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HELEN SILVING

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DEMOCRACY, as government of the people, is government by laymen. Its adherents admit that the judgment of experts may be, in substance, "better" than that of laymen, but claim that there is an overriding moral value in self-government. On the issue of self-determination versus welfare,[1] they have, with varying degrees of success, fought the aristocratic Platonic idea of government by the wisdom of sages as well as the totalitarian idea of government by the charisma of priests and dictators. With the advance of science and technology, they have faced the tempting call for government by experts in the narrower sense of the term, that is, by men of science, economists, psychiatrists, and the like. Recently, the proposition has been advanced that in exchange for apparently slight modifications of established democratic processes of law, science will supply a method of highly reliable objective "truth" finding by court experts.

I. The Legal Issue

Apart from *People v. Houser*,[2] which dismissed an appeal from a conviction based on results of a lie detector test, consented to by the accused, which showed that he lied when he denied having committed the crime of which he stood indicted, there is no clear American authority for admission of lie detector tests or of tests applying drugs to prove or disprove facts directly in issue upon trial. Nor is use of these so-called "objective tests" [3] for such a

* Research Associate in Law, Harvard Law School. LL.B., Columbia, 1944.

[1] Self-determination is not the exclusive ideal of democracy. Government by the people must to some extent yield to government for the people. See Silving, *The Conflict of Liberty and Equality*, 35 Iowa L. Rev. 357, 380–81 (1950). However, self-determination is the principal issue involved in the ideological struggle of democracy versus autocracy, which often also claims to serve the people's welfare and which, indeed, alleges that its methods are more efficient and thus better suited to reach this goal than are the methods of democracy.

[2] 85 Cal. App. 2d 686, 193 P.2d 937 (1948).

[3] There are three types of "objective tests": (1) purely psychological tests; (2) utilizing drugs; and (3) so-called "lie detector" tests. The latter two are also

purpose being seriously advocated. Except within certain specific contexts — foremost among them determination of mental capacity to stand trial [4] — courts have overwhelmingly rejected such tests as unreliable.[5] In legal literature, however, some of the most prominent lawyers and psychiatrists have recently proposed that testimony as to results of these tests be admitted for limited purposes, such as testing the sanity or judging the character of the examinee.[6] They point out particularly that when certain drugs or instruments are applied to an examinee, the expert has a better opportunity to evaluate his psychological structure, and thus to judge whether he possesses specific traits relating to the act charged. The argument is hence advanced that to the extent

based on the psychological assumptions of the purely psychological association test, but in the second type drugs are used to accelerate the reactions of the examinee, and in the third a mechanical device is used to record the physiological reactions said to accompany certain psychological associations. All these tests require interpretation of the examinee's responses by the examiner and are, therefore, "objective" in a limited sense only.

The psychological association test was described by Freud in a lecture delivered in 1906, *Psycho-analysis and the Ascertaining of Truth in Courts of Law*, in 2 COLLECTED PAPERS OF SIGMUND FREUD 13 (Riviere transl. 1924). It is based on the experience that people's mental associations are not coincidental but are rather causally determined, so that to each stimulus word there corresponds in the mind of the person under examination a "complex," that is, a group of ideas having an influence on the reaction to that stimulus word. When using such stimuli, it is possible to determine "whether a given complex (*e.g.*, knowledge of the crime under investigation) is present in the subject under examination by a study of the associations given as reactions." *Ibid.* For discussion of this and other psychological tests see MÖNKEMÖLLER, PSYCHOLOGIE UND PSYCHOPATHOLOGIE DER AUSSAGE 144–53 (1930). On tests using drugs, see Dession, Freedman, Donnelly, & Redlich, *Drug-Induced Revelation and Criminal Investigation*, 62 YALE L.J. 315 (1953) (author hereinafter cited as Dession); Muehlberger, *Interrogation Under Drug Influence, The So-Called "Truth Serum" Technique*, 42 J. CRIM. L., C. & P.S. 513 (1951). "Lie detector" tests are discussed in INBAU & REID, LIE DETECTION AND CRIMINAL INTERROGATION (3d ed. 1953); Levitt, *Scientific Evaluation of the "Lie Detector,"* 40 IOWA L. REV. 440 (1955).

[4] See People v. Esposito, 287 N.Y. 389, 397, 39 N.E.2d 925, 928 (1942).

[5] See Wicker, *The Polygraphic Truth Test and the Law of Evidence*, 22 TENN. L. REV. 711 (1953), for citation and discussion of sixteen appellate decisions ruling on the question of admissibility of objective tests in American courts.

Note that psychiatric testimony concerning credibility of a witness has only recently been admitted. United States v. Hiss, 88 F. Supp. 559 (S.D.N.Y.), *aff'd*, 185 F.2d 822 (2d Cir. 1950), *cert. denied*, 340 U.S. 948 (1951).

[6] See Dession, *supra* note 3; Wicker, *supra* note 5; INBAU, SELF-INCRIMINATION (1950); *cf.* Gagnieur, *The Judicial Use of Psychonarcosis in France*, 40 J. CRIM. L. & C. 370 (1949). For a judicial view supporting the admissibility of such tests, see Boeche v. State, 151 Neb. 368, 378, 37 N.W.2d 593, 597 (1949) (concurring opinion).

that the accused's character is involved, the expert psychologist or psychiatrist should examine the accused, using objective tests; that the expert should then testify and submit to cross-examination concerning the method employed and the results of the test. His testimony is expected not to dispense with the function of judge and jury to find ultimate facts, but rather to supply an additional item of evidence which may be evaluated for what it is worth. Nor is this "scientific" method of testing held out as scientifically infallible.[7] It is merely said to be more reliable than the intuitive laymen's psychology at present used in courtrooms, particularly the vague impression gained from the testimony of character witnesses.[8]

A. Present State of the Controversy

Several legal problems are involved in the controversy over the admission of objective testing into our law. Objections based on the lack of scientific accuracy of such tests are being challenged on the ground that evidence need not be conclusive in order to be admissible.[9] If the jury is properly instructed, admission of expert testimony based on scientific tests need not be more preju-

[7] Freud himself pointed out the potential sources of failure:

> You may be led astray in your examination by a neurotic who reacts as though he were guilty even though he is innocent — because a lurking sense of guilt already existing in him assimilates the accusation made against him on this particular occasion. You must not regard this possibility as an idle one . . . .

Freud, *supra* note 3, at 23.

[8] Dession states: "Considering the present state of scientific knowledge . . . a transcript of the interview should definitely not be admissible in evidence." For this is not "truth." But he recommends a limited use of such tests and psychiatric testimony based on them as "simply another — and presumably much more reliable — way of inquiring into personality structure for the same purpose [as that for which testimony of character witnesses is accepted]." Dession, *supra* note 3, at 325–26.

Most adherents of narcoanalysis abroad reject its admission as a means of proof in court, and merely advise its use for the purpose of discovering clues or determining a mental state, such as insanity, the latter use being referred to as "narcodiagnosis," as distinguished from "narcoanalysis" or "narcointerrogatory." See Faucher, *Narcose et Justice*, 74 REVUE PÉNINTENTIAIRE ET DE DROIT PÉNAL [hereinafter REVUE PÉNIT.] 3, 68 (France 1950); statement of Mellor, 74 *id.* at 556; statement of Gagnieur, 74 *id.* at 555–56; statement of Heuyer, 74 *id.* at 551. This position was also taken in an opinion of a committee of the Société de Médicine Légale de France. According to this opinion, the use of narcodiagnosis should be limited to cases where other methods have failed, and the expert should be subject to a duty of secrecy as to all revelations bearing on facts in issue. 25 ANNALES DE MÉDICINE LÉGALE 182, 183 (1945).

[9] See Wicker, *supra* note 5, at 723–25.

dicial to the accused than traditionally admissible evidence bearing on character.[10]

Perhaps the most forceful argument hitherto advanced against the use of objective tests is that based on the privilege against self incrimination.[11] When applied to any individual, the method of testing compels him to disclose his thoughts; he loses control over his verbal expressions; "words [are] taken from his lips." [12] In attempting to refute this argument, the proponents of the method point out that the privilege against self incrimination has always been held to be subject to waiver, which may be effected by the accused's consent to submit to the test [13] or simply by his choice to testify in his own behalf.

An often concurrent argument against admissibility of the objective test is based upon the "confessions rule." [14] Where a suspect, upon being confronted with the results of an objective test to which he has consented, confesses to a crime, it may be argued that the confession is not truly voluntary. But the defect, if any, is cured in our law where an improperly induced confession is later voluntarily repeated.[15] Also, testimony describing the testing operation and the incident conversation between the examiner and the accused has been held admissible precisely for the purpose of showing that the accused was not forced but merely "tricked" into confessing and that his confession was hence "voluntary." [16]

It would thus seem that the armory of our law affords sufficient ammunition for successfully pressing for the admissibility of objective testing,[17] and that the chances of such tests' being admitted increase with their growing scientific reliability. It may be appropriate, therefore, to bring to the attention of lawyers another possible objection to the use of such tests which has not been adequately considered, based upon due process.

[10] See Dession, *supra* note 3, at 342.

[11] For a discussion of the applicability of this privilege to the tests in the light of historical policy, see INBAU, SELF-INCRIMINATION 3, 66 (1950).

[12] Rochin v. California, 342 U.S. 165, 179 (1952) (Justice Douglas, concurring).

[13] In People v. Houser, 85 Cal. App. 2d 686, 193 P.2d 937 (1948), the court held the accused to be bound by his consent to submit to the test and his stipulation that the results be admissible in evidence. An express stipulation as to admissibility seems to be essential. See Orange v. Commonwealth, 191 Va. 423, 439, 61 S.E.2d 267, 274 (1950).

[14] On the kinship of the confessions rule and the privilege against self incrimination, see McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEXAS L. REV. 447, 452–57 (1938).

[15] Lyons v. Oklahoma, 322 U.S. 596, 603 (1944); see Stein v. New York, 346 U.S. 156, 162 n.5 (1953).

[16] Tyler v. United States, 193 F.2d 24 (D.C. Cir. 1951), *cert. denied*, 343 U.S. 908 (1952).

[17] The argument that the testimony of the expert as to answers given by the examinee in the course of the test is inadmissible as hearsay has been refuted in a rather summary manner. We are told that the utterances of the examinee are not used testimonially, that is "as statements of fact to show their truth." INBAU, SELF-INCRIMINATION 67 (1950); see Note, 44 HARV. L. REV. 842, 845 (1931).

B. *Due Process as Freedom of Defense*

The concept of due process evolves from historical precedent, and in the course of American legal history courts have had no occasion to rule on its applicability to the use of word association tests, narcoanalysis, polygraphs, and the like. However, "due process" is said not to have been frozen "at some fixed stage of time or thought," but rather to be adaptable to "continuity and . . . change in a progressive society." [18] Although the history of due process affords no direct answer with regard to the use of pentothal or polygraph, it does establish principles of judicial procedure which, it is submitted, exclude these devices. Paramount among these principles is the rule that judicial procedure must be adversary and not inquisitorial. It is of the essence of adversary procedure that at none of its stages must the accused be made its mere "object." The democratic principle of self-government is expressed in judicial procedure in the rule that the accused is, at all times, a "party" to the trial, that he "conducts" the defense on the basis of equality with the prosecution. Under appropriate conditions, his body may be subject to examination.[19] But his freedom of mind and will, with regard to the conduct of the defense, must be preserved.

In *Rochin v. California* [20] Mr. Justice Black, reflecting upon the principles of due process as conceived by the majority, said: "I am still in doubt as to why we should consider only the notions of English-speaking peoples to determine what are immutable and

[18] Rochin v. California, 342 U.S. 165, 171, 172 (1952), holding that where morphine capsules were extracted forcibly from the accused's stomach, conviction must be reversed as a denial of due process. Justices Black and Douglas concurred as to the result, arguing, however, that the case should have been decided on the basis of the privilege against self incrimination.

[19] On the scope of permissible examination, see the statement of Justice Douglas, concurring in Rochin v. California, 342 U.S. 165, 179 (1952).

[20] 342 U.S. 165 (1952).

fundamental principles of justice." [21] Since our courts have not yet reached the problem of adversary procedure as part of due process in connection with the use of objective truth tests, it may be appropriate to draw upon the experience of other nations.

In a recent case in Germany [22] the accused appealed from a conviction based upon evidence consisting of answers given in the course of a polygraph test conducted with his consent,[23] claiming that application of the test violated a principle of the Constitution of the Bonn Republic: "Man's dignity is inviolate. All state authority has the duty to respect and protect it." [24] The Bundesgerichtshof reversed the judgment of conviction and remanded the case, holding that the stated constitutional provision, in conjunction with the laws implementing it, guarantees the accused's standing as a party effectively in charge of the defense throughout the course of criminal proceedings. "The accused is a participant in, not an object of, criminal procedure." Nor is his status as a "party" to the suit a matter of mere form. He must, at all stages of the proceedings, remain capable of actually "conducting" the defense. This implies a continuous "freedom of will with regard to decision and action." [25] Such freedom precludes deliberate suspension of his consciousness for the purpose of exploring his unconscious. The accused cannot waive this standing and this freedom, for they are not privileges granted to him, but fundamental principles of criminal procedure, based upon law, which must be observed in accordance with the idea of government of laws.

[21] *Id.* at 176 (concurring opinion).

[22] Judgment of Bundesgerichtshof (I. Strafsenat), Feb. 16, 1954, 5 Entscheidungen des Bundesgerichtshofes in Strafsachen [hereinafter B.G.H. St.] 332. The Bundesgerichtshof is the highest court of the Bonn Republic in civil and criminal matters.

[23] There is no indication as to the manner in which the results of the test were utilized as evidence. The court merely said:

> The use of the accused's answers in the course of an examination with the "polygraph" and of the notations of this instrument as a means of proof was — without regard to his consent — inadmissible under article 1, section 1 of the Constitution and section 136(a) of the Code of Criminal Procedure.

5 B.G.H. St. at 333.

[24] Art. 1, § 1, Bonn Constitution. Contrast People v. Houser, 85 Cal. App. 2d 686, 193 P.2d 937 (1948), where the defense relied upon the privilege against self incrimination.

[25] The court, 5 B.G.H. St. at 334, cited § 136(a) of the Code of Criminal Procedure, Law of Sept. 12, 1950, [1949–1950] BUNDESGESETZBLATT 644 (Germany):

> (1) The accused's freedom of will in decision and action must not be impaired by abuse, exhaustion, bodily infringement, application of devices, torture, deception, or hypnosis. Compulsion may not be used except as admitted by the law of criminal procedure. Threats of measures which are not admissible under its provisions and promises of advantages which are not provided by statute are prohibited.
> (2) Measures which impair the memory or mental capacity of the accused are prohibited.
> (3) The prohibition set forth in subdivisions 1 and 2 applies regardless of the consent of the accused. Statements brought about by violation of this prohibition may not be used even if the accused consents to such use.

The court placed emphasis upon the idea of "government of laws" in a formal sense, meaning conformance to procedures laid down by the constitution and the statutes. However, in rationalizing these provisions, it in effect also invoked the principle of "government of laws" in a substantive sense — in the sense of government protecting specific moral values. It said:

> These principles of constitutional law and of criminal procedure are rooted in the fact that, when facing the community, even a suspect and one deserving punishment is deemed an independent moral person; when his guilt is established, he may and must be subjected to atonement under the law which has been violated; beyond such statutory restrictions, however, his personality must not be sacrificed to the public purpose of fighting crime, though the latter is certainly very important.[26]

Thus in the opinion of the court application of the polygraph test, in the course of which the unconscious mind of the accused answers involuntarily,[27] violated both the procedural requirement of freedom of the accused to conduct his defense and his ethical status as an independent moral "personality." For moral personality implies "an essential and inalienable autonomous area of the mind, which must remain inviolate also in criminal procedure." [28]

When this case reached the court, the judges were in the advantageous position of being able to consult a voluminous literature on the subject at bar. The weight of opinion in Europe favored rejection of the test.[29] Moreover, those opposing the test saw no reason for admitting exceptions based upon the examinee's con-

[26] 5 B.G.H. St. at 334.

[27] As stated in the opinion, *id.* at 335, 336, a court may, "in evaluating the evidence, consider the conscious and unconscious expressions of the accused which appear in the ordinary manner at the trial," but may not rely on "impressions which are obtained by measuring the unconscious."

[28] *Id.* at 335.

[29] Among those favoring use of the test in the United States and Europe are Wicker, *supra* note 5; Dession, *supra* note 3; Gagnieur, *supra* note 6; and Sauer, *Grenzen des richterlichen Beweises*, 3 JURISTISCHE RUNDSCHAU 500 (Germany 1949). On the other hand, the General Assembly of the Association Nationale des

sent.[30] For "freedom of defense," barring objective testing, was viewed to be a general principle of democratic government expressed in criminal procedure, rather than a civil right of the examinee which he could waive. The concept of *Rechtsstaat* (perhaps best translated for general purposes as "government subject to the rule of law"), invoked in literature and relied upon by the court, meant, in the context, something akin to due process. As visualized by the court, it was objective due process. Its meaning may be best conveyed by the words of the dissenting opinions in *Stein v. New York*: [31]

> All this, not out of tenderness for the accused but because we have reached a certain stage of civilization. . . . a civilization which, by respecting the dignity even of the least worthy citizen, raises the stature of all of us and builds an atmosphere of trust and confidence in government.[32]

While it is impossible to estimate with accuracy the impact of Anglo-American legal thought upon the decision of the Bundesgerichtshof, that decision — although distinctively German in style — is, at least in part, traceable to American influence. It would seem that its philosophy is also applicable to the issue of the admissibility of objective tests under our due process clause, particularly to the problem of the significance to be attributed to consent to, and waiver of immunity from, objective testing.

The doctrine of waiver, prevailing in our law and pervading all issues in which objective testing is involved,[33] is based on the

Médecins Déportés et Internés Politiques de la Résistance protested violently against any use of narcosis in criminal proceedings. See 74 REVUE PÉNIT. 577 (France 1950). The same position was taken in a Resolution of the Council of the Bar Association of Paris. For a translation of the resolution, see 39 J. CRIM. L. & C. 665 (1949). Finally, the Société de Médicine Légale refused to adopt the opinion of its committee, see note 8 *supra*, notwithstanding its limited scope. See Tanguy, review of ROLIN, DROGUES DE POLICE, in 74 REVUE PÉNIT. 908, 911 (France 1950). Any use of objective tests was also emphatically condemned by the Society for Forensic Psychiatry of Heidelberg. See the expert opinion prepared in behalf of the society at the request of the Ministry of Justice of Württemberg-Baden, in Schmidt, *Zur Frage der Eunarkon-Versuche in der gerichtlichen Praxis*, 4 SÜDDEUTSCHE JURISTEN-ZEITUNG 450 (Germany 1949).

[30] Those in favor of the test mostly regard the examinee's consent to be an essential requirement of legality. See 74 REVUE PÉNIT. 552, 559 (France 1950).

[31] 346 U.S. 156 (1953).

[32] *Id.* at 200, 207 (dissenting opinions of Justices Frankfurter and Douglas).

[33] In our law, civil rights are generally subject to waiver unless the subject matter is "jurisdictional," as in the right of the criminal defendant to be present at his trial. See 1 COOLEY, CONSTITUTIONAL LIMITATIONS 667 (8th ed. 1927).

belief in the essential rationality of man. This belief is part of the traditional philosophy which is characteristic of our judicial conception of individualism. A similar approach led in Germany to the formalism of the Weimar idea of constitutional rights,[34] since fundamentally revised by the Bonn Constitution.[35] In the light of this rationalistic philosophy, man is but the personification of "impersonal reason." [36] As "reason," he is believed to be endowed with an absolute capacity for waiving any rights that he may possess. Under the impact of modern philosophy — the philosophy of substantive value ethics,[37] on the one hand, and existentialism,[38]

One might argue, of course, that the right not to be objectively tested is in the nature of the right to be "present" during the whole trial, the examination being conducted as part of the trial.

[34] In Germany, the philosophy of rationalism was based on Kant's conception of man as essentially a rational being. By virtue of his rational nature, man is, according to Kant, the original creator of all his apperceptions and concepts and the exclusive originator of his actions (free will). Rationality imports self-determination. But self-determination in rational man means adoption of moral law, that is, of such conduct as he, as a rational being, would wish to be imposed by general law (categorical imperative). In the theory of law, the corollary of Kant's doctrine of the ultimate supremacy of moral law was the *Rechtsstaat*, the state governed by law. In close parallel to the government of formal moral law, the German *Rechtsstaat* was formalistic, and thus it remained throughout the 19th century and the era of the Weimar Republic. It meant "legality" or conformance to law. Any infringement upon the individual sphere was permissible, provided that it was based upon statutory law. Civil rights had no independent moral meaning. They were but a "remote guiding star upon the eternally evading conceptual heaven." Lange, *Ist die Anwendung von Narkoanalyse im Strafverfahren zulässig?*, 43 DEUTSCHE ZEITSCHRIFT FÜR DIE GESAMTE GERICHTLICHE MEDIZIN 552, 558 (Germany 1955).

[35] The Bonn Constitution undertook to make civil rights "real" by rendering them directly binding, that is, obligatory without implementing legislation, and in protecting them by express provisions for judicial review. See MANGOLDT, DAS BONNER GRUNDGESETZ 36, 42–45 (1953). There is emerging a substantive concept of the *Rechtsstaat*, as a state dedicated to the realization of inalienable moral values, which can neither be limited by statute nor waived.

[36] SCHELER, DER FORMALISMUS IN DER ETHIK UND DIE MATERIALE WERTETHIK 383 (4th rev. ed. 1954).

[37] *Id.* (*passim*); HARTMANN, ETHIK (3d ed. 1949). The foremost exponent of substantive value ethics in this country was John Dewey.

[38] The existentialists view man not as a member of a species but as an unique historical event, and stress that "moral man" is "more" than the sum of the abstractions made of him by the various sciences and infinitely more than "reason personified." In order to reach truth, thought must be implemented by one who not merely thinks it, but also fulfills it historically in his own existence. For representative examples of the existential approach, see JASPERS, DER PHILOSOPHISCHE GLAUBE (1948); SARTRE, L'ÊTRE ET LE NÉANT (1943); SARTRE, DESCARTES (1946). For an excellent appraisal of Sartre's philosophy see STERN, SARTRE, HIS PHILOSOPHY AND PSYCHOANALYSIS (1953).

on the other — and of psychoanalysis, this view of man is yielding to a broader and more comprehensive conception which allows for greater variation in individuality and which, without eliminating the importance of the rational, also stresses the significance of the irrational in man's psychological and ethical structure. This change of philosophical climate calls for re-examination of the doctrine of waiver in general, and more particularly, of waiver of immunity from psychological tests. For, since such tests reveal the unconscious, the examinee never knows in advance the precise scope of his waiver so that such waiver is largely meaningless.

Theoretically, the concept of waiver of immunity from objective testing is equally defective whether waiver takes the form of consent to the test or of an outright demand for it. But the practical effect of a denial of the test in cases where the accused actually demands it,[39] as the best means of proving his innocence, is harsh. However, in addition to the theoretical argument against admissibility, there are also social arguments to be considered. Unfortunately, legal science has not invented a method of treating the case of an accused demanding application of the test independently of other cases where the admissibility of such tests may be in issue. As soon as the test is admitted in any case, failure to submit to it will be interpreted as an admission of guilt,[40] and we shall be faced with the awkward phenomenon of "lie detector sex offenders" along with "fifth amendment Communists." Thus, the problem of waiver cannot be treated on a case-by-case basis but must be resolved in terms of general principles of government.

[39] This was the situation in many of the cases before our courts. See the leading case of Frye v. United States, 293 Fed. 1013 (D.C. Cir. 1923); *cf.* People v. Becker, 300 Mich. 562, 2 N.W.2d 503 (1942); People v. Forte, 167 Misc. 868, 4 N.Y.S.2d 913 (County Ct.), *aff'd*, 279 N.Y. 204, 18 N.E.2d 31 (1938); State v. Pusch, 77 N.D. 860, 884–86, 46 N.W.2d 508, 520–21 (1950); Peterson v. State, 157 Tex. Crim. 255, 247 S.W.2d 110 (1951); State v. Bohner, 210 Wis. 651, 246 N.W. 314 (1933). In People v. Kenny, 167 Misc. 51, 3 N.Y.S.2d 348 (County Ct. 1938), the test was admitted on defendant's motion.

[40] This danger was emphasized by Alauze, *La narco-analyse devant la Justice*, GAZETTE DU PALAIS (Doctrine) 37 (France 1st sem. 1949), and other commentators. It is noteworthy that shortly after Dession expressed the hope that courts would not be permitted to comment upon the failure of an accused to submit to narco-analysis, see Dession, *supra* note 3, at 344, the New York Court of Appeals refused, without opinion, to reverse a conviction of first degree murder where the prosecutor had implied in his summation that defendant's refusal to submit to an objective test was evidence of his guilt, People v. Draper, 304 N.Y. 799, 109 N.E.2d 342 (1952), *cert. denied*, 345 U.S. 944 (1953). *But cf.* State v. Kolander, 236 Minn. 209, 52 N.W.2d 458 (1952).

Waiver must be accepted or rejected as a social institution. In weighing the interest of the accused who demands the application of the test against the social and individual interest in preserving the integrity of the defense, account must also be taken of the fact that, if existing rules are conscientiously observed, the accused need not prove his innocence, for the prosecution has the burden of establishing guilt beyond a reasonable doubt. In fact, the argument has been made that acceptance of the test would jeopardize the presumption of innocence, for it would force the accused to adduce proof of innocence in order to counteract the unfavorable inferences that might be drawn from his failure to submit to the test.[41]

Of all arguments in favor of admitting objective testing, that invoked in behalf of an accused demanding such a test to prove his innocence is the most challenging one. Rejection of this argument, in fact, involves sacrifice of an essential ethical tenet, that man is an ultimate value, not as a member of a species, but as an unique historical event. Such rejection can be justified only by the limitations inherent in democratic law as a social ideal. Democracy is an ethical philosophy, on the one hand, and a governmental proposition on the other. Wherever possible, it respects individual uniqueness. However, consideration of such uniqueness is necessarily limited when it conflicts with the regard due to other individuals. In cases of conflicting claims, democratic law must give precedence to the general "dignity of man" over the individual dignity of a man. Human dignity in democratic law is not entirely a personal attribute of the individual as an unique event but rather a "virtue" accorded to the individual by the law. It is the expression of society's respect for the individual, the manner in which the state as a "person" meets the individual as a person. This is expressed in the statement, "All this, not out of tenderness for the accused but because we have reached a certain stage of civilization." [42]

There is, to be sure, a touch of collectivism in this conception of "civilization" being the source of individual right. The stress on individual uniqueness can, however, be preserved as long as we abide by the essential postulate best expressed by Kant:

> [M]an, conceived as a person . . . is exalted above all price; for,

[41] See Schmidt, *supra* note 29, at 454.

[42] Stein v. New York, 346 U.S. 156, 200 (1953) (dissenting opinion).

> in this capacity, he is not a mere means to ends of other men or even his own ends, but must be valued as an end in himself . . . .[43]

In terms of practical solutions, this means that while democracy must view man in social context, it should do so only in cases of unavoidable conflict between the interest of the individual and imperative social interests. In all other cases it should consider each individual as an ultimate irreducible value. This implies that democratic "human dignity" is, a priori, assigned to the good and the wicked, the innocent and the guilty, alike. It follows that procedural methods — such as objective testing — which violate that dignity should constitute a ground for reversing a conviction even where the accused is proved guilty by other evidence.[44] For any other solution may be interpreted to mean that a man forfeits dignity by guilt.

If the suggested interpretation of due process is accepted, it must be taken to extend indiscriminately to all phases of criminal proceedings. One such phase perhaps deserves special notice, namely, determination of the issue of insanity at the time of the act. In this instance, the issue to be determined by objective testing is not the examinee's general character, but rather his mental condition at the time of the act as inferrible from his present state of mind. Procedurally, the issue of insanity at the time of the act is treated differently from that of whether the defendant committed the act. The former can be set up only by way of defense,[45] and this defense, although originating in the presumption of sanity, is for peculiar reasons regarded as a privilege granted to the accused.[46] The adherents of objective tests claim that by invoking that privilege the accused implicitly waives his immunity from being subjected to available tests of insanity. It is hoped that, as an aftermath of *Durham v. United States*,[47]

[43] Kant, *Die Metaphysik der Sitten*, in 7 IMMANUEL KANTS WERKE 246 (Cassirer ed. 1916).

[44] *But see* Justice Jackson's statement in Stein v. New York, 346 U.S. 156, 196–97 (1953): "We are not willing to discredit constitutional doctrines for protection of the innocent by making them mere technical loopholes for the escape of the guilty."

[45] WEIHOFEN, INSANITY AS A DEFENSE IN CRIMINAL LAW 257–58 (1933). In some states, insanity at the time of the act must be pleaded specially, and the plea will not be heard unless seasonably offered. *E.g.*, People v. Hall, 220 Cal. 166, 171, 30 P.2d 23, 25, *appeal dismissed*, 292 U.S. 614 (1934), *cert. denied*, 296 U.S. 656 (1936).

[46] People v. Esposito, 287 N.Y. 389, 39 N.E.2d 925 (1942).

[47] 214 F.2d 862 (D.C. Cir. 1954).

the procedure with regard to the allegation and proof of insanity at the time of commission of the act will be subjected to a thorough re-examination and that the burden now placed upon the accused in accordance with the presumption of sanity will be more rationally distributed. It would seem that where the court has reason to believe that the accused was insane at the time of commission of the act, the issue should be considered even in the absence of a plea of not guilty, or of not guilty by reason of insanity.[48] If raising the issue of insanity is no longer conceived of as a privilege granted the accused, the doctrine of waiver becomes inapplicable, entirely apart from any philosophical change of doctrine.

C. Objective Testing of Capacity To Conduct a Defense

The problem is different where insanity at the time of trial is in issue. For insanity may, in fact, exclude the freedom of mind and will essential to the conduct of a defense, the very freedom to which the interest in establishing truth is to be sacrificed. The psychiatric examination in such instances is conducted for the purpose of establishing whether the accused is in possession of free will, that is, whether he is actually capable of conducting a defense. Such an examination was involved in the Cens affair, which aroused wide discussion.[49]

The late Professor Donnedieu de Vabres, who testified in *Cens v. Heuyer*,[50] distinguished narcodiagnosis for the purpose of disclos-

[48] In England the Royal Commission on Capital Punishment, 1949–1953, so recommended. CMD. No. 8932, at 155–56 (1953). In Israel, section 6(b) of the Law Concerning the Mentally Ill, SEFER CHUKIM No. 187, at 121 (July 6, 1955), now provides that a judge may of his own motion raise the issue of insanity at the time of the act and have evidence bearing on this issue brought before him.

[49] In 1948, Raymond Cens was arrested in France, charged with collaboration with Nazi occupation forces. His attorney claimed that he had suffered an apoplectic stroke which impaired his memory and prevented him from speaking. The examining magistrate appointed three physicians to examine him. They applied sodium pentothal, and under the influence of the drug Cens answered questions. The physicians reported the result of the examination to the magistrate. Subsequently, Cens was again examined by physicians, without the use of drugs, and found incapable of standing trial. Le Figaro (Paris), Dec. 16, 17, 1948.

It has been suggested that Cens was not a simulator but a genuinely ill person. See 74 REVUE PÉNIT. 563 (France 1950).

[50] Tribunal Correctionnel de la Seine, Feb. 23, 1949, [1949] Dalloz Jurisprudence 287, [1950] Sirey Jurisprudence II. 149, with note by Légal. This was a criminal action instituted by Cens against the physicians who had examined him under drugs. He now charged them with assault and violation of the duty of professional secrecy. Constituting himself a civil party to the action, he asked for damages in

ing deception without reference to the main issue of the case from narcoanalysis applied for the purpose of inquiring into that issue.[51] Gagnieur objects to the distinction,[52] alleging that malingering or simulating insanity is as legitimate a defense as any other lie or deception practiced upon the court,[53] to which the defendant has a right under French law.[54] Gagnieur's objection would seem to be inapplicable under our system of jurisprudence, which grants to the accused a right to remain silent, but does not grant a right to lie.[55] One might argue, on the other hand, that the facts of the Cens affair demonstrate the limitations, even within the framework of our law, of the distinction between the privilege

the amount of 100,000 francs. Under the French law of criminal procedure, an individual injured by the commission of a crime has the power of originating criminal proceedings, and constituting himself a civil party to them, demanding an award of damages in the criminal court. See DONNEDIEU DE VABRES, TRAITÉ DE DROIT CRIMINEL ET DE LÉGISLATION PÉNALE COMPARÉE 616–18 (3d rev. ed. 1947). The court acquitted the defendants on all counts.

[51] For a report of this testimony see Gagnieur, *supra* note 6, at 374.

[52] *Id.* at 374–75.

[53] "The intellectual stand of the liar and this [sic] of the malingerer are identical; the only difference lies in the muscles used to materialize them." *Id.* at 375.

[54] The accused's privilege against self incrimination has a different scope under continental law from that which it has under the common law. On the continent, an accused is not admitted to oath. He need not answer the accusation but must be given an opportunity to do so. For Germany, see Code of Criminal Procedure § 136, supra note 25; for France, see CODE D'INSTRUCTION CRIMINELLE art. 319 (44th ed., Dalloz 1952); Garçon, *Faut-il modifier les lois sur l'instruction contradictoire?*, 52 REVUE PÉNIT. 137 (France 1928). The fact that no sanction is imposed upon false statements made by the accused is interpreted to mean that he has no duty to tell the truth. For Germany, see Schmidt, *supra* note 29, at 451; for France, see statements of Mellor, Murat, 74 REVUE PÉNIT. 558, 566 (France 1950). Since the accused cannot be sworn and has a right to lie, his silence has a somewhat different psychological import from an accused's silence under our law.

Nor is silence in itself legally a basis for an inference of guilt. But the fact that the judge "freely" evaluates the evidence (*freie Beweiswürdigung*), or finds facts on the basis of his "inner conviction" (*conviction intime*), provided that he states the reasons on which his conclusions are based, opens wide possibilities for the drawing of such inferences. In Germany, the Bundesgerichtshof has held that an obstinate denial may be found to be an aggravating circumstance where it bears on the character of the accused, especially on his mental attitude toward the act, provided that the decision must clearly show that the court has reached its conclusion on substantial grounds. Judgment of Bundesgerichtshof (II. Ferienstrafsenat), Aug. 30, 1951, 1 B.G.H. St. 342. For discussion of other aspects of this case, see note 65 *infra*.

Throughout the debates on the question of admitting objective testing, 74 REVUE PÉNIT. 549–67 (France 1950), preservation of the accused's right to remain silent as well as to lie played an important role. See Schmidt, *supra* note 29.

[55] *Cf.* Walder v. United States, 347 U.S. 62 (1954) (illegally obtained evidence can be admitted for the purpose of testing defendant's credibility).

against self incrimination and lying. Cens' attorneys claimed that he had suffered an apoplectic stroke, some time after the acts with which he was charged, which rendered him incapable of remembering and using verbal expressions. Cens did not technically "lie"; his defense consisted rather of remaining "silent." But this silence — as Donnedieu de Vabres correctly pointed out[56] — constituted fraud upon the court. Moreover, Cens remained "silent" not in the course of a defense to the principal issue, but in avoidance of trial. Whatever may be the rule of French law, within our system of jurisprudence an accused has no "right" to do that. He need not incriminate himself, but he must stand trial. The rule exempting an insane person from that duty is not in the nature of a privilege granted to him, but rather expresses an objective principle of law which, in the interest of its own dignity, would no more try a lunatic[57] than it would tolerate an indictment of a dead man.[58]

It might thus be argued that, as a matter of legal principle, narcodiagnosis for the purpose of establishing the accused's capacity to stand trial — if found to be reliable — should be admissible. However, other doubts may legitimately be raised. The human personality is indivisible. It is highly dubious whether objective testing for diagnostic purposes can be effectively separated from a general exploration of the mind, which might reveal evidence bearing on the principal issue. To be sure, one could impose upon the expert a duty of professional secrecy with regard to such revelations. But can the law truly effectively prevent the psychiatrist's knowledge of such evidence from revealing itself by a choice of a word or by a gesture? Since under our law the expert is subject to cross-examination, it would be necessary to formulate new bars to such examination. Would not the expert's claim of privilege based upon potential disclosure of matters within these bars automatically work to the disadvantage of the accused? And the expert is often an officer of the court,[59] even in

[56] See Gagnieur, *supra* note 6, at 374.

[57] The trial of an insane person is absolutely void, even when he is represented by counsel. Ashley v. Pescor, 147 F.2d 318 (8th Cir. 1945).

[58] In the early German law actions were brought against the dead as against the living. See Schreuer, *Das Recht der Toten*, 33 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT 333, 365 (1916).

[59] For discussion of statutes providing for the appointment of psychiatric court experts, see GUTTMACHER & WEIHOFEN, PSYCHIATRY AND THE LAW 253 (1952). Where the psychiatric experts are appointed by the parties, there is at present no sufficient protection against disclosure in many of our jurisdictions. See Despres,

our law. The accused should not be forced to incriminate himself before him.[60]

D. Objective Testing of Witnesses

The problem of admitting objective testing of the veracity of a witness at first glance appears to be distinguishable from the questions above discussed. Gagnieur [61] contends that since a witness, in contrast to the suspect or the accused, owes truth to the officers of the law,[62] his veracity may be tested by any available harmless methods. In Germany, on the other hand, the problem has been discussed in the light of the relative status in criminal procedure of the witness and the accused. The argument has been made that a device which cannot be applied to the latter is a fortiori inapplicable to the former.[63] The proponents of this argument further contend that a contrary rule would undoubtedly arouse our "sense of injustice." They point out that in those instances where application of objective tests to the witness is most tempting, that is, in sex offense cases, it would be hardly humane to subject the victim, appearing as a witness, to the added strain of the test, while sparing the accused, perhaps indeed in order to spare him.[64] But the Bundesgerichtshof, in a case not

Legal Aspects of Drug-Induced Statements, 14 U. CHI. L. REV. 601, 615 (1947). Moreover, even should the physician-patient privilege be extended, no satisfactory protection could be afforded. Where an expert for the defense is allowed to testify on results of objective testing, the prosecution would also have to be permitted to have its experts subject the examinee to similar tests and testify as to their results. There is no realistic guarantee against disclosure by such partisan experts.

[60] Alauze, *supra* note 40, points out some of these factors in opposing objective truth testing even in the case of consent:

> In fact, to admit it [the test] would mean engaging upon an evil enterprise. . . . Particularly in view of the fact that should the examinee even consent to whatever might be disclosed on a specific point (for instance, the object of the prosecution), he might wish certain other zones of his subconscious to remain in the dark; this would involve the risk of his intimate secrets being divulged, which would be prejudicial to him. Now the method "opens the subconscious" in its entirety. What then would be the duty of the medical expert? Should he reveal everything he has heard? This could be frightfully dangerous. Draw distinctions, so as not to divulge but what bears on the subject of his appointment and preserve silence as to surplusage? What a delicate and difficult task!

Id. at 38.

[61] Gagnieur, *supra* note 6, at 373, 374.

[62] In contrast to other continental European countries, France does not grant a witness the right to refuse testimony on the ground that it would incriminate him. See 2 LE POITTEVIN, CODE D'INSTRUCTION CRIMINELLE ANNOTÉ 53–54 (1926).

[63] Lange, *supra* note 34, at 555. For a similar view in this country, see State v. Lowry, 163 Kan. 622, 628, 185 P.2d 147, 151 (1947).

[64] See Lange, *supra* note 34, at 557, for a discussion of this argument.

involving objective testing, to be sure, rejected this line of argument.[65] It held by implication that the status of the accused must not be impaired for the purpose of sparing a witness, regardless of the latter's age and the potential mental injury to him.

The most realistic criticism of the application of objective tests to witnesses, as in the case of objective sanity testing of suspects, is based upon the unitary conception of personality in modern psychology. In this instance, moreover, the psychological argument is strengthened by an analysis of the role often played by witnesses in criminal proceedings. Their connection with the crime is frequently ambiguous. In the course of the test, a witness may be shown to have been a participant in the crime. True, in such instances he might object to the application of the test on the ground that it would compel him to incriminate himself. But, assuming that a suspect were held to be a priori immune from objective testing, this would make the witness' protection substantially weaker than that of the suspect, for the former would be exposing himself to potential inferences of duplicity or complicity by his claim of the privilege. This raises the significant question of determining realistically the time at which "defense," carrying the postulate of freedom to conduct one's own defense, begins. Thus, in the case of the witness, as in that of the suspect or the accused, objective testing must be resolved not only within the framework of the privilege against self incrimination, but also in the light of "freedom of defense."

II. THE BASIC POLICY ISSUE: TRUTH V. DIGNITY

The decision with regard to admission or rejection of objective testing ultimately depends on a choice to be made between divergent philosophies of government within a basically democratic society. The status of the human being in that society is at stake. To be sure, provided that objective tests prove to be

[65] Judgment of Bundesgerichtshof (II. Ferienstrafsenat), Aug. 30, 1951, 1 B.G.H. St. 342. The court below found a basis for aggravating punishment in the fact that the accused's obstinate denial compelled the victim to testify in open court. The Bundesgerichtshof held this finding to be contrary to fundamental principles of procedure, for it means that "compulsion is used upon the accused, and that it is so used before evidence is taken for the express purpose of avoiding the taking of evidence." The court emphasized that, contrary to the position implied by the holding below, "not only does the guilty person have no duty to confess," but an accused "has a right to have an incriminating witness render testimony at the trial . . . ." *Id.* at 342–43.

highly effective, there will be also at stake the degree to which truth, in the sense of conformance of the facts found with the facts as they actually occurred, may be reached in criminal proceedings. The choice will then be between respect of human dignity and such truth.

The issue of human dignity versus truth may seem paradoxical: Is a conflict of dignity and truth possible? Is not truth a part of justice and justice essential to dignity? In order to resolve the paradox, we must concern ourselves with the functioning of justice in law, and that requires examination of justice against the perspective of the relationship of substance and procedure. In the light of this relationship, "dignity" evolves as a dual concept, as an end and as an essential attribute of each step toward the end.

All this may sound somewhat theoretical. And it has been said that the problem of narcoanalysis must be resolved on purely medical and legal grounds without recourse to "metaphysics." [66] But the fact is that whatever the practical solution may be, it will carry implications affecting the very core of our philosophy of government.

In the light of the numerous cases of "convicting the innocent," [67] it would be absurd to deny that the discovery of truth is a part of justice which must be conscientiously pursued. Surely, there can be neither justice nor dignity in finding the innocent guilty and the guilty innocent. But in the administration of justice, truth is but a means, whereas dignity is an end. Criminal justice would be devoid of meaning were it incidentally to deny the very human dignity which it is its ultimate purpose to protect.[68]

Dignity may be to a large extent predicated upon knowledge, but its justification lies beyond the area of knowledge, namely, in that area of ethics which comprises the human will. A conceptual separation of these two areas is essential, for it is to this separation that democracy in all its phases and on all its levels owes its existence. The proposition that virtue is exhausted in knowledge necessarily leads to government of the wise, which is an aristocratic, Platonic ideal. In the area of the will, the individual as an ethical value emerges. Only in this area may equality be discov-

[66] Statement of Faucher, 74 REVUE PÉNIT. 551 (France 1950).

[67] See BORCHARD, CONVICTING THE INNOCENT (1932).

[68] Faucher, *supra* note 8, at 68, exclaims: "What would be left for it to defend if the mental integrity of all were not preserved?" "Let us remember the old adage: *Propter vitam vivendi perdere causas*!"

ered, whereas to measure in terms of knowledge is to differentiate greater knowledge from less. In the sphere of the will alone can the individual grow to the stature of a "person," opposing the state as a "person," whereas in knowledge no contradiction is possible. In this possibility of the will of the individual opposing that of the state freedom has its origin.

Where justice is tantamount to knowledge, procedure is valued only in terms of teleology. The end justifies the means. Moreover, means and methods, provided that they are efficient, are wholly insignificant. That is the totalitarian view. By contrast, in the area of will procedure becomes meaningful apart from results. In the democratic view, each step on the road to the end has an independent significance, for each is an act of will which may affect other wills, the wills of those against whom action is directed. Dignity is significant at each step and not only at the end. Due process, whether substantive or procedural, is essentially "process" more particularly than it is an end. Thus there may indeed arise a conflict between "dignity" as an end result of procedure and "dignity" as a requirement of process. This conflict is not a novel one. The historical experience with the inquisitorial process may help to clarify the problem it presents. The excesses of this process make us overlook the fact that it originated in a consideration quite similar to that which now motivates the proponents of objective tests, namely, in a justifiable desire to substitute for formal proof substantive genuine truth, one might say "scientific truth." [69] The issue was there, as it is now, a choice between dignity and truth. The result of the choice of the latter in preference to the former was torture. Confession, the best of genuine proofs, the *regina probationum*, was thus extracted.

The lesson to be derived from the history of the inquisitorial process has further ramifications. In course of time, the weight of procedure was transferred from the courtroom to the torture chamber. Confession in open court was dispensed with, and, notwithstanding legal prohibition, the officials attending torture were permitted to testify to the confession.[70] From then on, trial and conviction became a mere formality. The danger of a similar development of objective testing, once its results are admitted, is very real. Public confidence in the omniscience of "science" is

[69] See SCHMIDT, EINFÜHRUNG IN DIE GESCHICHTE DER DEUTSCHEN STRAFRECHTSPFLEGE 68 (1947).

[70] *Id.* at 81–82.

greater than the trust medieval men placed in torture as a method of eliciting truth. There can hardly be any doubt that as soon as expert testimony as to the results of psychological tests is, in principle, admitted, the weight of procedure will shift from the courtroom to the testing laboratory. The psychiatrist will become the real judge. Moreover, like torture, psychological testing cannot be conducted in public.[71] Where the issues are decided in a laboratory, the institution of public trial is obviously a farce.

While the system of inquisition prevailed in continental Europe, England continued to develop the institution of trial by jury and, as part thereof, the adversary process[72] and rules of evidence. There is no denying the fact that jury trial is a primitive method of distributing justice, or the fact that many of our rules of evidence are comparable to the ancient rules of formal proof discarded by the inquisition. Nor can it be denied that the adversary method of litigation does not always afford the best assurance of reaching truth. There is undoubtedly merit in the contention that, in order to preserve the integrity of this traditional system, we are arresting the progress of "scientific law."

The issue before us is whether we are to abandon our traditional system of adversary litigation with emphasis upon dignity for "scientific" trial with emphasis upon truth. Let us now examine the assumptions on which the latter position is based. We shall find that acceptance of "scientific" trial in modern times is dependent upon a particular approach to criminal law in general, a distinctive jurisprudence of "welfare," of which Ferri's doctrine is a classic example. Gagnieur has recently restated it as the teaching of the so-called "French school."[73] According to this school — Gagnieur says — the aim of justice is not punishment but re-education and cure. The desire of the state is not to do harm to the criminal but rather to benefit him. Since criminal proceedings benefit the criminal as well as society, there can be no objection to the use of appropriate means to that desirable end. Indeed, since the ultimate object of proceedings is a cure, there should be required no difference in method between such proceedings and medical therapy.

[71] In some cases defendants have offered to submit to a lie detector test before the jury. See Frye v. United States, 293 Fed. 1013 (D.C. Cir. 1923); State v. Cole, 354 Mo. 181, 188 S.W.2d 43 (1945).

[72] *But see* April, *A Reappraisal of the Immunity From Self-Incrimination*, 39 MINN. L. REV. 75 (1954).

[73] Gagnieur, *supra* note 6, at 378–79.

The picture sketched by Gagnieur, as that of all utopias of welfare, is alluring indeed. It describes a state which not only relieves the individual of his insecurity and anxiety in this hostile world but, in addition, cures rather than punishes him when he becomes aggressive. The claim is that in such a state there is no objection to putting the individual to sleep and thus temporarily eliminating the functioning of his will. The end result of the process of diagnosis and cure is ultimate perfect freedom of "health." For the sake of that ultimate freedom, the present will of the individual may be disregarded. It is lost in the benevolent will of the state.

A seemingly more sophisticated version of the argument for scientific proof, in which this ideology of the welfare state is less obvious, has been advanced by Sauer.[74] The application of drugs to an examinee — Sauer says — does not deprive him of his freedom of will at all. On the contrary, it relieves him of his inhibitions, of his shyness and his concern with those present and with social taboos. It brings to consciousness repressed material. It thus makes him "truly" free rather than merely free from legal restraint.

The argument is perhaps less absurd than it appears to its critics. The law has traditionally shown concern with the individual's "genuine" free will. It punishes duress and declares acts made under duress void. It regards the will of a lunatic as irrelevant and his criminal intent as not constituting *mens rea*. Recently, it has made freedom of will a part of the sanity test by abandoning the old purely cognitive test. Why then should the law not seek to reach the "genuinely free mind and will" of the testifier, by ridding him of all his inhibitions, much as it seeks to make certain that the "genuinely free mind and will" of a contracting party or a criminal has not been overridden by duress or insanity?

The answer is that, while discovery of the "genuinely" free will of the testifier is as important as realization of the "genuinely" free will of the contracting party or the criminal, both are less important in a democratic state than the principle barring manipulation of individual will by the state. It is not because — as Piédelièvre says[75] — the accused must appear in court "as he

[74] Sauer, *supra* note 29, at 500.

[75] See 74 REVUE PÉNIT. 550 (France 1950).

is," but because the state must not attempt to transform him into another self, that psychonarcosis in criminal procedure is objectionable.

The state which attempts to manipulate the minds of men in order to "make them free" and the state which assumes the role of a physician treating the individual as a patient who is to be "made healthy" — *nota bene*, before he has been convicted [76] — are identical phenomena. The governmental operation the state performs in such cases does not differ in kind from governmental manipulation of public opinion. The latter, too, is usually done under the pretext of producing truth or welfare. Objective testing is predicated upon acceptance of that type of state to which human dignity is a concern inferior to welfare. The ultimate question is thus: do we want that type of state?

Civilization is a process, not a status. So is due process. We live in an age of science and psychology. This brings to the fore scientific and psychological methods. On the other hand, it deepens man's consciousness of himself, thus producing a new, broader and more intensive notion of human dignity. In the struggle between these forces of civilization, "due process" affords no "mechanical yardstick." [77] But it does supply a sensitive precision instrument which will help to assure that "eavesdropping" [78]

[76] In the light of modern legal and psychological, particularly psychoanalytical, research, there are overwhelming reasons for stress upon an enlightened policy of prevention, rehabilitation, and cure (in proper cases) and confinement of the policy of punishment to proper limits. As to the advisability of preserving a policy of punishment, within such limits, see Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 U. PA. L. REV. 378 (1952). In embarking on experiments of social policy making, however, we must constantly keep in mind the peril inherent in the adoption of social danger as a standard for restricting individual freedom. Concentration camps were rationalized by the ideology of social danger and its prevention. In order to safeguard individual freedom, we must preserve the system of separation of the pre-conviction from the post-conviction stage and apply the new progressive methods only to the latter. Pre-conviction procedure must be conducted on the assumption that conviction means punishment.

[77] Irvine v. California, 347 U.S. 128, 147 (1954) (Justice Frankfurter, dissenting).

[78] Justice Jackson, speaking for the majority in Irvine v. California, *supra* note 77, distinguished that case, in which police officers installed a microphone in accused's home and eavesdropped on his private conversations, from *Rochin*, saying: "However obnoxious are the facts in the case before us, they do not involve coercion, violence or brutality to the person, but rather a trespass to property, plus eavesdropping." *Id.* at 133.

The distinction drawn in the case between physical violence and impairment of the integrity of man's spiritual sphere sounds strange in our culture, which originated in spiritual nonconformity. In other fields of our law, there is an increasing tendency to extend protection hitherto accorded to physical aspects of personality to its spiritual aspects. Thus in the area of private law "personal rights" are being detached from the tangible property concept upon which they were originally based, see Brandeis & Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), and intimately connected with the total human personality. See Chafee, *The Progress of the Law, 1919–1920*, 34 HARV. L. REV. 388, 407 (1921); Nizer, *The Right of Privacy: A Half Century's Developments*, 39 MICH. L. REV. 526 (1941).

may not eventually develop into eavesdropping on man's unconscious.