [1943] WIS. L. REV. 430, 438, and in INBAU, *LIE DETECTION AND CRIMINAL INTERROGATION* 92 n.14 (1948), both authors suggesting that the case is not controlling upon the stipulation question.

38. 191 Va. 423, 61 S.E.2d 267 (1950).

39. *Id.* at 439, 61 S.E.2d at 274: "This test was made apparently on the motion of the defendant and her co-defendants, and agreed to by the Commonwealth's attorney, but with no agreement that the results should be given in evidence."

40. TRACY, *HANDBOOK OF THE LAW OF EVIDENCE* 367 (1952); Note, *Contracts to Alter the Rules of Evidence*, 46 HARV. L. REV. 138 (1932).

41. Weihofen, *Eliminating the Battle of Experts in Criminal Insanity Cases*, 48 MICH. L. REV. 961 (1950). See also Guttmacher & Weihofen, *The Psychiatrist on the Witness Stand*, 32 B.U.L. REV. 287, 306 (1952).

of the privilege against self-incrimination. Careful analysis is infrequent, the courts being more often influenced by considerations of expediency.⁴² However, either one of two theories would support the results reached. First, the privilege protects an accused from supplying any testimonial link in the chain of evidence necessary to show that he committed the crime in question. But it has no application to an investigation of his mental responsibility at the time the act was committed. This question does not necessitate an inquiry as to guilt or innocence. A psychiatrist may on occasion be able to make a satisfactory examination on the issue of mental disease without mentioning the crime in question. Of course, if an accused were required to discuss the crime itself, then the privilege would probably be applicable since the statements made by him would be equivalent to those made under testimonial compulsion.⁴³

Another theory supporting the admissibility of these psychiatric examinations is that the accused by interposing the defense of insanity thereby waives any immunity he otherwise may have had. This, of course, is broader than the first theory. In *People v. Esposito*,⁴⁴ the defendants had pleaded insanity and the trial judge had committed them to a mental institution for examination. As part of their psychiatric examination the defendants were injected with metrazol and sodium amytal. The report of the examination disclosed that the defendants were sane and that they were malingering. At their trial, defendants objected to the testimony of the psychiatrist in so far as it was based on the reactions of the defendants while subject to the drugs and on information obtained from them while under drug influence; one of the defendants' grounds was that their privilege against self-incrimination was violated. In approving the admissibility of the testimony of the psychiatrist, the New York Court of Appeals discussed the problem as follows:

"The drugs used were metrazol and sodium amytal. There was evidence that those drugs are frequently used in psychiatric examinations. We have reached the conclusion after due consideration that the injection of those drugs and the receipt of the testimony violated no rights of the defendants under the circumstances presented by this record. The drugs were administered for the purpose of removing defendants' inhibitions because the doctors suspected that they were shamming and malingering. One doctor testified that the symptoms exhibited by the defendants did not fit into 'any pattern that you know of, any form of psychosis' and that 'they [the defendants] are not showing any symptoms of any known psychosis.' It must be remembered that the orders for the examina-

42. INBAU, SELF-INCRIMINATION 52-61 (1950).

43. It has never been held that the right of a physician or psychiatrist to interview a subject under these conditions carries with it any loss of the subject's privilege to refuse to answer questions where the answers might tend to incriminate him. Cf. *People v. Esposito* 287 N.Y. 389, 39 N.E.2d 925 (1942), discussed in the next paragraph of the text. And see decisions collected in Despres, *Legal Aspects of Drug-Induced Statements*, 14 U. OF CHI. L. REV. 601 (1947).

44. 287 N.Y. 389, 39 N.E.2d 925 (1942).

tion and observation were based upon the defendants' claim that they should escape punishment by reason of their mental condition at the time of the commission of the acts charged or by reason of their condition at the time of arraignment and trial. Under those circumstances defendants may not both advance their claims and then seek to make the rules for the determination of those claims. Since they desired to present their claims that they were not legally responsible for their acts because of mental defect they were subject to the use of methods set up objectively by the medical profession for the proper determination of such claims. Courts, under the circumstances presented here, may not control the methods which have been determined by the medical profession to be proper means for discovering or treating mental diseases.

"As to the claimed violation of constitutional immunity from self-crimination, we do not pass upon the question whether testimony of the examining and observing psychiatrists was admissible to establish a confession of guilt or admissions evidencing guilt while the defendants were subject to the influence of the drugs which had been administered to them. We are not now prepared in view of the record presented here and of present medical knowledge and experimentation disclosed therein, to hold that such testimony is competent. The questions asked in this instance were quite evidently for the purpose, among others, of determining whether the defendants were capable of understanding the proceedings and of making their defense. Neither confessions of guilt nor admissions evidencing guilt were elicited. There was, therefore, no error committed."⁴⁵

Nor is the physician-patient privilege applicable. As pointed out before, it applies only when the physician has been consulted in his professional capacity with a view to curative treatment. For this reason, it is usually held that the privilege does not protect statements made to a physician appointed by the court⁴⁶ or designated by the prosecutor⁴⁷ or even to communications made to a physician who examined the patient at the request of the patient's attorney solely for the purpose of trial.⁴⁸

Use of Narcoanalysis to Establish Guilt

Although courts have not generally admitted lie-detector results in evidence, the value of the lie-detector in criminal investigation has been recognized.⁴⁹

45. *Id.* at 397-8, 39 N.E.2d at 928. Cf. *People v. Ford*, 304 N.Y. 679; 107 N.E.2d 595 (1952), discussed at pages 322-3 *supra*.

46. *Simecek v. State*, 243 Wis. 439, 10 N.W.2d 161 (1943); Note, 130 A.L.R. 977, 988 (1941).

47. *State v. Fouquette*, 67 Nev. —, 221 P.2d 404 (1950), *cert. denied*, 341 U.S. 932 (1951).

48. *City & County of San Francisco v. Superior Court*, 37 Cal.2d 227, 231 P.2d 26 (1951) (although not within physician-patient privilege they were within the attorney-client privilege). Also consult Note, 52 Col. L. Rev. 383 (1952).

49. *State v. Lowry*, 163 Kan. 622, 628, 185 P.2d 147, 151 (1947) ("All this is not to discredit the lie-detector as an instrument of utility and value. Its usefulness has

Some business concerns, such as department stores and banks, use lie-detection equipment in examining their employees.⁵⁰ And certain federal agencies have employed the lie-detector to supplement the exacting loyalty investigation for men and women involved in "sensitive" jobs related to national security.⁵¹ Furthermore, some attorneys, before proceeding to build a case, now send their clients to private lie-detector operators to check their stories.⁵²

Similar uses of narcoanalysis are to be expected. The Kansas City Police Department, for example, has repeatedly employed narcoanalysis in criminal interrogation.⁵³ And one of the most dramatic uses of the technique involved William Heirens. At the time of his arrest for an attempted burglary he received a blow on the head. It was contended that this injury resulted in an amnesia and possibly mental derangement. A board of experts was appointed by a court to examine Heirens. Sodium pentothal was administered and while under the drug's influence, Heirens not only displayed a clear memory but also admitted the commission of three murders and over five hundred burglaries. After his recovery the admissions were called to his attention, whereupon he made a written confession, pleaded guilty, and was given three consecutive life sentences.⁵⁴

The most recent report of the successful use of narcoanalysis in criminal interrogation is that of Dr. James H. Matthews of the Department of Anesthesiology of the University of Minnesota's Medical School. Collaborating with the State Department of Protection and Investigation he used a combination of pentothal, scopolamine, and morphine on ten subjects. Eight

been amply demonstrated by detective agencies, police departments and other law-enforcement agencies conducting criminal investigations. It is also being frequently employed in matters, other than investigation of crimes. By its use admissions and confessions are frequently secured, and facts developed which assist in further discoveries.")

50. Note, 39 CALIF. L. REV. 439, 443 (1951).

51. N.Y. Times, Dec. 20, 1951, p. 1, col. 2.

52. Note, 39 CALIF. L. REV. 439, 443 (1951).

53. Barkham, *Truth Drugs: The New Crime Solver*, Coronet, Jan. 1951, p. 29.

In the non-forensic field narcoanalysis has been widely used in the treatment of war neuroses. Muehlberger, *Interrogation under Drug Influence*, 42 J. CRIM. L. & CRIMINOLOGY 513, 522 (1941). It has also been effective in identifying victims of an amnesia. Mosier & Hames, *The Identification of an Amnesia Victim by the Use of Scopolamine—An Experiment*, 26 J. CRIM. L. & CRIMINOLOGY 431 (1935).

54. The case is discussed in Despres, *Legal Aspects of Drug-Induced Statements*, 14 U. OF CHI. L. REV. 601 (1947); and Muehlberger, *Interrogation under Drug Influence*, 42 J. CRIM. L. & CRIMINOLOGY 513, 526 (1951). The psychiatric report is reproduced in 38 J. CRIM. L. & CRIMINOLOGY 311 (1947).

Heirens has recently filed a petition under Illinois' new Post-Conviction Law alleging violation of constitution rights. In addition to charging police brutality, he asserts that he was given a "truth serum" against his will. Newsweek, Dec. 8, 1952, p. 29, col. 1. A trial court in Iowa recently authorized an examination under drugs to determine which of two men was driving a truck that ran over and killed a two-year-old boy. Both men agreed to the test. Apparently the results are to be reported to the grand jury. N.Y. Times, Dec. 19, 1952, p. 49, col. 7.

were under arrest on suspicion of murder, of which three were also suspected of, or charged with, sex offenses; the two other subjects were charged with armed robbery. The crimes had been committed from 4 days to 28 years prior to study. All suspects steadfastly asserted innocence. They had been subjected to lie-detector interrogation and, where circumstances permitted, had been given psychological evaluation tests. It is interesting to note that in every case the conclusions drawn from the lie-detector examinations substantiated those later obtained from narcoanalysis. These results were as follows:

"In our series of ten cases confessions of guilt were obtained from three. These were fully acknowledged and elaborated upon by the subjects the following day. The other seven subjects divulged a sufficient amount of new material withheld from previous investigators, and conducted themselves in a manner to convince the authorities of their innocence. In most of these cases subsequent police investigation has now substantiated their claim."⁵⁵

In view of the inadmissibility of the results of narcoanalysis generally, what is the legal status of confessions, admissions, and other evidence obtained in consequence of its use? This question is highly pertinent, for the authorities undoubtedly will continue to experiment with drugs and to use them to induce statements with two purposes in mind. First, to uncover important clues that will lead to admissible evidence or will convince investigators of the guilt or innocence of the suspect and thus narrow the investigation.⁵⁶ Second, to bring about an admission of guilt with which the suspect can be confronted and a confession obtained.

55. Matthews, *Narco-Analysis for Criminal Interrogation*, 70 THE JOURNAL-LANCET (NEW SERIES) 283, 287-8 (1950). The technique of administration and interview is described as follows:

"The technique of questioning varied in each case according to what was known about the patient's personality through history and interview, the seriousness of the legal charges, the patient's attitude under narco-analysis and his rapport with the investigators. In the beginning the questions were directed at establishing the identity of the patient and associating him with the scene of the crime and the space of time involved. As the desired plane of anesthesia was approached, the questions were more skillfully worded and pointed. Key questions were reworded when it was obvious that the patient was withholding the truth, and the fact of a given denial was quickly passed over and ignored. At times it was necessary to check the facts obtained by reference to the police authorities who accompanied the patient, because there was no other way for the examiner to distinguish truth from fantasy. Persistent careful questioning reduced the ambiguities, but did not eliminate them entirely . . . our patients could sometimes lie and their reasoning powers were sometimes present though much distorted. When the examination followed many weeks, sometimes years, of intensive questioning and investigation, it was much more difficult to evade the defenses. The best results were obtained when the narco-analysis occurred early in the investigation, prior to repeated and severe questioning." *Id.* at 288. See also Lorenz, *Criminal Confessions under Narcosis*, 31 WIS. MEM. J. 245 (1932).

56. Muelhberger gives as an example a suspect in a shooting case who may be questioned (under drug influence) as follows:

If a suspect voluntarily submits to narcoanalysis with full knowledge of his rights and, when confronted with the results, confesses to a crime, there is no legal objection to the use of the confession so obtained if it meets the usual requirements.⁵⁷ *A fortiori*, evidence resulting from leads obtained under voluntary narcoanalysis would be admissible.

Suppose that a suspect is threatened with narcoanalysis and then makes a full confession, perhaps in fear that if he submits additional crimes might be disclosed. Or suppose that he is forced to undergo narcoanalysis and confesses when confronted with the results (either accurately stated or misrepresented). In either case, is the confession admissible in evidence at his trial? The lie-detector cases are helpful analogies, but the results there have depended upon which one of two competing doctrinal propositions has been applied. On the one hand is the rule that a confession obtained by abuse, threats, or objectionable promises is inadmissible. On the other hand, the courts have uniformly held that a confession obtained by the use of trickery or deception is admissible providing the trick or deception was not of such a nature as likely to produce an untrue confession.⁵⁸

"Q. After the shooting, what did you do with the gun?

"A. I threw it in the river.

"Q. What river did you throw the gun into?

"A. The Chicago River.

"Q. Where did you throw the gun into the Chicago River?

"A. Off the Halsted Street bridge.

"Q. Off which side of the Halsted Street bridge did you throw the gun?

"A. Off the East side."

He also suggests another advantage of drug induced interviews: "After the proper stage of disorientation has been reached, one can bring in a whole group of investigators and even informers ('stool pigeons') who are personally known by the subject, and they can participate in the interrogation. The subject will recognize them at the time and will talk with them. If they are removed before the subject is too far out of the scopolamine influence, he will not know that they have been around. This is particularly helpful in preserving the usefulness (and health) of informers." Muchlberger, *Interrogation Under Drug Influence*, 42 J. CRIM. L. & CRIMINOLOGY 513, 519-20 (1951).

57. The lie-detector cases hold that where it appears that the defendant agreed to the test, or did not oppose it, and there are no threats or improper inducements, a subsequent confession will be admitted. *State v. Collett*, 144 Ohio 639, 58 N.E.2d 417 (1944); *State v. Dehart*, 242 Wis. 562, 8 N.W.2d 360 (1943).

In *People v. Wochnick*, 98 Cal. App.2d 124, 219 P.2d 70 (1950), *cert. denied*, 342 U.S. 388 (1951), 41 J. CRIM. L. & CRIMINOLOGY 387 (1950), a police officer who had examined the defendant on a lie-detector was called as a prosecution witness. He was permitted, over defendant's objection, to testify that on informing the defendant that the results were adverse to him the defendant answered, "I cannot explain that." On appeal defendant's counsel successfully contended that the results were inadmissible and therefore could not be introduced in the guise of an accusatory statement.

58. 3 WIGMORE, EVIDENCE § 841 (3d ed. 1940); INBAU, LIE DETECTION AND CRIMINAL INTERROGATION 175 (2d ed. 1948). However, this well-established rule is rendered uncertain in view of the Supreme Court's requirement that "certain decencies of civilized conduct" be observed. *E.g.*, *Rochin v. California*, 342 U.S. 165 (1952). *Cf. Lisenba v.*

In *Pinter v. State*,⁵⁹ the officers taking the defendant to jail discussed the lie-detector and referred to it as "a machine that would read your mind." At his trial, the defendant claimed that this conversation "scared" him into a confession, thus rendering it incompetent because unduly influenced. Although there had not been a direct threat of a lie-detector test, the language of the Mississippi Supreme Court is broad enough to admit a confession induced by such a threat:

"It would seem that his fear was not of the machine but of its capacity to elicit truth. It was therefore a fear of the truth and its consequences. A desire to anticipate, by voluntary disclosure, the supposed revelations of a 'lie detector' has its origin in the mind and conscience of the defendant, and is not an 'undue influence.'"⁶⁰

In *Commonwealth v. Hipple*,⁶¹ the defendant had been told when a lie-detector was placed upon his arm that "you can lie to us but you cannot lie to this machine." Believing that he had betrayed himself, he thereafter confessed to a murder. The admissibility of the confession was upheld by the Pennsylvania Supreme Court. Since no promises, force, or threats had been employed, the mere use of the instrument did not render the confession inadmissible. Furthermore, a "confession procured by a trick or artifice, not calculated to produce an untruth, is never vitiated thereby."⁶² However, when a suspect is forcibly subjected to a lie-detector and, while still under duress, confesses, the confession will be excluded.⁶³

Similar results may very well occur when drugs instead of the lie-detector are involved.

If a suspect is subjected to involuntary narcoanalysis, is evidence obtained as a result of clues revealed by him admissible evidence or

California, 314 U.S. 219, 237 (1941) ("If, by fraud, collusion, trickery, and subornation of perjury, on the part of those representing the State, the trial of an accused person results in his conviction, he has been denied due process of law. The case can stand no better if, by the same devices, a confession is procured, and used in the trial.")

59. 203 Miss. 344, 34 So.2d 723 (1948).

60. *Id.* at 347, 34 So.2d at 724. See also Note, 39 J. CRIM. L. & CRIMINOLOGY 271 (1948).

61. 333 Pa. 33, 3 A.2d 353 (1939).

62. *Id.* at 39, 3 A.2d at 356; *accord*, *Commonwealth v. Jones*, 341 Pa. 541, 19 A.2d 389 (1941).

63. In *People v. Sims*, 395 Ill. 69, 69 N.E.2d 336 (1946), the defendant had refused to take a lie-detector test but had been ordered to submit by the prosecuting attorney and police investigators. A confession was obtained from her while the lie-detector was attached to her body although not in operation. The Illinois Supreme Court held it inadmissible. See also *People v. Lettrich*, 108 N.E.2d 488 (Ill. 1952).

In *Bruner v. People*, 113 Colo. 194, 156 P.2d 111 (1945), a test was given a suspect who had previously been interrogated extensively for many days. The lie-detector test and the subsequent questioning by the examiner were alleged to have lasted from noon until three-thirty the next morning, at which time he confessed. It also appeared that he was abused and mistreated by the operator and the police. The confession was held to be involuntary and inadmissible.

is it barred as "fruit of the poisonous tree"? This latter doctrine, which renders inadmissible not only evidence illegally obtained but also any other evidence resulting from it, was first applied to evidence obtained by a search and seizure illegal under the Fourth Amendment.⁶⁴ It was later applied to evidence obtained by wiretapping.⁶⁵ But the Supreme Court has refused to extend it to confession cases,⁶⁶ and most state courts permit the prosecution to use evidence discovered through the involuntary confession of an accused even though the confession itself is inadmissible.⁶⁷

Eventually the techniques of narcoanalysis may be so improved or other drugs developed so that sufficient reliability will be attained to justify consideration of the results as evidence of guilt in criminal cases. If and when this occurs, what should be the status of confessions or admissions made under drug influence to which a suspect has submitted without objection? There seems to be no legal reason why they should not be admitted providing two cautions are observed. There will be cases, such as those of exceptionally ignorant or overly suggestible persons, where submission without the advice of competent counsel at the time may be adjudged involuntary notwithstanding ostensible consent. And there will be federal cases where, by reason of unlawful detention without arraignment at the time of narcoanalysis, a confession although otherwise "voluntary" may be adjudged inadmissible under the *McNabb* rule.⁶⁸ On the other hand, if the suspect is subjected to involuntary narcoanalysis over his objection, a resulting confession would unquestionably be inadmissible in a federal court because of the rule against involuntary confessions. And if a state court admitted such a confession, the Supreme Court would surely reverse a conviction as violative of due process.⁶⁹ It is true that the traditional reason for excluding an involuntary confession is that it is likely to be untrustworthy but recent decisions indicate that exclusion is motivated in substantial part by other considerations, particularly

64. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

65. *Nardone v. United States*, 308 U.S. 338 (1939).

66. *United States v. Bayer*, 331 U.S. 532 (1947), 33 IOWA L. REV. 136, 26 TEXAS L. REV. 536 (first confession, which was not offered, would have been inadmissible because obtained during a period of unlawful detention; second confession made after proper arraignment held admissible even though psychologically the fruit of the first); *Lyons v. Oklahoma*, 322 U.S. 1208 (1944) (a second confession made only twelve hours after the first was extorted by threats and some violence held admissible). And *cf. Malinski v. New York*, 324 U.S. 401 (1944) where Supreme Court reversed a state court conviction because a coerced confession was erroneously admitted in evidence, but refused to rule on later confessions.

67. 3 WIGMORE, EVIDENCE § 859 (3d ed. 1940); *State v. Cocklin*, 109 Vt. 207, 194 Atl. 378 (1937).

68. *McNabb v. United States*, 318 U.S. 322 (1943), as interpreted by *Upshaw v. United States*, 335 U.S. 410 (1948).

69. *Despres, Legal Aspects of Drug-Induced Statements*, 14 U. OF CHI. L. REV. 601, 605-9 (1946).

a desire to discourage the subjection of suspects to police procedures deemed inimical to individual privacy.⁷⁰

American courts draw a fine distinction between a confession and an admission, the former being an express acknowledgment "of the truth of the guilty fact charged or of some essential part of it"; the latter being an "acknowledgment of a subordinate fact, not directly involving guilt."⁷¹ Many courts do not require that an admission be shown to have been made voluntarily.⁷² In these jurisdictions an admission made under involuntary drug influence might be received. The potential use of drugs is a compelling reason for reexamining the validity of this distinction. If one of the chief purposes of the exclusionary rule of coerced confessions is the vindication of individual privacy, the restraint of officials disposed to invade privacy, and the protection of the judicial power from being employed as an instrument for lawless enforcement of the criminal law, a distinction between admissions and confessions is artificial and unrealistic. Thus there is reason for profound satisfaction with indications that due process covers both and will exclude coerced admissions as well as confessions.⁷³

Another plausible limitation upon the use of coerced admissions is the privilege against self-incrimination. Wigmore has insisted that the privilege has no application to investigations by the police.⁷⁴ Although the rule excluding involuntary confessions, as he points out, developed quite independently of the privilege against self-incrimination,⁷⁵ in federal trials the latter is sometimes adduced as an alternative ground for exclusion.⁷⁶ Inasmuch as

70. *E.g.*, *Rochin v. California*, 342 U.S. 165 (1952) (use of stomach pump violates due process); *People v. Leyra*, 302 N.Y. 353, 98 N.E.2d 553 (1951) (confession under hypnosis inadmissible).

Also consult, Inbau, *The Perversion of Science in Criminal and Personnel Investigations*, 43 J. CRIM. L. & CRIMINOLOGY 128 (1952); McCormick, *Some Problems & Developments in the Admissibility of Confessions*, 24 TEXAS L. REV. 239, 240-5 (1946). See also Allen, *The Wolf Case: Search & Seizure, Federalism & the Civil Liberties*, 45 ILL. L. REV. 1 (1950).

71. 3 WIGMORE, EVIDENCE § 821 (3d ed. 1940).

72. *Commonwealth v. Haywood*, 247 Mass. 161, 141 N.E. 571 (1923), 33 YALE L.J. 783 (1924); *Gorham, Involuntary Admissions Should Not be Competent Evidence*, 19 TEMP. L.Q. 485 (1926). *Contra*: *Gulotta v. United States*, 113 F.2d 683, 686 (8th Cir. 1940) ("If a false confession of guilt may be obtained from an innocent person by the use of coercion or flattery it is equally true that an admission of any element of the crime may also be obtained by the same means."). *Cf.* *Perovich v. United States*, 205 U.S. 86, 91 (1907) ("[A]s these conversations were not induced by duress, intimidation or other improper influences, but were perfectly voluntary, there is no reason why they should not have been received.").

73. *Watts v. Indiana*, 338 U.S. 49 (1949); *Ashcraft v. Tennessee*, 327 U.S. 274 (1946).

74. 8 WIGMORE, EVIDENCE § 2266 (3d ed. 1940).

75. *Brown v. Mississippi* 297 U.S. 278 (1936); Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 27-30 (1949).

76. See *Bram v. United States*, 168 U.S. 532, 542 (1897) ("In criminal trials in the courts of the United States wherever a question arises whether a confession is incompe-

evidence obtained from a person under the influence of drugs, if offered as an admission, is of a testimonial character the privilege—if used to bar confessions—should apply here as well.⁷⁷

If a defendant proposes to testify on his own behalf at trial, should submission to a narcoanalysis experiment ever be required as a condition, with an understanding that the results may be used for or against him depending on the outcome? At common law a defendant in a criminal prosecution was not a competent witness in his own behalf. Only within the past one hundred years has the disability been removed. Now, while a defendant cannot be compelled to be a witness, he is, if he so desires, entitled to be sworn as a witness and to testify in his own behalf.⁷⁸ It is arguable that if competency to testify is a creature of statutes, conditions can be attached to the privilege of testifying. To make narcoanalysis a prerequisite, however, would be indefensible. By taking the stand and testifying in his own behalf a defendant does, to be sure, waive his privilege against answering incriminating questions under oath. The waiver rule, however, contemplates a defendant who is conscious and in possession of his faculties, with benefit of counsel to protect him from inadmissible forms of cross-examination and to repair misleading impressions produced on cross-examination by further questioning on re-direct examination. The only form of coercion authorized as a consequence of waiver has been the power of the court to order the defendant to answer proper cross-examination under penalty of having his direct testimony stricken and being held in contempt.

Suppose that defendant has already put in evidence the results of a narcoanalytic experiment conducted at his own instigation? Should he then be

tent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States commanding that no person shall be compelled in any criminal case to be a witness against himself."); *United States v. Carignan*, 342 U.S. 36, 41 (1951) ("Whether involuntary confessions are excluded from federal criminal trials on the ground of a violation of the Fifth Amendment's protection against self-incrimination, or from a rule that forced confessions are untrustworthy, these uncontradicted facts do not bar this confession as a matter of law."); and also *see* *Upshaw v. United States*, 335 U.S. 410, 417 (1948) ("A prisoner's constitutional rights against self-incrimination or to due process are protected by the rule that no involuntary confession may be admitted.") (dissenting opinion).

This ground of exclusion would preclude, however, federal supervision of state court practices. *Adamson v. California*, 332 U.S. 46 (1947). Also see concurring opinions of Justices Black and Douglas in *Rochin v. California*, 342 U.S. 165 (1952).

77. It is arguable that narcoanalysis is analagous to blood tests, intoxication tests, fingerprinting, psychiatric examinations for insanity, medical examinations for pregnancy and disease, etc., and that the results are not offered testimonially. 8 WIGMORE, EVIDENCE § 2265 (3d ed. 1940). This has been suggested with respect to the lie-detector. *INEAU, SELF-INCRIMINATION* 67 (1950). But with the lie-detector neither the physiological reactions nor the "yes" and "no" answers are used testimonially; indeed the verbal answers may be dispensed with without materially affecting the results. When the results of narcoanalysis are offered as admissions they would be offered testimonially.

78. 2 WIGMORE, EVIDENCE § 579 (3d ed. 1940).

considered to have opened the door fully to a second narcoanalytic experiment pursuant to court order? In the absence of precedent the answer can only be speculative, but it is conceivable that a court might so hold.⁷⁹

Material Witnesses

Judicial resort to psychiatric examination and other scientific procedures for testing the veracity of key material witnesses in order to avert miscarriages of justice in criminal proceedings offers intriguing possibilities.⁸⁰ It is elementary that a witness to be competent must have a minimal capacity to observe, recollect, and narrate. At the *voir dire* examination on the question of competency, the judge is not bound by the ordinary rules of evidence and has full discretion to use any available aids, such as mental and psychological tests.⁸¹ The modern tendency is to permit a mentally disordered witness to testify at trial, leaving the defect in question to have whatever weight it deserves as discrediting his powers of observation, recollection, or communication.⁸² This relaxation of competency requirements has increased the need for psychiatric evaluation of a personality-disordered key witness. Judicial obstructionism has taken two different forms. First, some courts, applying the traditional methods of character impeachment, have limited evidence to the reputation of the witness as evidenced by community judgment⁸³ or, in a few jurisdictions, to particular instances of misconduct.⁸⁴ But these methods, which have no bearing on defective organic capacity or personality structure, should not limit the use of expert testimony in evaluating the testimony of a witness.⁸⁵ Second, other courts apply these restrictions only when expert diagnosis of the lesser mental illnesses is offered to discredit, but

79. A Wisconsin statute providing that "no testimony regarding the mental condition of the accused shall be received from witnesses summoned by the accused until the expert witnesses summoned by the prosecution have been given an opportunity to examine and observe the accused, if such opportunity shall have been seasonably demanded" has been held constitutional. *Jessner v. State*, 202 Wis. 184, 231 N.W. 634 (1930), 26 ILL. L. REV. 82 (1931), [1931] WIS. L. REV. 184, 40 YALE L.J. 667 (1931).

80. See 3 WIGMORE, EVIDENCE §§ 931-5, 997-9 (3d ed. 1940).

81. 2 *id.* §§ 492-501; Hutchins & Slesinger, *Some Observations on the Law of Evidence—The Competency of Witnesses*, 37 YALE L.J. 1017, 1019 (1928).

82. 3 WIGMORE, EVIDENCE §§ 501, 931 (3d ed. 1940).

83. *E.g.*, *State v. Driver*, 88 W.Va. 479, 107 S.E. 189 (1921).

84. 3 WIGMORE, EVIDENCE § 979 (3d ed. 1940).

85. *Id.* at § 931:

"Since the theory of this evidence is that any defect of capacity, insufficient to exclude, and yet involving less than the normal testimonial capacity, should legitimately discredit the witness, carrying whatever weight it may have in a given case, the only proper limit upon such evidence would seem to be as follows: *Any trait importing in itself a defective power of observation (at the time of the matter testified to), or of recollection, or of communication, is admissible, provided the power is substantially defective as judged by the average standard of mentality.*"

Consult also *State v. Armstrong*, 232 N.C. 727, 62 S.E.2d 50 (1950), where the only eye-witness to a killing was a girl who would have been described by a doctor who

admit evidence of extreme mental derangement verging on psychosis.⁸⁶ Contrariwise, many have come to realize that psychiatry can render valuable assistance in assessing the lesser mental disorders. Recognition has been most pronounced in sex offense cases where the courts have permitted psychiatrists to expose mental deficiencies, hysteria, and pathological lying in complaining witnesses.⁸⁷ And some courts permit evidence that a witness uses drugs either to show organic impairment of testimonial powers or a propensity to lie.⁸⁸ There is also the recent example of the hypothetical psychiatric testimony introduced by the defense to impeach the witness Chambers in the trial of Alger Hiss in the Southern District of New York. The psychiatrist was permitted to testify that in his opinion the witness was a psychopathic personality with "a tendency towards making false accusations."⁸⁹

had tended her—had he been allowed to testify—as "a low-class moron, equivalent of a nine-year-old child." In holding it reversible error not to let the doctor so testify, Chief Justice Stacy said:

"It is always open to a defendant to challenge the credibility of the witnesses offered by the prosecution who testify against him. . . .

"What could be more effective for the purpose than to impeach the mentality or the intellectual grasp of the witness? If his interest, bias, indelicate way of life, insobriety and general bad reputation in the community may be shown as bearing upon his unworthiness of belief, why not his imbecility, want of understanding, or moronic comprehension, which go more directly to the point? . . . That which may be shown indirectly may also be shown directly. The law favors directness over indirectness; simplicity over complexity; brevity over prolixity; clarity over obscurity; substance over form. There is no virtue in the long phrase when a short one will do just as well. The court-room is not the home of redundancy or circumlocution. Conciseness is the keynote there."

Id. at 728-9, 62 S.E.2d at 51.

86. 2 WIGMORE, EVIDENCE § 932 (3d ed. 1940). And see *State v. Driver*, 83 W. Va. 479, 107 S.E. 189 (1921).

87. See Comment, *Psychiatric Testimony for the Impeachment of Witnesses in Sex Cases*, 39 J. CRIM. L. & CRIMINOLOGY 750 (1949); and Note, 26 ILL. L.J. 93 (1950).

In 1938, the American Bar Association's Committee on the Improvement of the Law of Evidence recommended that "in all charges of sex offenses, the complaining witness be required to be examined before trial by competent psychiatrists for the purpose of ascertaining her probable credibility, the report to be presented in evidence." 3 WIGMORE, EVIDENCE § 924a (3d ed. 1940).

88. Note, 16 So. CALIF. L. REV. 333 (1943); 3 WIGMORE, EVIDENCE § 934 (3d ed. 1940).

89. See *United States v. Hiss*, 88 F. Supp. 559, 560 (1950), *aff'd*, 185 F.2d 822 (2d Cir. 1950), *cert. denied*, 340 U.S. 948 (1951) (District Judge Goddard, in discussing the problem of admissibility, said: "The existence of insanity or mental derangement is admissible for the purpose of discrediting a witness. Evidence of insanity is not merely for the judge on the preliminary question of competency but goes to the jury to affect credibility.")

See also Comment, *Psychiatric Evaluation of the Mentally Abnormal Witness*, 59 YALE L.J. 1324 (1950).

For a perceptive and critical appraisal of the psychiatric testimony in the Hiss case, see Roche, *Truth Telling, Psychiatric Expert Testimony and the Impeachment of Witnesses*, 22 PA. BAR ASS'N Q. 140 (1951).

Admittedly, the dividing line between truth and untruth is a shadowy one. It is debatable whether psychology and psychiatry have progressed to the point where they are able (with or without narcoanalysis) to establish the truth or falsity of testimony. A recent appraisal is as follows:

"Admittedly, categorical opinions about the truth of evidence can be given only rarely. And in simple, uncomplicated situations little or no assistance could be expected. But with the more complex problems, which involve the uncontrolled fantasy formation and suggestibility of childhood, the suggestibility and unreliability of the intellectually defective and the demented, the hallucinations and delusions of the psychotic, the irresponsibility of the true psychopath, the confabulations of patients with organic brain disorders, and the unreliability of hysterics, real help could often be obtained."⁹⁰

And it may be added that here as well as when insanity is the issue, narcoanalysis accompanying a complete and thorough examination is an important and valuable diagnostic adjunct.

If a witness agrees to submit to narcoanalysis the problem for the court is about the same as that posed by a defense offer of a voluntary narcoanalytic experiment on the defendant. If the witness does not consent several difficulties arise. The full potentialities of psychiatric evaluation can not be realized unless the diagnosis is based upon a full clinical examination. Therefore, to provide juries or courts with maximum psychiatric assistance there should be a clinical examination by a court-appointed psychiatrist upon a reasonable showing that a key material witness may be suffering from a mental illness likely to affect his credibility. Do courts have this power? If the competency of a witness is attacked, the judge certainly has power to appoint psychiatrists to examine the witness. His authority to do so stems either from his inherent power to summon witnesses⁹¹ or from statutes or rules confirming his authority to call experts.⁹² The *voir dire* may thus serve as a procedural device for obtaining a clinical diagnosis which will later be available for impeachment purposes.⁹³ But suppose the court finds a witness competent without clinical psychiatric examination; is there any way to get a clinical examination where impeachment is the objective? Although it is doubtful whether a court has power to order a psychiatric examination for impeachment purposes alone, the court may be willing to accomplish this result by invoking its power to determine competency, even though the witness

90. GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 365 (1952).

91. 2 WIGMORE, *EVIDENCE* § 563 (3d ed. 1940).

92. *Ibid.*, collecting and summarizing the statutes and court rules. Exercising these powers, trial judges have appointed psychiatrists to examine witnesses whose competency was questioned by opposing counsel. *People v. Hudson*, 341 Ill. 187, 173 N.E. 278 (1930); *Commonwealth v. Koch*, 305 Pa. 146, 157 Atl. 479 (1931). And in *Goodwin v. State*, 114 Wis. 318, 321, 90 N.W. 170, 171 (1902), the court stated that examination could be imposed as a condition precedent to testifying where the court is seriously doubtful of a witness' mental competency.

93. *People v. Hudson*, 341 Ill. 187, 173 N.E. 278 (1930), and note 87 *supra*.

has taken the stand and even though the court remains convinced that the witness is competent.⁹⁴

If a court can order clinical examination of a witness, can the witness be required, as part of the examination, to undergo narcoanalysis? This, of course, raises problems of self-incrimination and the physician-patient privilege which are substantially the same as those already discussed in connection with the compulsory examination of defendants.⁹⁵

SUMMARY AND CONCLUSION

Conducted under properly controlled conditions by a qualified psychiatrist with experience in its use, an interview in which the subject is partially under the influence of a drug (such as the barbiturates) may be a proper and valuable auxiliary procedure in a thorough diagnostic examination. The be-

94. In *State v. Palmer*, 206 Minn. 185, 288 N.W. 160 (1939), psychiatric examination was allowed after the witness left the stand. The diagnosis based on this examination was then used to impeach the witness. *Contra: Goodwin v. State*, 114 Wis. 318, 90 N.W. 170 (1902).

There may be cases where a diagnosis is already available because the witness has had psychiatric treatment either privately or in a mental hospital or clinic. If narcoanalysis was a part of the diagnosis this should not prevent its use. Of course, the physician-patient privilege might prevent the use of such a diagnosis.

95. To permit either party to compel all his opponent's witnesses to submit to narcoanalysis might well lead to intolerable confusion and delay unless the technique is developed, refined, and simplified far beyond present expectations. In *State v. Cole*, 354 Mo. 181, 188 S.W.2d 43, *rehearing denied*, 189 S.W.2d 541 (1945), the defendant made a motion at the beginning of the trial for a court order requiring all witnesses in the case to be required to give their testimony while strapped to a lie-detector. In holding that the trial court properly denied the motion the Missouri Supreme Court stated:

"In our opinion the day has not come when all the witnesses in a case can be subjected to such inquisitorial and deceptive tests (or to drugs like scopolamine, or to hypnotism) without their consent. Furthermore, such dramatics before the jury would distract them and impede the trial—this latter also because it is necessary for the inquisitor to ask both harmless, irrelevant and 'hot' questions in order to bring out the contrast in the witness' emotional responses. No doubt the lie-detector is useful in the investigation of crime, and may point to evidence which is competent; but it has no place in the court room." *Id.* at 193, 188 S.W.2d at 51.

If narcoanalytic techniques are developed to the stage where the results are reliable as "truth" there would be no necessity to test persons other than the principals. A test of them would usually provide a full and complete answer to the legal inquiry.

And in *State v. Lowry*, 163 Kan. 622, 627-S, 185 P.2d 147, 151 (1947), where the trial court had suggested that both the complaining witness and the defendant submit to a lie-detector, the Kansas Supreme Court indicated that it would be more reluctant to admit the test results on a witness than on a defendant:

"Consider the situation in the instant case. Two men were involved. One was a defendant on trial. The other was merely a witness and under no such emotional strain. Can it be said that with such wholly different mental states existing, the tests would be equally fair? Must the jury be asked to consider and weigh such intangible and elusive elements?"

havior manifested under drug influence varies with the physiological tolerance of the subject, his personality structure, his "set" or attitude at that time, and the immediate stimuli impinging upon him. Generally, relaxation is facilitated, verbalization is less inhibited, and there is freer expression of fact—as well as of fancy and suggestion. In some cases correct information may be withheld or distorted and, in others, erroneous data elicited through suggestion. Nevertheless, narcoanalysis when correctly used may enable the psychiatrist to probe more deeply and quickly into the psychological characteristics of the subject. For these reasons, the results should not be regarded by the psychiatrist as "truth" but simply as clinical data to be integrated with and interpreted in the light of what is known concerning the dynamics of the subject's conflictual anxieties, motivations, and behavioral tendencies.

Thus the bare results of an interview under the influence of drugs should not, standing alone, be considered a valid and reliable indicator of the facts. As a sole procedure, narcoanalysis is not sufficiently reliable. And where the drug-induced interview is a primary procedure and an otherwise full examination of the subject's personality structure is lacking, the results should not be considered; narcoanalysis should only be used as an adjunctive or auxiliary technique. On the other hand, when the subject has submitted voluntarily, after advice of counsel, to a thorough examination by a psychiatrist of his own choosing, the psychiatrist should be permitted to take the results of a drug-induced interview into account as data in forming an opinion about the subject's mental condition and personality structure. So limited, the results have acquired enough reliability in the field of medical psychology to be recognized as bases for an expert opinion. And where the subject has submitted voluntarily there is no question of self-incrimination or the physician-patient privilege, and the hearsay rule is inapplicable.

Under no circumstances should a suspect or material witness undergo narcoanalysis while in police custody unless he has consulted counsel of his own choice, thereafter competently and intelligently consented, and counsel is permitted to be present at the interview. Otherwise the dangers of abuse and violation of individual privacy while in police custody are so great as to overcome the usual counter arguments that police investigation will unduly be hampered. For the uncounseled person in police custody, the line between voluntary and involuntary submission is so tenuous as to be incapable of administration.

To protect a suspect or witness from drug interrogation while in police custody the courts should devise controls such as the following:

1. Discard the dichotomy between involuntary admissions and involuntary confessions and declare both inadmissible.
2. Recognize and apply the "fruit of the poisonous tree" doctrine to prevent the use of drugs to obtain clues and leads.

If a court thinks it advisable in a situation where the law so permits to order a defendant or key witness to submit to a full psychiatric examination, the psychiatrist should be permitted to use narcoanalysis. However, he should be required, if he finds that a drug interview would aid his diagnosis, to obtain a specific court order authorizing narcoanalysis.⁹⁶ And the court should authorize this procedure only if convinced that the defendant or key witness is willing to submit or—in the case of a defendant—has waived as in the *Esposito* case.⁹⁷

We have suggested that circumstances may justify narcoanalytic examination of a key material witness in a criminal proceeding. And by criminal proceeding we mean any proceeding—whether judicial, executive, or administrative—where severe sanctions that are “punitive” in fact may be imposed. But the possibility of impeaching as well as corroborating witnesses, other than key witnesses in criminal proceedings, by the method under discussion raises delicate policy questions. Should every witness who appears in any type of proceeding—however inconsequential the proceeding or the impact of his testimony from the point of view of the community at large—face this type of invasion of his privacy? Presumably not, according to Anglo-American tradition; and if this tradition is worth retaining, what are the appropriate limiting criteria? This question is but a part—perhaps one of the more acute parts—of the larger problem of the conditions under which character impeachment and psychiatric impeachment or disqualification of a non-key witness should be permitted. The question obtrudes itself here, but we feel that its attempted resolution requires an exploration of other issues and other considerations in a broader context than that of narcoanalysis alone.

A “transcript” of drug-induced material may take the form of a recording, a stenographic report of the interview, or the testimony of the interviewing psychiatrist or anyone else who was present. To what extent should the transcript’s disclosure be permitted in the specific proceeding in connection with which narcoanalysis occurred? If the narcoanalysis was not lawfully ordered or if the subject did not voluntarily submit, any disclosure without the subject’s consent or request (as, for example, if he sought it by way of discovery before trial or on cross-examination of the psychiatrist) should be deemed a violation of the privilege against self-incrimination. On the other hand, if the subject voluntarily submitted to narcoanalysis or if it was conducted pursuant to court order, the court should permit only such disclosure as it considers necessary to permit a fair testing of the psychiatrist’s opinion by cross-examining counsel.

Drug-induced statements may reveal many matters—including other crimes or indiscretions—not germane to the proceeding in which the narcoanalysis took place. What of the use of these statements in other proceedings? What

96. This suggestion for a specific court order has been made in de Vabres, *French Justice and the Use of Pentothal*, 4 INT’L CRIM. POLICE REV. (ENG. ED.) 2, 9 (1949).

97. See pages 329-30 *supra*.

has already been said of the unreliability of statements made under narcoanalysis, whether self-serving or dis-serving on their face, suggests not only that they should be inadmissible as independent evidence in the original proceeding, but *a fortiori* should not be admissible in other proceedings brought for other purposes. And the contempt power and an adjustment of the law governing libel and slander should also be considered as devices for controlling the subsequent use of drug-induced statements disclosed in the original proceeding.

As the use of narcoanalysis becomes more general and its potentialities more widely understood, we shall be faced with additional problems: should comment on and the drawing of any adverse inferences from the failure of an accused to submit to narcoanalysis be permitted or effectively prohibited; and, if comment and inference are permitted, should they be restricted to certain types of proceedings? The issue, of course, arises and will arise only in regard to suspects who are already in the community's clutches and subject to its array of investigative procedures and resources. We can but express the hope that the day may never arrive when the community will feel so impotent *vis à vis* suspects as to permit this type of comment and inference.⁹⁸

Concentration on judicial recognition and control of narcoanalysis should not mask the urgent fact—true here as elsewhere in criminal law and administration—that officials operating at the police or investigative level must be sensitive to, and aware of, the disturbing challenges posed by developments in the use of drugs. By modernizing the rules of evidence the courts can accord recognition to advances in medical science, although some lag is to be expected and perhaps to be desired. And, though recognized, the use of drugs can be controlled so as to preclude judicial tolerance of possible abuses—misinterpretation of drug-induced statements and invasions of privacy through involuntary narcoanalysis. But criminal investigators and prosecutors are in a position to stigmatize this procedure if they abuse it. They are also in a position, if overzealous or misinformed, to escape judicial restraints by extra-judicial coercion of suspects or by basing crucial administrative decisions on the results of improper drug administration. Those whose business it is to participate in the infliction of criminal sanctions may find narcoanalysis a helpful adjunct, an adjunct, however, which must be both mastered and controlled if we are to honor our belief in the dignity of the individual.

98. Shortly after these sanguine words were written the New York Court of Appeals refused, without opinion, to reverse a conviction of first degree murder where the prosecutor had implied in his summation that the refusal of defendant to take truth serum was evidence of his guilt. *People v. Draper*, 304 N.Y. 799, 109 N.E.2d 342 (1952) (Loughran, C. J., and Froessel, J., dissenting). Since the defendant interposed insanity as a defense, the court may have been relying upon the waiver theory of the *Esposito* case, *supra* note 44. But there the court limited waiver to the question of insanity and expressly did not extend it to the issue of guilt.

APPENDIX

USE OF NARCOANALYSIS AT MENLO PARK (N.J.) DIAGNOSTIC CENTER

The following statement provides a valuable description and analysis of the use of narcoanalysis in the correction process. It was contained in a letter written to the authors by Ralph Brancale, M.D., Director of the Menlo Park Diagnostic Center, which assists New Jersey courts, correctional institutions, and social agencies by diagnosing persons referred to it for examination. The statement is reproduced here with Dr. Brancale's permission.

Since the inception of our work at Menlo Park we have made extensive use of both narco and hypnoanalytic techniques to aid us in the correct psychiatric evaluation of our cases. There has been, within recent years, considerable progress made in the clinical insight into anti-social personality patterns so that our present approach veers from the old static descriptive classification attitude to one vitally interested in the dynamic and genetic development of the "psychopathic reaction." We are forced to the conclusion that the repetitive delinquent and repetitive adult offender is suffering from a complex and chronic neurotic reaction. The symptoms expressed in his anti-social behavior are understandable only in terms of deeply repressed and obscure motivations. We learn, too, that these repressed instinctive needs may undergo all types of displacements, distortions, and symbolizations in their attempt to seek expression. Hence the process of understanding the offender is dependent upon the extent that we are able to uncover the underlying repressed emotional charges and visualizing their pathological distribution in symptom formation. We are more than ever convinced that a great number of offenders are compulsives pressured by neurotic needs.

Analytical investigation of the unconscious trends has been hampered by the characteristic rigidity of the personality of the offender, a rigidity which makes him relatively unresponsive to verbal analysis—part of this is due to the painful nature of the conflicts and the chronicity of the repressive defenses.

While at Elmira Reformatory I happened to use both amytal and hypnosis and was surprised to obtain quickly and easily psychological content which I was not able to obtain by verbal interviewing method. I felt that the advantages of Deep Dissociating techniques were so great that they should be routinely employed.

Values of amytal interviews:

1. Quicker understanding of underlying dynamics of the anti-social process;
2. Point up the nature and severity of the personality disorder;
3. Give a good idea of responsiveness or lack of responsiveness to treatment;
4. Have a distinct therapeutic effect;
5. Speed up diagnostic and treatment process.

At our Diagnostic Center over 90 percent of our in-patient population (age 10 to 18) undergo amytal interviews unless contra-indicated for medical

reasons. This narcosis interview is arranged with the consent of the guardian or parent. No amytal is given without written consent. Patient first undergoes medical, psychological, and social work investigation. Following psychiatric interviews he then undergoes an amytal examination (drug administered intravenously—average dose $7\frac{1}{2}$ grains).

Narcoanalysis is equally, if not more valuable in dealing with adult offenders. These are seen on an out-patient basis. Adult offenders may be—

1. Referred from the courts—pre-trial;
2. Referred from the courts—pre-sentence;
3. Referred under sex statute (mandatory for all sex cases to be seen at Center following conviction);
4. Referred from our correctional institutions—pre-parole.

The material gained through amytal interviews of adults may throw an altogether different light on the case analysis. Unfortunately, time and convenience does not permit sodium amytal interview as a routine on out-patient cases.

I believe it should be stressed that sodium amytal is not a truth-eliciting device. There are offenders who are able to cover up guilt even under deepest narcosis. The depth of narcosis, however, is an important consideration.

While psychological material obtained under medication is usually valid, it is still possible for individuals to phantasize. This is especially true of pathological types with poorly differentiated ego structure, where the line between reality and phantasy remains extremely thin. In such cases great care must be exercised to avoid mistaking an unconscious phantasy for real experiences.

At the Diagnostic Center it is necessary to interpret to the offender the usefulness of this technique and to assure him that it is not used for "truth gathering" purposes, but primarily for purposes of insight and therapy. When the full picture is interpreted to the court, disposition is prone to be more equitable and considerate. In our experience offenders do not seem to resent this procedure.

I should add that not all patients are productive with the sodium amytal hypnosis. We have a fairly good percentage who develop non-productive reactions or sleep reactions. Secondly, the usefulness of an amytal interview is also dependent upon the patience and skill of, and the time taken by, the therapist; and the process and technique of ventilation employed is as important as any other factor in the use of this drug. I should mention also that a new drug has been recently employed in our institution and in other psychiatric centers. This drug, methedrine, essentially a cortical stimulant, seems also to produce a cathartic, talkative response on the part of the patient. We frequently find that in cases which are non-productive with amytal, the administration of a small amount of methedrine intravenously may give us some very desirable effects. The drugs can produce a cathartic, talkative response without amytal. In some cases the reactions are quite dramatic. We are not clear at this moment whether the value of methedrine is superior to that of amytal;

we are inclined to feel that amytal has a greater therapeutic effect than this latter drug. Methedrine, we feel, is a very important addition to the use of narcoanalysis.

I would like to touch briefly on the pre-trial case. We are receiving an increasing number of such referrals, both from the courts and from the patient's attorney, to do amytal studies pre-trial. This puts us in a serious dilemma because, as psychiatrists, we try to avoid the issue of guilt and innocence. Nevertheless we have had occasions to use such interviews prior to trial. On one occasion consent was obtained from the prosecutor, the trial judge, the defense attorney, and the patient. Interestingly enough, the patient gave us material which would have resulted in a very long sentence. He also poured out psychological factors that gave us greater insight and afforded some possibility of some form of treatment. It was thus possible in this case to compromise the extreme demands of the prosecutor, on one hand, and the exonerating demands of the defendant's attorney, on the other, to the advantage both to the offender and society. However, as a rule in pre-trial cases we prefer to limit ourselves to the question of mental responsibility and the capacity of the patient to stand trial.

We are using amytal on institutional cases pre-parole, especially those with history of assault and homicidal trends. Amytal in certain cases releases the latent aggression and affords us a better idea of the potentialities of a given case.

In our hands the use of narcoanalysis is a very important technique and extremely useful from the diagnostic, prognostic, and therapeutic standpoint.