Indiana Law Journal

Volume 28 | Issue 3 Article 3

Spring 1953

The Case for Uniform Union-Security Regulation

NOTES

THE CASE FOR UNIFORM UNION-SECURITY REGULATION

The magnitude of labor forces, increasing concern over paralyzing strikes, and the influence of union-management relationships on the individual, community, and nation have pushed labor issues into prominence. Congress has established a national policy of encouraging labor and management to bargain collectively. While the Labor Management Relations Act[1] permits unions and employers to enter contracts that allow selection of workers without regard to their union or non-union status, the contract may require such employees to affiliate with the representative union after a probationary period. But the same Act further provides that states may enact more stringent union-security restrictions applicable to labor relations in enterprises which conduct operations in more than one state.[2] Thus, union-security agreements are subject to regulation by both national and state governments.[3] As might be expected, such concurrent legislation gives rise to conflicts between application of federal and state regulations, thus causing difficulty in determining the

1. 61 STAT. 136 (1947), as amended, 29 U.S.C. § 141 *et seq.* (Supp. 1952). Hereafter the Act is referred to as LMRA; section references are to that Act.

2. Conventional union-security measures pertinent herein are the closed and union shops. Closed-shop provisions provide absolute union protection; the employer obligates himself to hire only union members, and employees must maintain union affiliation to retain their positions. The congressionally—indorsed union-shop contract requires all employees to become union members and retain membership but permits the employer to select workers at will. The contract specifies a probationary period after which an employee must affiliate with the union or lose his job.

3. Section 14(b) of the Taft-Hartley Act states: "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

In reviewing pertinent sections of the Act in the case of *Algoma Plywood and Veneer Co. v. Wisconsin Employment Relations Board,* the United States Supreme Court left no doubt that the states are free to restrict union-security devices more severely than does the federal law. Mr. Justice Frankfurter, in delivering the Court's opinion, proclaimed: "Other provisions of the Taft-Hartley Act make it even clearer than the National Labor Relations Act that the states are left free to pursue their own more restrictive policies in the matter of union-security agreements. Because § 8(a)(3) of the new Act forbids the closed shop and strictly regulates the conditions under which a union-shop agreement may be entered, § 14(b) was included to forestall the inference that federal policy was to be exclusive." 336 U.S. 301, 313-314 (1949).

Congress too has stated: "It was never the intention of the National Labor Relations Act, as is disclosed by the legislative history of that act, to preempt the field in this regard so as to deprive the States of their powers to prevent compulsory unionism."

proper groups of employees to be permitted to enter security agreements with their employers. In addition, conflicting federal and state laws permit some workers to demand and secure union benefits without any contribution to, or membership in, the union.

The LMRA, in addition to prohibiting closed-shop agreements,[4] prescribes rules concerning employer and union activity which affects the sanctioned forms of union security.[5] State legislation regulating union security invokes various means designed to prevent discrimination in hire or tenure of workers on conditions of union or non-union status.[6] While all such state acts proscribe employment dependent on union affiliation, some statutes declare the entire employment contract void,

---

H.R. REP. No. 510, 80th Cong., 1st Sess. 60 (1947). See H.R. REP. No. 1147, 74th Cong., 1st Sess. 19-20 (1935); SEN. REP. No. 573, 74th Cong., 1st Sess. 11 (1935).

The Supreme Court asserted the validity of a Nebraska constitutional amendment and a North Carolina right-to-work statute, each more restrictive than Taft-Hartley union-security provisions, in Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949). The same day the Court affirmed the constitutionality of a similar Arizona enactment in American Federation of Labor v. American Sash & Door Co., 335 U.S. 538 (1949). However, the Court reversed without opinion a Wisconsin Supreme Court decision upholding the state labor board's jurisdiction in Plankinton Packing Co. v. Wisconsin Employment Relations Board, 338 U.S. 953 (1950), *reversing* 255 Wis. 285, 38 N.W.2d 688 (1949). The Court did cite Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767 (1949) and LaCrosse Telephone Corp. v. Wisconsin Employment Relations Board, 336 U.S. 18 (1949). The *Plankinton* decision has occasioned some controversy as to the meaning of the cryptic reversal. See 53 Col. L. Rev. 258, 260-265 (1953); 1 LAB. L.J. 419 (1950). Apparently *Plankinton,* in its denial of jurisdiction to the state agencies, indicates that federal policy remains supreme in other areas of congressional labor legislation, because both the *Bethlehem* and *LaCrosse* decisions relied in part on possible conflicts in the exercise of discretion between the NLRB and state labor boards. *See* Bethlehem Steel Co. v. New York State Labor Relations Board, *supra* at 775-776, and LaCrosse Telephone Corp. v. Wisconsin Employment Relations Board, *supra* at 25-26. See also International Union of United Auto. Workers, CIO v. O'Brien, 339 U.S. 454 (1949).

4. § 8(a)(3).

5. Section 8(a)(3) elaborately specifies the conditions under which an employer may enter a union-shop agreement. Section 7 guarantees to each worker the right to join or refrain from joining a labor organization except as that right may be abridged by § 8(a)(3). Union tactics are curtailed by § 8(b)(1) which restrains union activities as they affect workers' rights and by § 8(b)(2) which admonishes the union not to force the employer to violate § 8(a)(3).

6. The following state statutes prohibit employment conditioned on union status: ARIZ. CODE ANN. § 56-1302 (Supp. 1952); ARK. CONST. AMEND. XXXIV, § 1 (1947); COLO. STAT. ANN. c. 97, § 94(6)(1)(c) (1935) (all-union agreement permitted if authorized by three-fourths secret vote); FLA. DECLARATION OF RIGHTS § 12 (1951); GA. CODE ANN. § 54-804 (Supp. 1951); IOWA CODE ANN. c. 736A, § 736A.2 (1950); KAN. GEN. STAT. § 44-809(4) (1949) (all-union agreement permitted if authorized by majority vote of employees in bargaining unit); NEB. REV. STAT. § 48-217 (Supp. 1951) (laws to render operative NEB. CONST. Art. XV, §§ 13, 14, 15); 31 LAB. REL. REP. (Ref. Man.) 3009 (Nevada initiative petition approved Nov. 4, 1952); N.C. GEN. STAT. § 95-81 (1950); N.D. REV. CODE § 34-0114 (Supp. 1949); S.D. CONST. Art. VI, § 2 (1939); TENN. CODE ANN. § 11412.8 (Williams 1934); TEX. STAT. REV. CIV. art. 5207a, § 2 (1948); VA. CODE § 40-70 (1950); WIS. STAT. § 111.06(1)(c)1 (1951) (all-union agreement permitted if authorized by two-thirds secret vote).

unlawful, or illegal.[7] Two statutes stipulate that it is unlawful to enter into a contract which conditions job hire or tenure on the workers' organized status.[8] Several enactments permit employees to recover damages for denial or deprivation of employment[9] and some afford injunctive relief against threatened discriminatory action.[10] Four acts label violation of union-security restrictions a misdemeanor and inflict fines from $100 to $500[11] while one state provides for imprisonment not to exceed twelve months.[12]

Prior to the repeal of Section 9(e)(1) of the Taft-Hartley Act, the National Labor Relations Board confronted a chaos of union-shop elections in bargaining units stretching beyond state boundaries.[13] Complexity of determining employee units in which to hold elections to comply with this section created confusion not only on the Board but among employees as well because of the rigors of varying degrees of federal and state union-security regulation. Illustrative of this confusion is the *Northland Greyhound Lines* case where the Board was petitioned by a bargaining unit to hold an election in an area encompassing eight states and the Province of Manitoba, Canada.[14] Four states were silent on union-security regulation;[15] three states prohibited union security in any form;[16] one state required employee authorization of union-security agreements by a two-thirds vote.[17] The Board's solution was to establish the locus of the employees' headquarters as the criterion for determining which state's law is applicable in such situations.[18] In *Western Electric Co.,*

7. ARIZ. CODE ANN. § 56-1303 (Supp. 1952); N.C. GEN. STAT. § 95-79 (1950); TEX. STAT., REV. CIV. art. 5207a, § 3 (1948); VA. CODE § 40-69 (1950).

8. IOWA CODE ANN. c. 736A, § 736A.3 (1950); TENN. CODE ANN. § 11412.9 (Williams 1934).

9. ARIZ. CODE ANN. § 56-1306 (Supp. 1952); GA. CODE ANN. § 54-908 (Supp. 1951); N.C. GEN. STAT. § 95-83 (1950); VA. CODE § 40-73 (1950).

10. ARIZ. CODE ANN. § 56-1307 (Supp. 1952); GA. CODE ANN. § 54-908 (Supp. 1951); IOWA CODE ANN. c. 736A, § 736A.7 (1950).

11. ARK. STAT. ANN. § 81-204 (1947); IOWA CODE ANN. c. 736A, § 736A.6 (1950); NEB. REV. STAT. § 48-219 (Supp. 1951); TENN. CODE ANN. § 11412.12 (Williams 1934).

12. TENN. CODE ANN. § 11412.12 (Williams 1934). This enactment provides in addition that "[e]ach day that any person, firm, corporation or association of any kind remains in violation of any of the provisions of this act shall be deemed to be a separate offense, punishable in accordance with the provisions of this section."

13. Section 9(e)(1) originally empowered the NLRB to hold an election to determine whether a majority of employees in an appropriate unit desired a union-shop provision in their employment contract.

14. 80 N.L.R.B. 288 (1948).

15. Illinois, Michigan, Minnesota, Montana.

16. Iowa, North Dakota, South Dakota.

17. Wisconsin.

18. This particular petition fully awakened the Board to the effects of multi-security regulation. "The Employer in the instant case is directly engaged in the field of transportation, and the nature of its operations is such that some of its employees, particularly its drivers, continually travel between States which either permit without

where the employees labored in 45 states and the District of Columbia, the NLRB followed its *Northland Greyhound Lines* rule, stating "that the headquarters of the employees provide the best criteria because they represent the focal points of the employment relationship."[19] The difficulty with this mechanical approach appears in a finding of the Board that the employees "are frequently transferred from one job location to another in the same, or in a different, State."[20] Presumably, a new "headquarters" would be designated in every new area into which the employee is transferred. If no new "headquarters" were assigned, the employee could have a home office in a state which requires a two-thirds majority vote to authorize a union shop or which prohibits all union-security devices, yet he could perform work assignments in a state having no union-security regulation whatsoever.[21]

---

restriction, regulate, or prohibit union-shop agreements. It therefore becomes necessary to determine initially which State law is applicable and then, in view of the language of Section 14(b), whether the particular State law or the national law is paramount. In resolving the question as to the applicable State law, such factors as the residences of the employees, the places where they were hired, their headquarters, the proportions of working time spent in the various States, and (with regard to the drivers), their routes, have been given consideration. In view of all the circumstances involved, we are persuaded that the headquarters of the employees provide the best criteria because they represent the focal points of the employment relationship. The headquarters are where the employees report to work, receive their instructions, and are paid their salaries. It is, therefore, in the States in which they have their headquarters that the provisions of any agreement between a union and an employer regarding the employees involved will be effectuated. In view of the fact that most of the essential matters with respect to the employment relationship will be dealt with in the States where the employees have their headquarters, we believe that application of this test to determine which State law shall control will result in the least amount of extra-territorial effect being given to the laws of one State as against those of another." 80 N.L.R.B. 288, 291 (1948).

Less acute three-state problems arose in Giant Food Shopping Center, 77 N.L.R.B. 791 (1948), and American Viscose Corp., 23 LAB. REL. REP. (Ref. Man.) 1359 (1949). In Giant Food Shopping Center, *supra* at 796, the Board decided (3-2) that "although the unit appropriate for the purposes of Section 9(e)(1) in most instances will be coextensive with the unit appropriate for the purposes of collective bargaining under Section 9(a) . . . it need not be identical in all cases with such unit." In dissent, Chairman Herzog warned "[t]his, I fear, may create more problems than it will resolve. In shunning Scylla, we may fall into Charybdis." *Id.* at 799. The holding of this case has been viewed dubiously by Congress. See SEN. REP. No. 99 Pt. 1, 81st Cong., 1st Sess. 18-19 (1949).

19. 84 N.L.R.B. 1019, 1020 (1949), citing Northland Greyhound Lines, 80 N.L.R.B. 288 (1948).

20. 84 N.L.R.B. 1019, 1021 (1949). An estimate by the employer set the number of such transfers during 1948 at 50,000. *Ibid.*

21. Indeed this contention was pressed on the Board by the employer who pointed out that the employee "momentarily in a State outlawing the union-shop, may, after the election, be transferred to a State which permits the union-shop, and thereupon become subject to the terms of a union-shop contract, although he had no chance to vote on the authorization of the contract. However, [the Board concluded], such an employee would be in the same position as any citizen of a State who finds himself bound by laws passed before his arrival there." 84 N.L.R.B. 1019, 1023 (1949).

While the Board's decision reached a practically expedient result, the individual worker's rights sought to be protected by both state and federal statutes were sacrificed

Since the repeal of Section 9(e)(1) the precise problem, administration of security elections, confronting the NLRB in the preceding cases is no longer encountered, but the chaotic situation described still exists to confuse the status of union-security provisions in employment contracts throughout the nation.

The incompatability of the state and federal security legislation assumes the greatest significance in application of these laws to area-wide bargaining units. The trucking industry vividly depicts the discordant effects of non-uniform regulation. Over-the-road affiliates of the International Brotherhood of Teamsters negotiate employment contracts on a multi-state basis.[22] In a representative group of contracts, each participating area included both states which allow and those which prohibit the conditioning of continued employment on the basis of union membership.[23] These agreements disclose that employees receive such union-security protection as is permitted by the laws of the states in which they are domiciled.[24] Multifarious union-security laws portend serious economic repercussions on both unions and their members in such situations. Since they need never join the union, which, as bargaining agent, must represent them,[25] employees domiciled in states outlawing union-

to provide a workable rule of thumb. Thus, the very statutes enacted to protect the employee's interests and to encourage his participation in determination of employment relation conditions actually prevent the protection they purport to guarantee.

22. Over-the-road affiliates connotes drivers of tractors and trailers for private, common, and contract motor carriers.

23. The International Brotherhood of Teamsters, AFL, supplied the INDIANA LAW JOURNAL with contracts revealing this condition. Those states which prohibit or regulate union security are italicized. *Arkansas,* Louisiana, Oklahoma, and *Texas,* comprise a collective bargaining area. Another area includes Illinois, Indiana, *Iowa, Kansas,* Michigan, Minnesota, Missouri, *Nebraska, North Dakota,* and Ohio. A third area encompasses Alabama, *Florida, Georgia,* Kentucky, Mississippi, and *Tennessee.*

24. The union-shop security provisions of these contracts contain the following stipulations. "As respects employees domiciled in those states covered by this Agreement in which required Union membership as a condition of employment is not prohibited by law, the following [union-shop] clause shall be applicable. . . .

"The Employer in Texas and Arkansas agrees to give consideration to prospective employees furnished through the employment facilities of the Union when the Employer is in need of employees working in the various classifications covered by this agreement. . . . Should the Texas Anti-Closed Shop Law which became effective on September 4, 1947, or the Arkansas Anti-Closed Shop Law which became effective on February 19, 1947, be declared unconstitutional or unenforceable by a final judgment of a court of last resort, the Company and the Union agree that Article II, Section 1 [union-shop provision], shall become effective immediately for Arkansas and/or Texas.

"The above [union-shop provision] . . . shall not . . . apply in any state where prohibited by state law. If the [union-shop stipulation] hereof is invalid under the law of any state wherein this contract is executed, it shall be modified to comply with the requirement of state law or shall be renegotiated for the purposes of adequate replacement." The Ford Motor Co. and United Auto Workers, CIO, contract also contains a provision which renders the union-shop clause inoperative in states prohibiting security measures. See 5 CCH LAB. LAW. REP. (4th ed.) ¶ 53,160.009 (1952).

25. Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944).

security devices receive the identical benefits as the unionized workers. Thus, in area-wide bargaining units, employees against whom union-shop rules may be legally enforced bear the added burden of the "free-riders,"[26] who occupy secure positions by virtue of the LMRA and restrictive state legislation.[27]

Union-employer agreements reflect attempts to reconcile collective bargaining and multiplicate security regulation. There is evidence that union and employer are confused by and wary of present state and federal union-security restrictions. The parties insert elaborate clauses in the employment contract in an attempt to provide maximum security under conflicting regulation and simultaneously prepare for possible invalidation of state statutes.[28] Several NLRB decisions have condemned security provisions as improper under applicable state law.[29]

Congress was not without warning of certain ramifications of concurrent union-security regulation.[30] Legislation which completely pro-

26. To combat the "free-rider," the Central States Area contract provides: "In those instances where the [union-shop] clause may not be validly applied, the Employer agrees to recommend to all employees that they become members of the Union and maintain such membership during the life of this Agreement, to refer new employees to the Union representative, and to recommend to delinquent members that they pay their dues *since they are receiving the benefits of this contract.*" (emphasis added)

27. This factor undoubtedly retards the growth of unions in interdictive jurisdictions because no worker wishes to pay the way of another by increased personal expenditures.

A second disadvantage not restricted to area-wide bargaining units is incurred by unions in those states which prohibit utilization of security devices. Reconciliation of union-management differences at the bargaining table necessitates concession of certain demands asserted by each party. The process is not unlike a sale in which certain demands are "sold," in return for which other demands are granted. Prohibition of union security removes a valuable demand which, although it might not have been granted, could have been "sold" for other substantial concessions.

28. See note 24 *supra.*

29. Green Bay Drop Forge Co., 29 LAB. REL. REP. (Ref. Man.) 1142 (1951). The parties added these clauses to their contract: "The Union Security Provisions here established shall be in effect when, and to the extent that, the applicable Federal and State laws have been fully complied with.

"Any provision of this agreement which shall be in conflict with any Federal or State law shall be and hereby is modified to conform to any State or Federal law." *Id.* at 1143. This stipulation did not cure a failure to comply with the 30 day grace period imposed by the Taft-Hartley Act on union-shop provisions in employment contracts.

In Hickey Cab Co., 88 N.L.R.B. 327, 329-330 (1950), the parties agreed to a complex security provision and then annexed this stipulation: "If any provision of this agreement is in violation of any Federal or Connecticut State Law, such provision shall be inoperative to the extent only that such provision may be at variance therewith." But the NLRB declared that union-security provisions are effective until deemed invalid by "the proper tribunal." Consequently, "[t]he very existence in the contract of the union-security provision therefore acts as a restraint upon employees desiring to refrain from union activities within the meaning of Section 7 of the [Taft-Hartley] Act." This same conclusion was expounded in Hazel-Atlas Glass Co., 85 N.L.R.B. 1305, 1306 (1949); Evans Milling Co., 85 N.L.R.B. 391, 392-393 (1949); Unique Art Manufacturing Co., 83 N.L.R.B. 1250, 1252 (1949).

30. See 93 CONG. REC. 6456 (1947). Senator Morse cautioned: "Thus, we lay down in the bill a very full and complete national policy as to closed- and union-shop

hibits union-security devices has the tendency to weaken unions. In those jurisdictions not restricting union security, unions can reasonably be expected to flourish, at least comparatively. Weak unions cannot enforce wage demands consonant with those of a secure, vigorous union; consequently, wage rates reflect the power and skill of the union bargaining for them. Skilled union leaders with faithful followers have consistently won wage increases at the bargaining table. Labor costs in states which do not regulate or do not severely restrict union-security measures will increase; labor costs in states which forbid union-security methods will remain at a relatively lower level. Employers engaged in business in the former states whose labor costs constitute a large proportion of the total product cost will discover that profit margins diminish, while comparable entrepreneurs in the latter jurisdictions will enjoy a competitive advantage and expanding profit margins. Competitive goods at lower prices will infiltrate the markets of the high-cost producer and capture consumer demand by their more attractive price. In an effort to reduce labor costs by weakening unions which represent their employees, employers in states not denying union security will urge adoption of laws proscribing security. Uniform regulation precludes this condition and the necessity for its extension.[31] Important as these considerations may

agreements. At the same time, the bill provides in section 1[4](b), however, that the national policy may be entirely disregarded and superseded by the States if they desire to impose a more restrictive policy on the same subject matter. A more pointed instance of antilabor bias could hardly be envisaged than this alleged minor change in the bill.

"Mr. President, we are dealing under a national policy with interstate commerce. The jurisdiction of the National Labor Relations Board is limited to interstate commerce cases and issues. But this amendment proposes that we except from the national policy, as it relates to interstate commerce, national jurisdiction over these matters as they involve the closed shops and union shops, in the case of any State which passes an anticlosed shop or antiunion shop bill. The bill provides in effect that we allow to employers in those States a State policy over interstate commerce contrary to a national policy that we would apply through the National Labor Relations Board in all other States which do not enact such State legislation.

"Mr. President, if anyone knows of a better example of unfair discrimination than that, I should like to hear about it. I say that when it comes to interstate-commerce policies, they should be uniform throughout the Nation, and we should not have a national policy in regard to closed shops and union shops in States X, Y, and Z, but then permit . . . a policy quite contrary to that policy under State laws in States A, B, and C. Many employers will not like that, either, Mr. President, because that has some interesting competitive implications connected with it, too. It will be rather interesting, if this measure becomes law, to hear from some employers who, when bound by the national policy, will come forward with allegations, and, I think, in due course of time will prove, that such discriminatory practices result in some unfair competitive factors for them in their competition with competitors in other States who are able to function under a different policy." See also *Hearings before Committee on Labor and Public Welfare on S. 249,* 81st Cong., 1st Sess. 1770 (1949).

31. Conflicting laws on union security are ominously significant in another application restricted to intrastate commerce. Non-uniform state acts which impose various degrees of restrictiveness represent supreme regulation of business enterprises not interstate in character. Jurisdictional boundaries of the NLRB have vaccilated over certain

be,[32] the significant effect of union-security prohibitions on collective bargaining is revealed only by scrutiny of federal and state labor policies and their ramifications.

---

portions of commerce so that amenability of the Board may include tomorrow what today it rejects. Difficulty in determining the bargaining unit and administering elections has made this circumstance necessary, even though it may be undesirable. SEN. REP. No. 1509, 82d Cong., 2d Sess. 3-7 (1952); *Hearings before Subcommittee on Labor and Labor Management Relations of Committee on Labor and Public Welfare on S. 1973*, 82d Cong., 1st Sess. 79-83 (1951). Also, conditions in certain other industries defy application of present law. *E.g., id.* at 80.

A recent case, NLRB v. Guy F. Atkinson Co., 195 F.2d 141, 143-144 (9th Cir. 1952), prophesied the effects of incidence of those circumstances. The Board there assumed jurisdiction over the building and construction industry contrary to the policy which it followed two years previously when the company and the union executed a closed-shop agreement. The union had not been certified as the employees' bargaining representative by the NLRB, and, therefore, had no authority to enter such an arrangement even though the closed shop was permitted under laws applicable at that time. The Board declared the company guilty of an unfair labor practice because it had entered a closed-shop agreement with the union. The court concluded that the facts did not warrant the exercise of discretion and therefore labelled the Board's order "arbitrary, capricious, and an abuse of discretion." *Id.* at 151. Thus, employment contracts containing closed-shop stipulations which are valid under many states' laws may render both employers and unions guilty of unfair practices if the shifting boundaries of NLRB jurisdiction envelop other enterprises now considered beyond the Board's scope of authority. The circuit court's judgment prevented injustice here, but nevertheless this case warns that lack of uniformity may plague those industries now considered not amenable to federal labor law. A realistic appraisal of labor relations justifies the opinion that the inclusiveness of NLRB jurisdiction will continue to fluctuate, providing fertile ground for similar litigation.

See NLRB v. Sterling Furniture Co., 21 U.S.L. WEEK 2419 (March 3, 1953). "Since the law of California does not prohibit union-shop or closed-shop arrangements, the language of the Board's order is so broad as to prohibit activity of the union which may be entirely lawful. The union says it has similar agreements with some 80 or 90 small establishments whose businesses do not affect interstate commerce. Moreover, in borderline situations, the union cannot know until the Board or this court has spoken whether its union-security agreements are valid or invalid, so it is required to proceed more or less in terrorem or, as an alternative, to forego freedom of action which in good faith it deems itself entitled to take." *Ibid.*

32. Labor relations scholars have not reached a unanimous opinion as to the desirability of all forms of union security. One of the nation's authorities on union security observed that "[f]rom labor's viewpoint, the closed shop is indispensable to successful unionization." TONER, THE CLOSED SHOP 6 (1942). But an equally authoritative scholar contends "[a] rule which would bar management's free access to the employment market . . . may, properly be regarded as an impairment of an essential management function." TELLER, MANAGEMENT FUNCTIONS UNDER COLLECTIVE BARGAINING 242 (1947). In arriving at their conclusions they consider, not incorrectly, the patent effects of union security on day-to-day union-management collaboration. This particular method of ascertaining the worth of security for the union permits observers to list both advantages and disadvantages. Consequently, regardless of the ultimate personal evaluation of the desirability of security, imposing substantiation of that judgment can be made. It would be well to recognize that significant numbers and authoritative members of management forces ally themselves with the proponents of union security. *E.g., Hearings, supra* note 30, at 2018; BRAUN, THE RIGHT TO ORGANIZE AND ITS LIMITS 191 (1950); TAYLOR, GOVERNMENT REGULATION OF INDUSTRIAL RELATIONS 63-65 (1948); Jansen, *The Closed Shop Is Not a Closed Issue*, 2 IND. AND LAB. REL. REV. 546 (1949).

Champions of union security contend that a secure labor organization cooperates

The Right to Work

That Congress failed to respond to such cogent arguments against the union-security provisions of the LMRA indicates that a consideration far more compelling than possible detrimental economic ramifications made passage of Section 14(b) imperative. This overriding factor can be detected in Senator Taft's contention that "either we should have an open shop or we should have an open union."[33] Previously the Senator had stated: ". . . apparently they [union members] feel that today they are at a great disadvantage in dealing with union leaders, and that

willingly with management because of assured existence. The union need not contest every exercise of employer discretion since no such exercise can cause discrimination due to union affiliation. Both union and management mutually attempt to improve efficiency to meet competition from non-organized and low-cost plants. When an entire industry has been organized and the union secures uniform wage rates, labor costs cease to be a competitive factor, thus permitting concentration of effort on improved production and distribution; the union can effectively "police" this form of industry-wide agreement. Union demands on management moderate with the realization that both parties have secured interests in the continuation of the business enterprise. Workers' interest and efficiency increase because they have no fear of arbitrary dismissals; and union discipline is more effective, thereby creating a more responsible labor organization. All of these effects tend to produce stable costs and production rates permitting accurate estimates of future expenditures and completion dates. All employees contribute to the union's support, eliminating the "free rider," and of course, jurisdictional disputes are impossible so long as the security provision remains in force.

Disparagers of union security claim that labor leaders tend to make unreasonable demands when employment contracts include security provisions. Labor costs rise because of increased, more enforceable union demands, and higher costs decrease the profit margin thus forcing high cost enterprises out of business. Worker efficiency is impaired because the employee, aware of his secure position, lacks incentive to do well. Unions exercise dictatorial power over workers, and consequently the organized laborer owes allegiance to the union and shop steward instead of to employer and foreman.

Fairness to critics of union security requires the observation that few labor-relations authorities favor abolition of all security devices. SLICHTER, UNION POLICIES AND INDUSTRIAL MANAGEMENT 96 (1941); TELLER, *op. cit. supra*, at 240-241. Disagreement occurs over the particular form of provisions to be utilized to acquire security, not whether all security should be abolished. Respected scholars propose complete abandonment of the closed shop but assert the merits of retaining the union shop. The distinction is significant because it reveals that union security *per se* is not undesirable; in fact, many of their criticisms pertain uniquely to the closed shop. They contend that management's hiring prerogative is obstructed because non-union applicants cannot be considered for employment. Since available labor supply bulks no greater than union membership, union forces inadequate to furnish the employer's needs tend to increase wage rates, hours of overtime, and production costs. Management can be compelled to select less desirable workers. Furthermore, union membership as a prerequisite to employment antagonizes popular concepts of freedom and the right to work.

The manifest effects of existing laws pertaining to union security provide no definite criterion by which to judge the value of present statutes notwithstanding the confusion and inconvenience they cause. In the discussion thus far the desirability of secure unions is moot; obviously then, no proper conclusion can be formed about the suitability of right-to-work laws which prohibit security. Consideration of the desirability of retaining present laws in light of the arguments for and against union security reveals that mere examination and comparison of advantages and disadvantages of union security affords no justifiable basis to condemn existing statutes.

33. 93 CONG. REC. 3837 (1947).

the power given to the leaders by existing legislation is so great that the individual is unable to exercise [his] right to free speech, his *right to work as he pleases,* and [his] general right to live as he pleases."[34] (emphasis added)

Compulsion in whatever form cannot easily be reconciled with popular American views of freedom and liberty. While this basic tenet of democratic society does not admit of precise delineation, a free people almost without exception abhor being compelled to do something. It is, therefore, understandable that many reject the contention that mandatory union membership is consistent with traditional notions of individual freedom.[35] Nor is it surprising that "the right to work" has received a considerable amount of academic attention, as well as avid public support.[36]

The right to work can be protected in two ways. Unions may be required to admit and retain all those who desire employment within their "jurisdiction," or employers may be ordered to employ applicants and retain workers without regard to their union status. The former is the open union; the latter is the open shop.[37] There is a vast distinction between the two methods. The closed-shop interdict imposed by the Act and the complete prohibition of security devices by various state statutes reveal that both Congress and state legislature selected, although not completely, the latter of Senator Taft's alternatives. To enforce the right to work they decided to restrict union security rather than to provide for the open union.[38] Congress rejected the open-union approach purportedly

34. *Id.* at 3835. Senator Taft also stated: "Even on the question of the closed shop, which the union leaders are most vigorously defending, the polls show that more than half their men are actually opposed to the position the leaders are taking. . . ." *Ibid.* Experience refuted the Senator's statements. Of the 44,587 union-shop elections conducted prior to discontinuance in 1951, the union shop was the workers' choice in 97% of the elections. 73 MONTHLY LAB. REV. 682 (1951).

35. The great surge of antipathy for union control of job opportunities has been of recent origin. Of the thirteen states which completely prohibit all forms of security, ten states enacted such legislation in 1947, one state in 1945, one in 1944. Nevada approved an interdictive constitutional amendment in 1952. Many states rejected similar legislation during the same period.

36. Other related topics, the right to join a union and admission and expulsion policies of unions, have been discussed, too. Summers, *The Right to Join a Union,* 47 COL. L. REV. 33 (1947); Summers, *Disciplinary Powers of Unions,* 3 IND. AND LAB. REL. REV. 483 (1950); Summers, *Admission Policies of Labor Unions,* 61 Q.J. ECON. 66 (1946).

37. For an examination of the problems encountered by attempting to enforce an open-union policy see Summers, *The Right to Join a Union,* 47 COL. L. REV. 33, 36 (1947).

38. "Confronted with the wealth of evidence on the abuses of individual and minority rights under closed-shop contracts, the framers of the Taft-Hartley Act faced the dilemma of either prohibiting the closed shop and protecting individual rights under other forms of compulsory membership in unions, such as the union shop, or else writing an elaborate statute protecting the rights of individual members of unions

in order to avoid governmental interference with internal activities of unions, although it could be argued that the LMRA does in fact regulate internal union affairs to some extent.

It is thus apparent that any pertinent inquiry into the propriety of existing federal and state union-security laws must include an examination of their effectiveness in guaranteeing the right to work. A failure to achieve this proclaimed purpose coupled with any harmful effects on collective bargaining which might be incurred as a result of concurrent federal-state regulation of union security would indicate that there is little justification for such legislation as it now exists.

The number of reported instances in which unions have denied admission to applicants is small.[39] Nor do litigated unreasonable expulsions from union membership occur often.[40] The total number of such incidents cannot be precisely determined, however, because many cases are tried in courts whose decisions are not reported. Many rejected applicants for union membership probably lack the financial resources necessary to litigate their alleged causes of action. But as a practical matter, unions maintain their effectiveness by controlling labor forces; therefore, wholesale rejection of membership-aspiring workers would tend to diminish union strength and power. No union would long adhere to such a policy. It must be remembered that unions have assumed

---

against arbitrary or capricious expulsion. The solution of the dilemma was to reject the idea of having the Federal Government interfere and police the internal activities of unions." H.R. REP. No. 317 Pt. 2, 81st Cong., 1st Sess. 14-15 (1949). Nevertheless, Congress has given serious consideration to proposals regulating internal union affairs. See Aaron and Komaroff, *Statutory Regulation of Internal Union Affairs,* 44 ILL. L. REV. 425, 631 (1949).

"H.R. 3020, as passed by the House, listed a number of union unfair labor practices relating to the conduct of union internal affairs; but these were stricken from the version of the bill passed by the Senate." *Id.* at 447 n.102. As the authors point out, the Labor Management Relations Act does actually impose some restrictions on union internal affairs. *Id.* at 447-451.

Three proposals have been presented to Congress purporting to regulate internal affairs of unions. One bill elaborately lists ten union unfair labor practices. Generally the provisions of all the bills attempt to protect the union member from unreasonable and arbitrary union action. *Id.* at 636-649.

39. Summers, *Admission Policies of Labor Unions,* 61 Q.J. ECON. 66, 67 (1946). The relatively small number of unreasonable refusals to admit workers to union membership are so contrary to common views of justice and democracy that no condemnation seems too vehement. Any number of such incidents, no matter how few, is too many.

"It is impossible to determine precisely to what extent the various 75,000 local unions close their membership books, for no systematic study has yet been made. A few horrible examples, such as Local 110 of the Motion Picture Operators in Chicago refusing to accept any new members for 15 years, have been widely publicized, but it is generally agreed that there are relatively few unions which engage in this practice." *Id.* at 79.

40. The frequency of reported unjustified dismissals has been determined as less than four per year. Summers, *Disciplinary Powers of Union,* 3 IND. AND LAB. REL. REV. 483, 487 (1950).

responsibility for the conduct of their members; proper execution of the duties imposed by that responsibility necessitates powers of control and censure over members. The most effective element of control lies in the organization's ability to terminate the workers' employment by withdrawal of their union membership. Of course, this cannot be accomplished unless union affiliation is a condition of employment and unless members can be expelled for unreasonable conduct. Present law prohibits the employer from dismissing a worker under a union-shop agreement if the cause of termination of union membership is other than a failure to pay union fees and dues.[41] Since many employment contracts provide for automatic check-off if the worker supplies the employer with a written authorization, a great number of organized employees are legally immune to union discipline.[42] Employees laboring under a union-shop contract with no check-off provision would seldom fail to pay dues if to do so would result in dismissal from employment.

The particular mode adopted by Congress to protect employment rights has proved extremely difficult to enforce. Notwithstanding proscription of the closed shop, it still exists in many employment relationships.[43] Those industries which utilized the hiring hall prior to Taft-Hartley continue that practice,[44] and undoubtedly many employers continue to hire only organized workers by custom or, perhaps, to cultivate the union's good will. Gentlemen's agreements not only achieve the precise practical effect of formal contracts, but make detection of improper relationships almost impossible. Strict closed-shop agreements can flourish because neither party to the illegal agreement will likely reveal its provisions.

---

41. § 8(a)(3)(B).

42. An analysis of 602 contracts revealed that 72% of them contained check-off provisions. 13 CONFERENCE BOARD MANAGEMENT RECORD 352-353 (1951).

43. "The NLRB has been consistent in throwing out contracts that require union membership as a condition of employment. But despite the [B]oard and the law of the land, the closed shop in some form has continued to thrive in several sectors of the economy. . . . [S]ome equivalent of the closed shop is common in printing, longshore, maritime, building, clothing, and trucking among others." Fortune, Sept. 1951, p. 62.

"The exact number of bootleg (i.e., verbal) closed-shop agreements is unknown, but the NLRB believes them to be on the rise. It is actually a moot question whether more or fewer workers are under closed-shop conditions since Taft-Hartley." *Id.* at 64. See also SEN. REP. No. 99 Pt. 1, 81st Cong., 1st Sess. 20 (1949); SEN. REP. No. 374, 81st Cong., 1st Sess. 33 (1949); Summers, *Union Powers and Workers' Rights*, 49 MICH. L. REV. 805, 807 n.5 (1951).

See United Ass'n of Journeymen Plumbers & Steamfitters v. Graham, 73 Sup. Ct. 585, 588 n.5 (1953).

44. *E.g., Hearings before Subcommittee on Labor-Management Relations of Committee on Labor and Public Welfare on Hiring Halls in the Maritime Industry*, 81st Cong., 2d Sess. (1950). It has been conceded that the hiring hall is merely a form of the closed shop. *Id.* at 7.

While the LMRA does not purport to regulate union admission and expulsion practices, it prohibits dismissal from employment of paid up workers notwithstanding their hostility toward the union. This mandate produces a peculiar anomaly. Heretofore, governmental policy encouraged union membership and worker participation in determination of employment terms. In effect, the federal government sponsored a program of industrial democracy by urging the employee to cast his vote in union proceedings and thereby share in prescribing employment relationship provisions. But the Taft-Hartley Act informs the worker that he need not actively participate in the union. In fact, the worker owes no allegiance to the union save monetary contribution because only for failure to pay dues can the union legally demand dismissal from employment.

Congressional and state legislation outwardly encourages union development but simultaneously denies union security in an effort to shield job opportunities from abusive union membership practices. Yet clearly, the measures adopted to protect the right to work neither admit of effective enforcement nor further the aim of industrial democracy. Therefore, since they fail to accomplish their intended purpose, if laws prohibiting union security impose any substantial detriment on other desirable policies, their retention cannot be tolerated.[45]

Intelligent appraisal of the security dilemma constrains reflection on the importance of collective bargaining and the latent effects of present statutes on the bargaining process.

The Function of Union Security in Collective Bargaining

Federal law declares that collective bargaining shall characterize labor-management relations.[46] There is but a single function of the

45. More extensive treatment of the topics, protection of the right to work and right to join a union, lies beyond the contemplation of this note. They have been extensively examined in other discussions. *E.g.*, Lenhoff, *The Right to Work: Here and Abroad*, 46 ILL. L. REV. 669 (1951); Summers, *supra* note 36.

46. "It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining. . . ." § 1. This portion of the National Labor Relations Act's declaration of policy has remained unchanged since enactment in 1935. It is interesting to note the emphasis placed on collective bargaining by Taft-Hartley. Employees receive the assurance that they "shall have the right to . . . bargain collectively. . . ." § 7. The employer is admonished that he commits an unfair labor practice by refusal "to bargain collectively with the representative of his employees. . . ." § 8(a)(5). Similarly, the union is warned not "to refuse to bargain collectively with an employer. . . ." § 8(b)(3).

Popularly and superficially the bargaining process is restricted to negotiation of and agreement to employment contract provisions. That is a significant portion of

bargaining process: Resolution of labor-management controversies. All other accomplishments are complementary attributes of that process, rather than distinct functions. Some persons tend to regard bargaining as a cure-all which should invariably solve even the most acute disagreements without resort to strikes or other forms of economic coercion.[47] Indeed, proponents of collective bargaining concede that often the *threat* of such coercion promotes effectiveness in the bargaining process and expedites resolution of disagreements.[48] Collective bargaining embraces the possibility of coercion not as a bludgeon, but as a result of failure to resolve disagreements by cooperation.

Although collective bargaining does not guarantee perfect labor-management relations,[49] the undesirability of alternative approaches to resolution of employer-employee differences, governmental inaction or governmental regulation, justifies tolerance of the bargaining process. Governmental inaction produced the conditions prevalent previous to adoption of the National Labor Relations Act.[50] Reversion to that environment would merely re-create an industrial economy with no place for unions or union-management relations and, consequently, no hope for effective collective bargaining. Congressional regulation of industrial

collective bargaining practice and procedure, but the written agreement composed by union and management negotiators also creates the future rights and responsibilities of the parties to that agreement. Occurrences previous and subsequent to the formally executed contract constitute integral elements of collective bargaining and often exceed the agreement itself in significance.

47. Section 7 of the LMRA specifically affirms the employee's right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."

48. "A right to engage in industrial warfare is essential to the cause of industrial peace under the collective-bargaining system." TAYLOR, *op. cit. supra* note 32, at 22.

49. Collective bargaining affords an imperfect process by which to solve union and management differences. Too often imperfection results from a lack of appreciation for the other party's position and circumstances. Not seldom the parties submit ultimatums which reveal no contemplation of the ramifications which their selfish desires impose on the public interest.

50. Prior to 1935 the federal government expressed no policy pertaining to negotiations or attempted negotiations between the employee or his representative and the employer. Of course, collective bargaining presupposes an employee representative with whom the employer can deal, but several factors made governmentally unencouraged bargaining improbable because unions' efforts to gain recognition as the employees' representative generally failed. Few employers welcomed unions into their employment relationship. Management developed several devices by which to impede union infiltration into working forces such as the company spy, yellow dog contract, and black list. Society shared management's unfavorable view of organized labor to no little extent, perhaps because unions relied on the strike to gain recognition (no other device sufficed). At times the strike degenerated into a pitched battle of violence, loss of life, and destruction of property necessitating use of the militia to restore order. Of course, unfavorable publicity followed. And too, courts justifiably deemed themselves obligated to protect life and property but often issued injunctive decrees which afforded the prayed for protection and, as well, sounded the death knell for organizational endeavors of the employee.

relations would obviate private negotiation and stifle voluntary cooperation and incentive. No advantage or recompense could accrue from collective bargaining because legislation would dogmatically resolve disagreements by mandate. Issues which now are resolved by bargaining would become controversies in political campaigns. But failure of the bargaining process to resolve disagreements between union and management will inevitably necessitate substitution of governmental mandate for private negotiation. The undesirability of legislatively pre-determined labor relations warrants utilization of every justifiable means to insure the effectiveness of collective bargaining.

Successful collective bargaining basically requires both a suitable environment and union and management personnel who share a proper state of mind. These seemingly easily supplied prerequisites have not yet been attained. The Wagner Act was based on the premise that when an environment conducive to negotiation had been supplied the parties would resolve their differences by the bargaining process.[51] That this result did not follow was largely due to the fact that the parties exhibited neither the reciprocal consideration and understanding of the other party's position nor an appreciation of the public's interest in peaceful resolution of labor controversies. Fortunately, Congress, in passing the Wagner Act, apprehended that proper bargaining attitudes could not be created by legislation. Unfortunately, in the Taft-Hartley Act, Congress sought to substitute regulation of collective bargaining for the deficiency of proper attitudes.[52] While attainment of proper bargaining attitudes

51. Advocates of collective bargaining promulgated the notion that a balance of power between union and management would propitiate their differences. Unfortunately, the balance of power ideology found no more success in labor relations than in international relations. Perhaps this arrangement could have effected complete attainment of congressional intent to assure successful private negotiation of differences but for the philosophy that the parties gathered at the bargaining table as essential preparation for disagreement. This philosophy injected bellicose attributes into collective bargaining and prepared union and employer for an economic conflict and display of stamina. Admittedly not all attempts to bargain resolved themselves in this manner, but many did and often in industries with which the public interest was inextricably involved. The schism between this practice and the sought for successful private negotiation procedure widened until remonstrance made alteration imperative because unions abused their power which now often exceeded that of the employer.

In November, 1945, a Labor-Management Conference was convened to afford all interested parties an opportunity to resolve controversies and determine plausible courses of action for future labor relations. The Conference was not without success, but it fell far short of evolving a workable procedure by which to insure peaceful union-management relations. For an extensive analysis of this step in the development of union-management collaboration see TAYLOR, *op. cit. supra* note 32, at 205-244.

52. The LMRA reveals a mutation of government policy, from the premise that union and management can better resolve all issues of the employment relationship by private negotiation to the notion that some facets of the relationship (*e.g.*, union security) can more appropriately be determined by mandate.

depends largely upon the parties involved, creation of an atmosphere conducive to that end rests with Congress.[53]

Recognition of the union as the representative of the employees essentially precedes all bargaining relations. The Taft-Hartley Act, as did the Wagner Act, provides for union-recognition elections,[54] thus precluding the necessity for recognition strikes which were prevalent prior to federal encouragement of collective bargaining.[55] The employer commits an unfair labor practice by refusing to bargain with an NLRB certified union.[56] The employees possess authority to decertify their union bargaining representative by election.[57] This power presumably assures that the union will remain responsive to employee demands and needs. Manifestly, union conduct is directed toward perpetuation of recognized status, for without it the union has no collective bargaining utility. Comprehension of this phenomenon explains union efforts to secure a permanently recognized position in industrial government. Anything which threatens a union's recognition jeopardizes its existence and, because bargaining requires a union, threatens the very process of collective bargaining.

Subsequent to enactment of the Wagner Act, union security supplanted union recognition as the primary goal of the labor movement.

53. Note well the paradox which Congress effectuated. Collective bargaining, which presumed that private negotiation can better solve labor-management discord than can governmental fiat, underwent direct statutory regulation. Union and management cannot obey statutory decrees to negotiate freely when subsequent decrees prohibit bargaining for certain employment provisions. Section 302, regulation of welfare funds, constitutes an excellent example of governmental control of heretofore privately determined stipulations. If collective bargaining affords a superior process for settlement of employee-employer conflicts, full support should be accorded that process; but if statutory determination contributes better results, resort to that method should prevail. Current practice attempts to combine both procedures with remarkable unsatisfactoriness.

France has recently begun a return from governmentally regimented labor relations to free collective bargaining. Sturmthal, *Collective Bargaining in France,* 4 IND. AND LAB. REL. REV. 236 (1951).

54. Section 9(c) of the Wagner Act and § 9(c)(1) of the Taft-Hartley Act designate the election process.

55. There can be no collective bargaining if the employees have no representative with which management can negotiate. Pre-Wagner Act union-management relations did not often develop into a bargaining process because the employer seldom recognized the union as the representative of his employees. If the union had not the allegiance of sufficient workers, the employer would be picketed to gain employee support and to induce the employer to acknowledge the union. When the employees were already faithfully organized, a recognition strike endeavored to persuade the employer that the union represented his workers. Neither contributed consistent success as is evidenced by membership in the American Federation of Labor which never rose as high as three million members at any time during the period 1923 to 1932. Source of membership data: 37 MONTHLY LAB. REV. 1128 (1933).

56. § 8(a)(5). Before certification of the union as bargaining representative, it must receive approval by the majority of workers in the unit. § 9.

57. § 9(e)(2).

Unions desire security because it means control of job opportunities, but, of even larger significance, union security performs functions essential to the effectiveness of collective bargaining. Union security devices provide the *only* means by which the union can achieve continued recognition, which is, of course, a prerequisite to collective bargaining. Thus, union security has a dual function indispensable to collective bargaining: It promotes acquisition of proper bargaining attitudes, and it guarantees recognition of the union throughout the employment contract period.

Realization of the effects of state prohibition of union security on federal collective bargaining policy clothes such legislation with a far deeper significance than mere disruptive influences which naturally ensue as a result of state divergence from congressional policy. Concurrent state and federal union-security regulation does not directly cause current deplorable industrial conditions. But, present laws hamper efforts to eliminate these conditions by collective bargaining. Though the distinction may seem narrow, the consequences which flow from it are broad. State laws which deny unions the use of security measures compel retrogression of union-management relations to conditions corresponding to the pre-Wagner Act environment. By prohibiting union security, the states compel unions to resort to protection of their recognized bargaining status through picketing and strikes. Furthermore, in jurisdictions permitting union-security agreements, collective bargaining receives encouragement because unions can more easily maintain a recognized status, whereas in states prohibiting such devices, union-management relations reflect an unstable union position and consequent obstruction of collective bargaining.[58]

Federal union-security policy depicts a unique departure from conventional congressional action. Rarely does Congress designate a particular national policy and simultaneously encourage the states to legislate so as to impair its effectuation. The practical effect of Section 14(b) of LMRA is congressional authorization of state sabotage of federal collective bargaining policy. Yet recent developments indicate that Congress is aggravating the union-security conflict.

Recent Legislative Developments

The building and construction industry, because of the peculiar intermittent nature of its production process, could not adjust to the LMRA union-security requirements. Employees do not often remain in the employ of one contractor for the 30-day period necessary to make

58. For an examination of the economic repercussions of this condition by Senator Morse see note 30 *supra*.

union affiliation mandatory. More important, this same condition renders certification of a union as a recognized bargaining representative impossible, because the work force rarely becomes sufficiently stabilized to warrant an NLRB certification election. Senate Bill 1973 was introduced to alleviate this condition by exempting the building and construction industry from the operation of Section 14(b).[59] Although the bill was approved by the Senate, adjournment prevented action by the House of Representatives. It is problematical whether the Eighty-third Congress will enact this legislation, but if passed, it would add another discriminatory provision to federal union-security regulation.[60] Congress will have displayed partiality to the building and construction industry in its attempt to compensate for a defect in previous legislation if this proposal becomes law.[61]

Conditions in the building and construction industry warrant remedial legislation, but antagonization of the union-security problem is implicit in the proposed act. If the House of Representatives had concurred with the Senate, the scope of discrimination would have been broadened from that invoked by the states to that of federal partiality for a certain industry as well.[62] Members of building and construction

59. The portion of S. 1973 pertinent here would attach this proviso to § 9(a) of LMRA: *"Provided further,* That nothing in this section or any other section of this act or of any other statute or law of the United States *or of any State or Territory* [emphasis added] shall preclude an employer primarily engaged in the building and construction industry from making an agreement . . . to require, as a condition of employment, membership in such [union] organization on or after the seventh day following the beginning of such employment. . . ." 98 CONG. REC. 5109 (May 12, 1952).

60. The Railway Labor Act has been amended so as to immunize the railway brotherhoods from state union-security bans. 64 STAT. 1238 (1951), 45 U.S.C. § 152 (Supp. 1952). While the Railway Labor Act amendment is equally discriminatory, the railroad industry and its unions have long been the subject of special legislation. For that reason, exemption of the railway unions will probably not have the same effects as S. 1973 would have if it became law.

61. There can be no doubt that the proposed amendment is intended to overrule § 14(b). Acting Chairman Reynolds of the NLRB inquired of the legislators: "Would this language, then, have the effect of overriding State law as to union-security agreements in this one industry?" Senator Humphrey, Chairman of the Subcommittee on Labor and Labor-Management Relations, rejoined: "Well, it would seem to me that that word 'nothing' is rather all-inclusive and comprehensive. I think we could define that word. That means that section 14, so far as this is concerned, is kaput. It is out." *Hearings, supra* note 31, at 74. See also SEN. REP. No. 1509, 82d Cong., 2d Sess. 7 (1952).

62. Some Congressmen are aware of the situation created by concurrent union-security restriction. See note 30 *supra.* In a discussion concerning the efficacy of § 14(b) under another bill, Senator Humphrey uttered this judgment of concurrent security regulation: "Of course, I think that is a sort of distortion on Federal jurisdiction. . . .

"I cannot understand how the United States can legislate in a field in which it declares it has no prerogative to legislate, and can then play footsie and say, 'If North Carolina wants to pass a law regarding union security, the Congress will just retreat.'

unions would be permitted to enjoy the security and benefits of a union shop in every state; but other workers and unions would remain subject to the ramifications of Section 14(b).

The influence of S. 1973 cannot be appraised precisely, but the apparent injustice could be expected to impair collective bargaining in industries not granted special exemption from state laws. Union leaders will quickly comprehend that a failure of the bargaining process nearly brought nation-wide union security to the building and construction trade. They may reason that similar failure in another industry might well make more special relief essential.[63] The Senate has merely rewarded an industry which could not bargain under the restrictions imposed by Section 14(b). Workers and unions may sincerely doubt the good faith of Congress when statutes deny them privileges granted to others, privileges obtained by unsuccessful attempts to bargain.[64] There is little incentive to bargain when greater benefits accrue to those who do not. When failure of collective bargaining commands a premium in the form of special legislative treatment, failure will be commonplace. More unfavorable publicity for collective bargaining shall weaken already skeptical public faith in the bargaining process. And still, Congress depends on the success of collective bargaining to solve union-management discord.

Since collective bargaining seems the most desirable process by which to resolve industrial conflict, the importance of assuring its success cannot be over-emphasized. Congressional labor legislation must encourage the

---

That is just the candid opinion of one member of the committee." *Hearings, supra* note 31, at 75.

63. While testifying before a Senate Subcommittee on Labor, the Acting Chairman of the NLRB answered a question as to the effect of all S. 1973 provisions on the long range stability of the construction industry with this admonition: "I think that if the Congress sees fit to make an exception of the building-construction industry, you are going to have the same request before you to make exceptions of a number of other industries." *Id.* at 80.

The Acting Chairman forewarned: "The problems which have been confronted in this industry are also confronted in the application of the Taft-Hartley law to the maritime industry. They are confronted to a great extent in the motion-picture industry. . . .

"And in the television industry, a new industry, also. . . .

"These problems of the building construction industry are tremendous. There isn't any question about it. But they are also tremendous in a number of other industries. And I am just rather concerned that the Congress will be met with a request to exempt other industries as you go along." *Ibid.* The motion-picture industry did plead its case before the Subcommittee. *Id.* at 106.

64. Note how applicable the following excerpt is to all other industries, as well as the building and construction industry. "The needs of contractors, labor organizations, and employees in this industry are the *same throughout the country.* Failure to meet these needs have resulted in problems which are *Nation-wide and indivisible.* Their impact upon the national economy, and especially upon defense activities, *does not vary from State to State.*" (emphasis added) SEN. REP. No. 1509, 82d Cong., 2d Sess. 7 (1952).

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

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

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

VOLUNTARY FALSE CONFESSIONS: A NEGLECTED AREA IN CRIMINAL ADMINISTRATION

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

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

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

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

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

I

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

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

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

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

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

5. *Id.* at 12.

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

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

II

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

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

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

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

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

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

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

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

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

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

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

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

13. See note 10 *supra*.

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

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

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

---

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

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

16. See note 10 *supra.*

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

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

19. See note 10 *supra.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

III

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

56. 3 *Id.* § 999.

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

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

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

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

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

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

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

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

62. 3 WIGMORE, EVIDENCE § 866 n.1, 2.

63. 3 *id.* § 866 n.3.

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

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

IV

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

74. See note 21 *supra.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PROTECTION OF THIRD PARTIES UNDER CONTRACTUAL LIMITATIONS OF LIABILITY

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

---

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

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

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

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

to the goods to a sum relatively small in relation to their value.[1] Such stipulations, commonly termed limitations of liability, have received varied treatment by the courts.[2] In many situations courts have held them void as against public policy.[3] Some courts have refused to give them effect on the theory that the customer had no notice of the condition and did not consent thereto.[4] A significant number of jurisdictions, however, have upheld this type of limitation as being a permissible area of contract.[5] A debate on the merits of these differing positions is not essential to consideration of a question which arises in those jurisdictions which give effect to the limitations of liability. Who, other than the contracting party, is entitled to the protection afforded by the stipulations in question?

The Ohio case of *Employers' Fire Ins. Co. v. United Parcel Service*[6] illustrates this problem. A Mrs. Oberhelman contracted with Jenny, Inc. to store her fur coat for the summer. For purposes of limiting liability for possible damage to the coat, the value thereof was set at $100.00.[7] The defendant, United Parcel Service, was instructed by Jenny, Inc. to pick up the coat and deliver it to them. During delivery, the coat was damaged.

Since Ohio gives effect to contractual limitations of liability, it is obvious that Jenny, Inc. could be held liable only to the extent of

1. *E.g.,* liability for damage to a mink coat was limited to $100.00, hardly market value. Employers' Fire Ins. Co. v. United Parcel Service, 89 Ohio App. 477, 99 N.E.2d 794 (1950).

2. See generally, Pierre Dessaulles, *Clauses of Non-Liability,* 7 Rev. du B. 147 (1947); R. J. Guglielmino, *Contracts; Legality; Exemptions from Liability for Negligence,* 20 CORNELL L. Q. 352 (1935); McClain, *Contractual Limitations of Liability for Negligence,* 28 HARV. L. REV. 550 (1915); C. H. Rehm, *Contracting Against Liability for Negligent Conduct,* 4 Mo. L. REV. 55 (1939); Notes, 37 COL. L. REV. 248 (1937); 35 MINN. L. REV. 197 (1951); 25 TULANE L. REV. 268 (1951); 4 VAND. L. REV. 346 (1951).

3. *E.g.,* Kaylor v. Magill, 181 F.2d 179 (6th Cir. 1950); Housing Authority of Birmingham Dist. v. Morris, 244 Ala. 557, 14 So.2d 527 (1943); Apache Ry. Co. v. Shumway, 62 Ariz. 359, 158 P.2d 142 (1945); Freigy v. Gargaro Co., 223 Ind. 342, 60 N.E.2d 288 (1945); Wessman v. Boston & M. Ry. Co., 84 N.H. 475, 152 Atl. 476 (1930); Tankele v. Texas Co., 88 Utah 325, 54 P.2d 425 (1936).

4. The leading case on the requirement of notice is The Majestic, 166 U.S. 375 (1897); see also, Jones v. Great Northern Ry. Co., 68 Mont. 231, 217 Pac. 673 (1923); Ross v. Pan American Airways, Inc., 299 N.Y. 88, 85 N.E.2d 880 (1949).

5. *E.g.,* Golden v. National Life & Accident Ins. Co., 189 Ga. 79, 5 S.E.2d 198 (1939); Globe Home Improvement Co. v. Perth Amboy Chamber of Commerce Credit Rating Bureau, 116 N.J.L. 168, 182 Atl. 641 (1936); Paddle v. Atlantic Basin Iron Works, 91 N.Y.S.2d 336 (1950); Barrett v. Couragon, 302 Mass. 33, 18 N.E.2d 369 (1939); Monsanto Chemical Co. v. American Bitumuls, 249 S.W.2d 428 (Mo. 1953).

6. 89 Ohio App. 447, 99 N.E.2d 794 (1950).

7. The coat was purchased by Mrs. Oberhelman in 1943 for $2,028.35 and was appraised in 1945 at $3,500.

$100.00.[8] It is similarly clear that if the damage had been negligently caused by a complete stranger to the transaction, *e.g.*, the driver of another vehicle, full recovery could be obtained. The extent to which the delivery company, or its negligent driver is pecuniarily liable seems to present a more difficult question. To the Ohio court, however, the answer seemed easy—"[W]hen it [Jenny, Inc.,] engaged the defendant to get the coat for it, it clothed the defendant with all the authority and rights which it, the principal, had against the owner, including the right to have liability limited to $100.00."[9] Thus, the delivery company successfully invoked the liability limitation embodied in a contract to which it was not a party.

If it is assumed that limitations of liability are valid, it logically follows that this could be a proper result. Any doctrinal objections which might arise, can be met by considering the third party a donee beneficiary of the contract. Contemporary legal theory widely allows such parties to assert rights under the contract.[10] Such a result would be manifestly correct if the governing contract expressly provided that the stipulation was intended to protect employees, agents and independent contractors handling the goods under the contract. However, the contract in question, as is undoubtedly true in the great majority of similar agreements, did not explicitly or even impliedly refer to the rights of third parties under such stipulations. The contracts are silent or at best vague with respect to the scope of protection intended. In lieu of express categorization of the parties to be benefitted thereby, the question arises as to what factors should be considered in determining who may take advantage of liability limitations.

In the *United Parcel Service* case,[11] the only authority or rationalization advanced was Section 347 of the Restatement of Agency which states that "[a]n agent who is acting in pursuance of his authority has such immunities of the principal as are not personal to the principal." Use of the Restatement of Agency suggests that the solution to the problem will be determined on agency principles. There is at least a negative implica-

8. It seems to be generally accepted, however, that the limitation would have no effect if the damage was inflicted intentionally. Arizona Storage & Distributing Co. v. Rynning, 37 Ariz. 232, 293 Pac. 16 (1930); Union Construction Co. v. Western Union Telegraph Co., 163 Cal. 298, 125 Pac. 242 (1912); Page v. Allison, 173 Okla. 205, 47 P.2d 134 (1935).

9. Employers' Fire Ins. Co. v. United Parcel Service, 89 Ohio App. 447, 456, 99 N.E.2d 794, 799 (1950).

10. Baurer v. Devenis, 99 Conn. 203, 121 Atl. 566 (1923); RESTATEMENT, CONTRACTS § 135 (1932); Corbin, *Contracts; For the Benefit of Third Parties*, 46 L. Q. REV. 12 (1930); Notes, 27 N.D.L. REV. 347 (1950); 1 SYRACUSE L. REV. 334 (1949).

11. 89 Ohio App. 447, 99 N.E.2d 794 (1950).

tion that independent contractors might be treated differently.[12] Paradoxically, the defendant in each of the recent cases in point which cite the Restatement of Agency appears to have been an independent contractor, although the issue is not discussed in either opinion.[13] Even assuming that the third party is an agent or that the rationale of Section 347 applies also to independent contractors, it is doubtful that the section has been properly applied to this type situation, for its application must be predicated on the theory that limitations of liability are "immunities" and on the supposition that they are non-personal.

That limitations of liability are "immunities" seems debatable. The term, immunity, defies precise definition.[14] Little attempt is made by the Restatement to give it fuller meaning,[15] and judicial use of the term has been anything but consistent. An immunity has been held synonomous with[16] and distinguished from[17] a privilege"; it has been said to be equivalent to an "exemption"[18] and a "franchise";[19] and it has been further confused by judicial interpretation of the privileges and immunities clause of the federal constitution.[20] Essentially, an immunity operates to

12. *E.g.*, the doctrine of respondeat superior applies generally when an agent commits a harm, but not when an independent contractor is responsible. Divines v. Dickenson, 189 Iowa 194, 174 N.W. 9 (1919); Picket v. Waldarf System, 241 Mass. 569, 136 N.E. 64 (1922); Newman v. Sears, Roebuck & Co., 77 N.D. 466, 43 N.W.2d 411 (1950).

13. Although the opinions give little information, it is a reasonable assumption that both third parties involved were separate corporations of considerable size. It does not seem that the tasks they performed were under any great degree of control by the contracting parties. A. M. Collins & Co. v. Panama R.R. Co., 197 F.2d 893 (5th Cir. 1952); Employers' Fire Ins. Co. v. United Parcel Service, 89 Ohio App. 447, 99 N.E.2d 794 (1950).

14. See Hohfield, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913), 26 YALE L.J. 710 (1917); Corbin, *Legal Analysis and Terminology*, 29 YALE L.J. 163 (1919).

15. The Restatement does give several examples of accepted immunities: (1) Municipality not liable for harms caused by a fire truck; (2) Parent not liable for punishment of child; (3) Landowner not liable for injury to unknown trespasser. The Restatement indicates that only the latter of these is applicable to an agent. See Comments, RESTATEMENT, AGENCY § 347 (1933).

16. *Ex parte* Levy, 43 Ark. 42, 54 (1884); Van Valkenburg v. Brown, 43 Cal. 43, 48 (1872).

17. Phoenix F. & M. Ins. Co. v. Tennessee, 161 U.S. 174 (1896).

18. Buchanan v. Knoxville & O.R.R., 71 Fed. 324, 334 (6th Cir. 1895); State v. Smith, 158 Ind. 543, 63 N.E. 25 (1902).

19. Lake Drummond Canal & Water Co. v. Commonwealth, 103 Va. 337, 49 S.E. 506 (1905); Lawrence v. Times Printing Co., 22 Wash. 482, 490, 61 Pac. 166, 169 (1900).

20. The privileges and immunities guaranteed by the fourteenth amendment seem to be of a nature independent of common law or statutory immunities. See Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939), holding that the right to use public streets is a "privilege and immunity"; Douglas v. City of Jeannette, 130 F.2d 652, 655 (3rd Cir. 1942), saying that freedoms of speech, press, worship, and assembly are not "privileges and immunities"; United States v. Sutherland, 37 F. Supp. 344, 345 (N.D. Ga. 1940), saying that the right to due process of law is a "privilege and immunity." See also, State v. Griffen, 226 Ind. 279, 79 N.E.2d 537 (1948).

absolve one who has inflicted a harm from liability.[21] This does not mean that a harm was not committed, but only that there may be no recovery therefor.[22] While limitations of liability also possess this attribute of non-liability, there seem to be important differences between recognized immunities[23] and limitations of liability, both in the manner and purposes of their creation. The usual immunity is a result of public policy as articulated by a statute or by the common law.[24] It originates in the machinery of government and in theory is an expression of the will of the body politic. The immunity exists because the legislatures or the courts have determined that the general public will be better served if a certain class of persons in a particular situation be free from liability for harms which result from their acts. Thus, a benefit has been conferred which is contrary to the general principles of law;[25] or it might be said that the class of persons is relieved from a burden which the general public bears.[26] It seems reasonable, therefore, that the courts, when giving effect to an "immunity," should consider the public interest which engendered its creation and extend the scope of protection thereof only if it is manifest that the public interest will be better served thereby. Contractual limitations of liability are not, however, within the purview of this type of immunity. Rather they are a product of private negotiation, representing expressions of private interests to which the contracting parties have agreed. No social evil is corrected by the limitation of liability nor is any public purpose effectuated which might importune broad application of the limited liability. These distinctions at least raise a doubt as to the validity of characterizing limitations of liability as "immunities" within the meaning of the Restatement of Agency.

Even if contractual limitations of liability are considered to be within a broad definition of the term "immunity," it still seems questionable that the Restatement rule is immediate authority for extending the benefits of such clauses to third persons.[27] Granted that limitations of liability

21. Leatherwood v. Hill, 10 Ariz. 243, 89 Pac. 521 (1906).
22. U.S. v. Swift, 186 F. Supp. 1002, 1017 (N.D. Ill. 1911).
23. See note 14 *supra.*
24. For example, the immunity granted to hosts by automobile guest statutes expresses a policy against collusive claims against insurance companies and a policy that one who is gratuitously rendering a service should not be liable for ordinary negligence. Kriezie v. Sanders, 23 Cal.2d 237, 143 P.2d 704 (1944); Robb v. Ramey Associates, 1 Terry 520, 14 A.2d 394 (Del. 1940); Russel v. Pilges, 113 Vt. 537, 37 A.2d 403 (1944). As these policies apply to agents also, the immunity has generally been extended to them. Herzog v. Mittleman, 155 Ore. 624, 65 P.2d 384 (1937); Richard v. Parks, 19 Tenn. App. 615, 93 S.W.2d 639 (1935).
25. *Ex parte* Levy, 43 Ark. 54 (1884).
26. Lonas v. State, 3 Heisk, 287, 306 (Tenn. 1871).
27. It seems that the same arguments advanced for not terming limitations of liability "immunities" might also serve as arguments for a rule that such agreements

may be either personal or non-personal, the establishment of this attribute should be determined by what the parties to the contract intended.[28] Courts which have relied upon the Restatement, however, have rather summarily assumed that limitations of liability are non-personal.[29] In effect, this manner of application becomes a means of supplying, rather than ascertaining, the parties' intent.

As is true with respect to other contract problems, the court's function in this area should be to ascertain the intention of the contracting parties. Whether this is accomplished by utilization of the Restatement's personal-non-personal dichotomy or by initial examination of the contract seems irrelevant. Resolution of the issue in this manner would be more equitable than having the result turn on nebulous and arbitrary distinctions between agents and independent contractors,[30] although in certain situations, such a distinction might be one helpful factor in determining contractual intent.[31] Certainly there are other objective criteria which the courts might seize upon in ascertaining intent. For example, the customer may agree to the liability limitation only because he had faith in the skill and prudence of the individual with whom he contracts.[32] If the work is then delegated, it would be harsh to deny the customer full recovery from the careless third party. The significance of this factor would often depend upon the purpose for which the contract is made. It should be of greater importance, for example, where the contract is for the repair of a watch than where it is for parking space for an automobile.

---

are "personal" rather than non-personal. That is, an immunity would be personal unless there is an underlying public policy which would be served by permitting third parties, as well as the contracting party, to benefit. There is, however, no apparent public policy underlying a limitation of liability.

28. The notion that some contracts are personal is not new. For example, it is a familiar rule of law that personal contracts are non-assignable. Rochester R.R. v. Rochester, 205 U.S. 237 (1906); Paige v. Faure, 229 N.Y. 114, 127 N.E. 898 (1920). The determination of whether the contract is personal and non-assignable is dependent upon the intention of the parties to the contract as expressed or implied from the circumstances. Crana Ice Cream Co. v. Terminal Freezing & Heating Co., 147 Md. 588, 128 Atl. 280 (1925).

29. A. M. Collins & Co. v. Panama R.R., 197 F.2d 893 (5th Cir. 1952); Employers' Fire Ins. Co. v. United Parcel Service, 89 Ohio App. 447, 99 N.E.2d 794 (1950).

30. To have liability turn on whether the defendant is an agent or an independent contractor is to encourage litigation. Further, there is no apparent reason why a limitation of liability should be granted to an agent and denied to an independent contractor.

31. *E.g.*, if the contract states the limitation is to apply to those under control of the contracting party, it would be a fair inference that agents, but not independent contractors, were included.

32. Paige v. Faure, 229 N.Y. 114, 115, 127 N.E. 898, 899 (1920) (Held that a contract granting an automobile agency was non-assignable since it involved a personal relationship between the promisee and promisor).

A criterion deemed significant by one court was whether the parties to the contract foresaw that various employees, agents and independent contractors would be handling the goods.[33] The theory behind this is that the parties, knowing that others would necessarily be involved in performing the contract, must have intended the limitation to apply to them as well as to the contracting party. One could as well argue, however, that if the parties knew others were to handle the goods, they would have explicitly stated any exceptions intended to apply to the ordinary liabilities of such parties.

Perhaps the most significant factor is that of insurance, for in many contracts here in question the customer is offered alternative rates.[34] The lower charge provides for limited liability, while the higher rate allows full recovery. The difference in rates is thus in the nature of an insurance premium. If the customer has already insured the goods or if he considers himself self-insured, he will contract at the lower rate. Certainly this is some indication that he intends the stipulation to have broad coverage and to rely upon his insurance for indemnification in case of injury to his property.

Although other criteria may appear convincing in individual cases, it is apparent that in a large percentage of the cases the circumstances surrounding the contract will not provide any degree of certainty as to the intent of the parties. It is quite likely that the parties had no particular intent; in such situations the decision will be little else than a calculated guess as to what their intentions might have been. At this point, solution of the problem involves a policy question as to whether the courts should freely extend or narrowly restrict the scope of the limitations. Recent cases seem to have adopted an attitude of liberally extending the protection of the stipulation. A stricter interpretation seems more desirable. In view of the general principle that one should be answerable for his tortious conduct,[35] it would be better to resolve any doubt as to the intent of the parties against the third person who attempts to set up the limitation of liability as a defense.

The courts have employed a similar approach in analogous situations arising under workmen's compensation laws. In this area also an exon-

33. "That the carrier would engage such services [those performed by the defendant] must have been contemplated by the parties." A. M. Collins & Co. v. Panama R.R., 197 F.2d 893, 896 (1952).

34. ". . . [T]he undersigned hereby agrees to have effected for the benefit of the depositor insurance on the articles listed in this receipt . . . for the value set opposite each item, which value shall represent respectively the limit of liability for loss or damage to the same." Consideration for the storage is then established in line with the value of the items stored. Storage receipt from Kisters' Furs, Bloomington, Ind.

35. Second National Bank v. Samuel & Sons, 12 F.2d 963, 968 (2d Cir. 1926).

eration from liability is involved. The employee, by agreeing[36] to recover from the workmen's compensation fund in the event of personal injuries, relinquishes the common law cause of action which he might otherwise have against his employer.[37] The problem has arisen as to whether the employee has also relinquished his common law actions against various classes of third persons who actually caused his injury.[38] Most workmen's compensation statutes have provisions which purport to define the rights of injured employees to sue negligent third persons;[39] such provisions, however, do not clearly delineate the classes of third persons which are to benefit by the freedom from suit which the employer enjoys;[40] consequently, the rights of injured employees to sue third persons are, to a great extent, dependent upon the manner in which the provisions have been interpreted by the courts. In general, the statutes have been strictly construed, preserving whenever possible the injured employee's right to sue.[41] Some courts have said that only classes of persons expressly exempted from suit by the terms of the statute can claim

36. Though statutory in the sense that legislatures have drafted the statutes, the courts have, for the most part, said that workmen's compensation rights and obligations are contractual. The theory is that the employee must agree to the provisions of the statute before such provisions become binding upon him. Beausoleil's Case, 321 Mass. 344, 73 N.E.2d 461 (1948); Fauver v. Bell, 192 Va. 518, 65 S.E.2d 575 (1951).

37. For discussions of the development of compensation as a remedy for injured workmen see DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION, 1-26 (1936); HOROVITZ, WORKMEN'S COMPENSATION, 7-10 (1944).

38. Employees frequently attempt to recover in common law actions rather than accept awards from compensation funds in view of the fact that the measure of damages may be substantially different. The schedules for statutory compensation are based upon a loss in earning power. See Indiana State Housing Ass'n v. Clack, 110 Ind. App. 504, 39 N.E.2d 451 (1942); Miller v. James McGraw Co., 184 Md. 529, 42 A.2d 237 (1943); Branham v. Denny Roll & Panel Co., 223 N. C. 233, 25 S.E.2d 865 (1943). In a common law action, however, such factors as pain, suffering, mental anguish, and disfigurement, as well as loss in earning power, are factors in determining damages. MCCORMICK, DAMAGES, 299-322 (1935).

39. *E.g.*, 44 STAT. 1440 (1927), 33 U.S.C. § 933 (1946) (Longshoremen's and Harbor Workers' Compensation Act); IND. ANN. STAT. § 40-1213 (Burns 1952); MASS. ANN. LAWS c. 152, § 15 (1950); N.Y. WORKMEN'S COMPENSATION LAW § 29; Va. Code § 65 (1950). West Virginia seems to be the only state which does not have a third party provision in its Workmen's Compensation Law.

40. The statutes commonly provide that the injured employee may maintain a common law action against persons "other than the insured." 44 STAT. 1440 (1927), 33 U.S.C. § 933 (1946).

41. Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1945); Wells v. Lavitt, 115 Conn. 117, 160 Atl. 617 (1932); Albert v. Hudson, 49 Ga. App. 636, 176 S.E. 659 (1934); Labuff v. Worcester Consol. R.R., 231 Mass. 170, 120 N.E. 381 (1918); Reynolds v. Grain Belt Mills Co., 229 Mo. App. 380, 78 S.W.2d 124 (1934); Hall v. Hill, 158 Misc. 341, 285 N.Y. Supp. 815 (Sup. Ct. 1936) (although the statute said that workmen's compensation was to be the "exclusive remedy"); Shelter v. Grobsmith, 143 Misc. 380, 257 N.Y. Supp. 353 (Sup. Ct. 1932).

freedom from liability, with the consequence that an employee can usually maintain an action against any person other than his employer.[42]

The principle of strict construction has also found expression in judicial interpretation of statutes in derogation of the common law.[43] Statutes of this sort are seldom given effect beyond their clear and unequivocal terms,[44] with the result that persons not plainly within the statute's protective scope have not been allowed to benefit.[45] Limitations of liability are in derogation of the common law, and it seems that such contracts should likewise be strictly construed.[46] The courts would be hypocritical in adopting other than a policy of restricting the scope of protection of such stipulations. Limitations of liability are not favored by the law;[47] they are said to promote negligence;[48] they are often imposed upon the customer by the superior bargaining power of the other party.[49] Such clauses are upheld only when the courts feel that the interest in preserving and promoting freedom of contract outweighs their disposition to void such agreements.[50] To liberally extend protection of liability limitations to third persons would be anomalous in light of judicial imposition of strict requirements for creation of a valid limitation of liability between the contracting parties.

---

42. McGann v. Moss, 50 F. Supp. 573 (W.D. Va. 1943); Zimmer v. Casey, 296 Pa. 529, 146 Atl. 130 (1929).

43. Thompson v. Thompson, 218 U.S. 611 (1910); Mulford v. Davey, 64 Nev. 506, 186 P.2d 360 (1947); Crayton v. Larabee, 220 N.Y. 493, 116 N.E. 355 (1917); Weis v. Weis, 147 Ohio St. 416, 72 N.E.2d 245 (1947).

44. Kidd v. Bates, 120 Ala. 79, 23 So. 735 (1898); Conley v. Conley, 92 Mont. 425, 15 P.2d 922 (1932). The courts seem unwilling to search for the intent of the legislature in such statutes, saying that ". . . no statute is to be construed as altering the rules of the common law farther than its words plainly import." McCarthy v. McCarthy, 20 D.C. App. 195 (1902).

45. Howe v. Meyers, 94 Wash. 563, 162 Pac. 1000 (1917); Weis v. Weis, 147 Ohio St. 416, 72 N.E.2d 245 (1947).

46. "The right of the ship or carrier to limit its liability for negligence to an amount not exceeding $500.00 is in derogation of the common law and must be strictly construed." Holmes, A. M. Collins & Co. v. Panama R.R., 197 F.2d 893, 898 (5th Cir. 1952) (dissenting opinion).

47. Luedke v. Chicago & N.W. R.R., 120 Neb. 124, 231 N.W. 695 (1930); Crew v. Bradstreet Co., 134 Pa. 161, 19 Atl. 500 (1890); see note 2 *supra*.

48. "It seems to us that such contracts [limitations of liability] do induce a want of care, for the highest incentive to the exercise of due care rests in a consciousness that a failure in this respect will fix liability to make full compensation for any injury resulting from the cause." Southern Exp. Co. v. Owens, 146 Ala. 412, 422, 41 So. 752, 754 (1906).

49. If the disparity in bargaining power is marked, the limitation of liability will be declared invalid. Baltimore & Ohio S.W. R.R. v. Voight, 176 U.S. 498 (1900); Cato v. Grendel Cotton Mills, 132 S.C. 454, 129 S.E. 203 (1925). But inequality of bargaining power can be present, and yet not be so great as to invalidate the limitation of liability. Manhattan Co. v. Goldberg, 38 A.2d 172 (Mun. Ct. App. Dist. Col. 1944).

50. Manhatten Co. v. Goldberg, *supra* note 49; California & Hawaiian Sugar Refining Corp. v. Harris County, 27 F.2d 392 (S.D. Tex. 1928).

In the absence of express contractual terms to the contrary, there should be a presumption that third persons were not intended to be freed from liability. Such an approach, if adopted, would generally add certainty to the law in this area without being unduly harsh. It is a simple matter for the businessman to expressly provide for liability limitation of third parties if he so desires. This is particularly true when it is realized that this problem usually emanates from use of a standardized contract. It would seem, also, that such a presumption best fits the tenor of the law which expects an individual to be responsible for his negligent conduct.