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The Third Degree--Its Historical Background, the Present Law and Recommendations

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Notes

THE THIRD DEGREE—ITS HISTORICAL BACKGROUND
THE PRESENT LAW AND RECOMMENDATIONS

Torture is a certain method for the acquittal of robust
villians and for the condemnation of innocent but feeble men. . . . If
truth is difficult to discover from a man's air, demeanor, or counte-
nance, even when he is quiet, much more difficult will it be to dis-
cover from a man upon whose face all the signs, whereby most men,
sometimes in spite of themselves, express the truth, are distorted by
pain. . . . An innocent men either confesses the crime and is con-
demned, or he is declared innocent, having suffered an undeserved
punishment. But the guilty man has one chance in his favor, since,
if he resists the torture firmly and is acquitted in consequence, he has
exchanged a greater penalty for a smaller one. Therefore, the innocent
man can only lose, the guilty man gain, by torture.¹

PART I

THE HISTORICAL BACKGROUND

The use of physical maltreatment to extort confessions of guilt of
crime was widespread in Europe before the end of the eighteenth
century. “[T]orture was applied daily—men were broken on the
wheel, branded, mutilated, subjected to barbarous cruelties—secret ac-
cusations were encouraged, capital penalties indiscriminately multi-
plicated. . . .”² Such had been the fare for the despotically ruled peoples
of the continent since the days of Greece. But, as the torture and suf-
fering went on during the eighteenth century, so did an attack on such
inhumane practices,³ and this onslaught of words and reason dimin-
ished the use of physical punishments to induce the “truth.” Today,
actual violence to the body is almost unheard of. It is believed that a
resume of eighteenth century abuses, and demands of abolition of the
same, might aid in this proposed survey of present-day methods of ob-
taining “truth” in criminal cases. The reasons for limitation of extorted
confessions, expounded then, can be relied upon still, and can even be

¹Quoted by Marcello T. Maestro in his work, Voltaire and Beccaria as
Reformers of Criminal Law, pp. 59-59, Columbia University Press, New York,
1942, from Cesare Beccaria’s Dei Delitti e Delle Pene, pp. 148-156.
²Phillipson, Three Criminal Law Reformers (Beccaria, Bentham, Ro-
³Id. at 27: “Eminent publicists and statesmen frequently pronounced dis-
courses on justice, on natural right; distinguished writers emphasized the existence
of human rights and obligations, fundamental and inalienable; poets and drama-
tists produced works filled with noblest sentiments; essayists dilated on the sublime
aspirations of man.”
applied, to a large extent, in an attack upon present-day sweatbox methods.

Prior to the eighteenth century most of the nations legislated in favor of the practice of torture. Hellenic and Roman law sanctioned it, and the religious upheaval of the late middle ages encouraged its use. The Spanish Inquisition flourished in the midst of broken bones and blood obtained along with "confessions" of heretics. In France, the nature of the crime had much to do with the confessions.

There was a maxim that where the alleged crime was a particularly heinous one, a conviction might be had on slight evidence, or on scarcely more than mere suspicion. The mere fact of accusation was considered as prima facie evidence of guilt; so that the prisoner was compelled to establish his innocence beyond the least doubt. All men had to be, literally, above suspicion. 'Confession', extorted amidst the horrors of the torture-chamber, was regarded as the queen of proofs, 'regina probationum'.

Royal ordinances regulated torture, however, in France, and there were two sanctioned kinds: 'La question preparatoire', inflicted on a man accused of a crime which was punishable by death, and 'La question prealable', to obtain a confession of accomplices after the condemnation of the accused. In Italy, the institution of torture attained a high degree of development. It could even be applied in some civil matters, and in most criminal offenses. John Howard, the famous English prison reformer, found torture chambers widespread in his tours of Europe. "The tender mercies of the wicked are cruel," he wrote, and "the cries of the sufferers in the torture-chambers may be heard by passengers without, and guards are placed to prevent them from stopping and listening."

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4 Id. at 32.
5 Id. at 30: "Terrorism was deemed the one panacea for all public and social ills. Unrestrained cruelty and ferocity, judicial disregard of human life, indiscriminate extortions of 'confessions', intimidating methods of securing evidence, and mechanical means of estimating its applicability and its value, secret procedure, and sudden confrontations—all these were thought apt and sufficient measures to secure respect for life and property."
6 Id. at 31.
7 Id. at 35.
8 PHILLIPSON, op. cit. supra note 2, at 35.
9 HOWARD, THE STATE OF THE PRISONS, p. 109, E. P. Dutton & Co., New York, 1929. On page 64, Howard writes: "The execrable practice of torturing prisoners is here (Hanover, Germany) used, in a cellar where the horrid engine is kept. The time for it is as in other countries, about two o'clock in the morning. A prisoner suffered the osnabrug torture twice about two years ago (in the 1760's); the last time, at putting him to the third question (the executioner having torn off the hair from his head, breast, etc.) he confessed, and was executed. If the prisoner faints, strong salts are here applied to him, and not vinegar as in some other places." He continues, on page 109: "A physician and surgeon always attend when the torture is applied; and on a signal given by a bell the gaoler brings in wine, vinegar, and water to prevent the sufferers from expiring. Thus in the Spanish inquisition the physician and surgeon attend to determine the
However, some countries refused to permit torture. It had been abolished by the middle 1700's in Sweden, and similarly by Frederick the Great in Prussia. In Ireland it was not recognized by law. And, although there is evidence that torture was applied in England, it was not widely sanctioned. "Though English judges have occasionally allowed torture in fact, their pronouncements are wholly against it." Stephen admits of the use of torture in his work, *History of the Criminal Law of England*, but asserts also that it was never recognized as a part of the law of England. He explains its lack of legal sanction:

> Probably the extremely summary character of our early methods of trial, and the excessive severity of the punishments inflicted, had more to do with the matter than the generalities of Magna Charta or any special humanity of feeling.

The fact remains that torture was widespread in Europe as late as 1775. It had been deemed the "one panacea for all public and social ills," and had been defended by jurists and ecclesiastics. St. Augustine thought that it was necessary, even though he admitted its defects, and Bacon regarded the application of torture as an experiment by which to obtain the truth. But these men were in a definite minority, and the words of eighteenth century philosophers and writers initiated the demise of such inhumane methods. For example, classical writers, like Cicero and Montaigne, often condemned it. The latter urged:
... that to put a man to the rack was a test of strength and patience rather than of truth, that the infliction of pain is as likely to extort a false confession as a true one ... and that he whom the judge has tortured that he might not die innocent dies both innocent and tortured.\(^\text{20}\)

These men appealed to reason, to utility, to humanity. They contended that it was a suicidal policy on the part of governing authorities to give way indifferently and blindly to such measures of ferocity and cruelty. They cautioned rulers that men had already suffered these abuses too long, and they urged them to adopt more reasonable and equitable means to prevent mass revolts and disorder.\(^\text{21}\) Beccaria was possibly the most vociferous and most effective of the anti-torture lobbyists. He based human justice on the conception of public utility, contending that the object of the law is to lead the greatest number of men to the greatest possible happiness or to the least possible misery.\(^\text{22}\) He asserted:

Torture is useless, wrong, barbarous; it is conducive to false conclusions, and is worse for the innocent than for the guilty, for the physically feeble than the robust. . . . By the use of torture, an innocent man, as he has nothing to gain, is placed in a worse position than a guilty one.\(^\text{23}\)

Words such as these, with the passage of time and revolutions, brought about the desired end—the outlawry of physical torture; and the limitations on the use of confessions obtained by such means. In 1768 in Austria, the *Constitutio criminalis theresiana* was promulgated, which limited the application of torture, and torture was formally abrogated in 1776.\(^\text{24}\) All over Europe the capitalist merchants and producers backed the criminal law reform movement also, because...
they were anxious to safeguard their investments by eliminating both
criminal and legal violence. Italy finally abolished torture in 1789
by decree, although it had been attacked in 1772 in a government
council. The action of Austria also helped lead to the 1789 decree in
Italy, reached after cautious reforms. Torture had been abolished in
1771 in Denmark, and Spain, in 1775, prohibited torture of an accused
without the sentence having previously been announced. The Con-
stituent Assembly abolished torture in France in 1791, and Alexander
I formally abolished it in Russia in 1801.

Thus by 1800, words of wisdom and reason, and aroused masses,
had dropped the curtain on a sordid history of crying human voices
and wrenched confessions. It might all seem fantastic and untrue
today, as we look back, but it does help to review the waste. It is
believed that by looking at these times of horror, which exaggerate
many thousand times over our own examples of injustice, the pos-
sibilities of coercive tactics can be shown. It has been only a little
over a century and a half that the modern world has been free from
physical maltreatment in a large degree. Today's practices, though
mild in contrast, display tendencies of inhumanity—men are given the
third degree, and confessions are beaten out of them. To overlook the
past, therefore, might lead us to overlook a possible future.

But today's problems are more closely connected with a system of
law. The solutions lie there, and the answers to probing questions lie
there—in the law. The second part of this note is concerned, therefore,
with the protections and remedies which the law offers.

**PART II**

**The Present Law**

One has to read only a few cases wherein the issue of voluntariness
of a confession is discussed to realize that, although the reforms of the
eighteenth century were sweeping, they were not totally successful.
The fact must be faced that today we do have cases of psychological
coercion, and also some of physical coercion. Although such tactics
have not been openly sanctioned since 1800, there has been resort to
them. But the law has presented a protection, theoretical to a great

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25 GERSHONY, FROM DESPOTISM TO REVOLUTION, p. 218, Harper & Brothers
26 PHILLIPSON, op. cit. supra note 2, at 93-98.
27 For a brutal example, see Police Duty, by James Maxwell, at p. 726 in
FRANKS, CASES ON CONSTITUTIONAL LAW; see also p. 730 of this book where an
excerpt from Report on Lawlessness in Law Enforcements appears. See also Har-
riss v. South Carolina, 338 U.S. 65, (1949); Ashcraft v. Tennessee, 322 U.S. 143,
(1944); McNabb v. United States, 318 U.S. 332 (1943).
extent, to the victims of such abuses, which has provided some measure of safety to go with the abolition of sanctioned torture.

Today, the protection of the accused can be viewed in two broad areas. One has to do with the use of the *fruit* of the alleged third degree—the confession—for, generally speaking, coerced confessions are not admitted as evidence in courts of law. The other area is more remedial than protective, though (as does any remedial right) it deters wrongful action to a certain extent. This area has to do with the victim's rights of relief, for his damages, against his coercers. It will be seen that the former area, which will be discussed first, is put to much more practice, but it will also be seen that the latter area theoretically affords a better defense against coercion, since it attacks the *primary evil*—the actual infliction of the third degree.

1. *Admission of Confessions As Evidence.* It will be wise first to re-examine the generally accepted purpose of third degree measures. Physical and psychological maltreatment is applied mainly to obtain a confession of guilt of crime from one accused of crime. (It is not doubted that some such treatment is also inflicted because of sadistic thinking.) Now, although the *primary evil* in such tactics is the *application* of them, the law as to confessions has not arisen because of denunciation of the tactics per se. The law concerning confessions hits at the resultant *secondary evil* (the *fruit* of the third degree)—the *use* of the coerced confession as evidence to convict one of crime. This law is based upon a single determination, that of voluntariness or involuntariness. If it is believed that the confession was given voluntarily, then it is admissible, regardless of the measures used to obtain it. If it is determined that it was not given voluntarily, then it is not admissible, because to admit it would violate the fundamental principle that one cannot be forced to testify against himself. Also, a confession not given voluntarily is thought to be untrustworthy. It can readily be seen that a weak victim of a third degree might decide that it is currently better for him to tell a lie—to confess to something which he did not do—than it is to prolong the torture. It can be said that the "admissibility of confessions" rule has lent some assistance to the fight against such tactics. Although the rule is primarily concerned with insuring the voluntariness of the confession obtained from the accused, it also hinders the interrogator, to some extent, in that if he realizes he will gain nothing by his use of third degree measures, then he may abandon them. His primary purpose is to get a conviction, but this he cannot get with an involuntary confession, so why coerce? It would appear that abolition of the *fruit* would decrease the incentive for such methods. A short resumé of the law concerning con-
confessions should shed some light upon the situation and what is needed to correct it.

Determinating the voluntariness of the confession is the major problem in this area concerning the protection of rights of a person accused of crime. The determination if left for the court or for the jury. In either case, the decision upon the conflicting evidence is absolute, unless the evidence is insufficient to sustain a finding of voluntariness according to legal standards. On appeal, the higher court accepts the trier of facts' decision with regard to disputes, and looks only to undisputed evidence. Confessions made while the prisoner is being illegally detained by authorities will not be received in federal courts. The same rule is not binding on state courts, however, as illegal detention is held not to be the ultimate fact determinative of voluntariness or lack of it. But even in state courts, the fact of illegal detention has some significance in that it is one of the factors for the court or jury to consider in deciding upon the issue of voluntariness. The burden of proving voluntariness is generally held to be upon the state. Voluntariness, though it may be highly determinative of a party's guilt (a voluntary confession is the highest type of evidence), does not need to be proved beyond a reasonable doubt, as does the party's guilt. However, voluntariness must be shown more clearly when the confession is the only evidence of the guilt. Cautionary

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30 McNabb v. United States, supra note 27.
32 People v. Hall, 413 Ill. 615, 110 N.E. 2d 249 (1953); Gallegos v. Nebraska, supra note 31.
34 People v. Hall, supra note 32, at 254. See also State v. Cooper, 10 N.J. 532, 92 A. 2d 786, 792 (1952). "... he may be convicted of murder on his confession." But see Cole v. State, 65 S. 2d 262 (Miss. 1953); People v. Gavurnik, supra note 29.
35 People v. Lettrich, supra note 29.
36 State v. Archer, supra note 28; People v. Lettrich, supra note 29. See the interesting case of Cole v. State, supra note 34, where the court ruled the confession to be voluntary, but that guilt was not proved beyond a reasonable doubt.
statements are not necessary to make a confession voluntary,\textsuperscript{37} nor is presence of counsel required.\textsuperscript{38} Even the presence of arms on the questioner's person does not forego a finding of a voluntarily given confession.\textsuperscript{39} However, the court or jury will consider these matters, along with the age of the accused, the hours when questioned, the duration of interrogation, and the fact that no friends were present.\textsuperscript{40} Generally, it can be said that protracted and uncontrolled subjection of the accused to interrogation ordinarily will indicate involuntariness.\textsuperscript{41}

Once voluntariness has been determined to be lacking, further issues in a criminal case may arise, as to the use of a confession. Two related, but legally separated, problems must be mentioned. The first has to do with the effect of the truth of a confession. It may be said, generally, that even if the confession is established to be true in fact, it is inadmissible if not legally voluntary.\textsuperscript{42}

The second problem has to do with a situation where the record shows that an involuntary confession has been admitted by the trial court. Since the controversial decision in Stein v. People of the State of New York,\textsuperscript{43} evidence of guilt, independent of the confession and adequate in itself, can convict a person even though his trial was marred by admission of a coerced confession. Prior to the Stein case, it was the rule that an appellate court should reverse under such circumstances, because admission of a coerced confession would be held to be a violation of procedural due process and that "fundamental fairness" which is essential to criminal proceedings.\textsuperscript{44}

Consequently, it is believed that the present law is in effect a

\textsuperscript{37} State v. Archer, \textit{supra} note 28; State v. Cooper, \textit{supra} note 34.

\textsuperscript{38} Driver v. State, 92 A. 2d 570 (Md. 1952); State v. Grillo, 11 N.J. 178, 93 A. 2d 328 (1952).

\textsuperscript{39} Tait v. State, 85 S. 2d 208 (Ala. 1953).

\textsuperscript{40} People v. Hall, \textit{supra} note 32; State v. Gallegos, \textit{supra} note 31; Haley v. Ohio, 332 U.S. 596 (1948). Also, in connection, one confession to an earlier one, Lyons v. Oklahoma, 322 U.S. 596 (1944).


\textsuperscript{43} Supra note 31. Frankfurter's dissent, at p. 203: "But if law officers learn that from now on they can coerce confessions without risk, since trial judges may admit such confessions provided only that, perhaps through the very process of extorting them, other evidence has been procured on which a conviction can be sustained, police in the future even more than in the past will take the easy but ugly path of the third degree." For the old rule, see Brown v. Allen, \textit{supra} note 31; Gallegos v. Nebraska, \textit{supra} note 31.

\textsuperscript{44} State v. Vaszorich, \textit{supra} note 28; Driver v. State, \textit{supra} note 38; Watts v. Indiana, \textit{supra} note 42; Chambers v. Florida, \textit{supra} note 29; 22 Tenn. L. Rev. 1011 (1953).
retrogression. It does not go far enough to protect the accused from the miseries of the third degree. The cases indicate that involun-
tariness is difficult to show, and conviction can often be gained even though a coerced confession is admitted. What does a police officer or questioner have to lose by his coercive tactics? He has everything to gain, so why not use them? If he can coerce a confession out of a defendant, he stands a fair chance of proving it was voluntarily given—it is his testimony against that of one accused of crime. He at least can go a long way in maltreatment of his victim before he has "legally" coerced a confession. And even if the confession is involuntary, its ad-
mission will not be cause for reversal, if there is sufficient evidence otherwise. Why shouldn't the police officer coerce to get a confession which may lead him to other evidence which will be sufficient to get a conviction? So the rewards are higher than the dangers or disap-
pointments. It appears, therefore, that thus far in the United States mere resort to an attack upon the secondary evil—the fruit of coercive tactics—has done little to remove the primary evil. The third degree, although not sanctioned legally, will go on, it appears, because its present day reward is great for those who apply it.

2. The Victim's Civil Recourse or Criminal Action. A study such as this brings an amazing contrast to light. There are many involuntary confession cases and yet few civil or criminal actions against the inquisitors. Some of the cases where voluntariness is disputed have been decided in favor of the defendant, and very clearly in these cases, he has grounds for a civil action. Some of the cases decided in favor of the state would also provide the accused with an actionable claim. A good many of these cases even appear to show that the treatment amounted to a crime. Yet civil suits, or prosecutions by the state against the inquisitor applying the third degree are few and far between. It would seem that, if the system of justice were complete in this area, then the civil recovery and criminal prosecution cases should balance out the coercion cases. Such symmetry in the law is invisible at present, and is definitely a part of the problem of the third degree.

In many of the coerced confession cases there can be found examples of civil wrongs. Those using third degree methods commit assaults when they threaten one accused of crime. They commit bat-

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46 Stein v. People of State of New York, supra note 31; Rochin v. California, supra note 40; Lisenba v. California, supra note 29.
48 Supra notes 46 and 47.
teries when they lay their hands or instruments upon him. And, in many instances when this third degree procedure is being carried on, the victim is falsely imprisoned. The few cases on the books show that the officers applying such treatment are in no better position than would be ordinary citizens doing the same thing.\textsuperscript{49} That they are police officers or state investigators is no defense.\textsuperscript{50} A similar rule applies with regard to the crimes of assault and battery, false imprisonment, and false arrest. "The official position of the officers provides them no defense for an assault which the law prohibits."\textsuperscript{51}

The hard facts (lack of civil cases) indicate a defect in the victim's right to relief. Difficulty of proof is the major concern of any attorney confronted with a client who has been mauled at the hands of the local gendarmes. Since most of the treatment is given in secret, witnesses cannot be found. Other evidence is likewise lacking. It is only when the extreme cases come to light that such torts can be proved. The difficulty which arises where the victim is a plaintiff, as compared to where he is an accused contending that a confession was forced out of him against his will, is in regard to the burden of proof. It apparently is not too difficult to disprove the state's contention that a confession was voluntarily given\textsuperscript{52} but it is difficult to carry the burden of proving a cause of action. Evidence might be sufficient to leave the court in such doubt as to whether the confession was voluntarily given that it would not be admitted, but a plaintiff also has to convince the jury that he was assaulted, or beaten. It can be seen that the victim might be given the benefit of a doubt in one case, where his life or freedom hangs in the balance, whereas in the other case where he has been wronged, but not too badly, and where the other party faces disgrace and heavy damages, or a prison sentence, he might not be given such a benefit.

But theoretically the remedy is available. And so others might be. There are cases in the books where sureties of official bonds have been held liable to innocent victims of the official under bond.\textsuperscript{53} But generally, the official is not acting within the authority of his office, virtute officii, but only under color of office, colore officii, and for this reason, the surety is not liable.\textsuperscript{54} There have even been

\textsuperscript{49} Wray v. McMahon, 182 Miss. 592, 182 So. 99 (1938); Bonahoon v. State, 178 N.E. 570 (Ind. 1936); Karney v. Boyd, 186 Wis. 594, 203 N.W. 371 (1925).
\textsuperscript{50} 4 Am. Jur. 177 (1936).
\textsuperscript{51} Nostyn v. United States, 64 F. 2d 145 (1933); Bonahoon v. State, supra note 49.
\textsuperscript{52} Supra note 46.
\textsuperscript{53} See the dictum in Union Indemnity Co. v. Cunningham, 22 Ala. App. 226, 114 So. 285 (1927).
\textsuperscript{54} State, to Use of Brooks v. Fidelity & Deposit Co. of Md., 147 Md. 194, 127 Atl. 758 (1925); State ex rel. Bruns v. Clausmier, 250 N.E. 541, 50 L.R.A. 73 (1900).
some cases where the doctrine of respondeat superior has come to the aid of the injured party. Sheriffs may be held liable for the injuries inflicted by their deputies, but once again, the limitation of acting within the authority of the office comes forth. The same rules and limitations apply broadly to cities who employ the tort-feasors.

And, of course, the factor of the inquisitioner's financial resources also enters the civil suit picture, to a very important degree. His police salary, and assets are often insufficient to provide the lure to sue, even if the case can be proved.

It can be seen, therefore, that certain civil remedies are present, but are either too impractical or too ineffective to be of much value to the harassed and mistreated prisoner. And he gains little solace from the fact that the officer might be prosecuted for his crimes. The victim's own injuries are not healed by such action, but future third degree methods could be cut down in number and intensity if there were more of such prosecutions. But here we also find another practical difficulty. In many cases, the application of the third degree is sanctioned by those who prosecute these assault and battery offenders. This, it seems, to a large extent answers the query as to why there are not more criminal prosecutions. True enough, grand juries do receive some of these cases, but there is often a tie-up between the offending law officer and the public prosecutor.

Perhaps some of these statements seem rather sweeping, but it must be noted that the cases are few, which have allowed remedies for such illegal coercion. The answers lie somewhere for the strange contrast mentioned above, and it is suggested that what has been offered here might highlight the weak spots.

PART III

SOME RECOMMENDATIONS—A PROPOSED THIRD DEGREE STATUTE

The law in England is that a person accused of crime or in the custody of the police cannot be questioned in secret by the author-

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Footnotes:
66 State, to Use of Brooks v. Fidelity & Deposit Co. of Md., supra note 54.
67 Kennedy v. City of Daytona Beach, 132 Fla. 675, 182 So. 228 (1938), where the city was not held liable for assault and battery and false imprisonment by police chief—only he is liable for such unlawful acts. See also City of Nampa v. Kibler, 62 Idaho 511, 113 P. 2d 411 (1941) City not liable for expenses of defending police officers: 18 McQuillan, MUNICIPAL CORPORATIONS sec. 53.80, wherein it is stated that statutes may provide for such liability.
ties. One observation of this practice shows that there were but three cases concerning coercive tactics and confession issues in England from about 1910 through 1930. Another observation is that the rate of crime detection in England compares favorably with the rate of crime detection in the United States. Looking at these two observations, it becomes obvious that, although the English law is strict with regard to police methods, it does protect the citizens, and apparently it does not hinder police work.

Ultimately, any argument for or against the use of third degree measures amounts to a balancing of the two sides of the problem. On the one hand we have the desire that all men should be free from despotic handling at the caprice of the police and government, whether innocent or guilty, before trial. On the other hand, we have the alleged need for such coercive tactics so that the guilty person might be discovered, in the necessary protection of the people from wrongdoers. The complete freedom argument was that urged by the philosophers of the 1700’s, and reviewed in the opening portion of this note. In short, this argument says that since no man is guilty until so proved by the state, then every man should be treated as an innocent man until proved guilty by a fair trial. Aligned with this complete freedom view is a belief by many that coercive measures interfere with the efficient administration of police work and of justice.

The police side of the argument contends that third degree methods are necessary in some cases (and supporters of this view stress the need only for liberal questioning methods, not coming out openly for actual physical coercion) where the police are fairly certain that the victim is the actual culprit, and where conviction can be had only upon the use of a confession, or evidence obtained through following up a confession. Otherwise, the criminal escapes, it is argued, and

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58 Rex v. Grayson, 16 Cr. App. R. 7 (1921) (“... police had no right to question Grayson ...”); Rex v. Matthews, 14 Cr. App. R. 23 (1919) (officer has no right to try to elicit admissions from persons suspected by him).
59 43 Harv. L. Rev. 617, at 618 (1930).
60 Chambers v. Florida, supra note 29, at 240, fn. 15; See also LAVINE, THE THIRD DEGREE, Vanguard Press, New York, 1930, p. vii: “The police in Great Britain, infinitely more efficient than our own, operate without resort to violence or to any of the ‘persuasive’ methods described in this volume.”
61 Stephen, op. cit. supra note 14, at 442, “... I think that the fact that the prisoner cannot be questioned stimulates the search for independent evidence.” And a note on the same page, “There is a great deal of laziness in it. It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil’s eyes than to go about in the sun hunting up evidence.” GLOECK, CRIME AND JUSTICE, Little, Brown & Co., Boston, 1936, at p. 76, and statement by a Chicago attorney, p. 77: “The jury saw that their methods had been unfair and acquitted defendants who might have been convicted except for the police.”
62 People v. Hall, supra note 32 (questioning necessary), at 254: “The effect of detention and questioning in coercing a confession ... [depends] primarily upon the individual being questioned.”
can continue his wrongdoing. It is contended that the integrity and superior knowledge of police with regard to criminals, their demeanor and ways and habits, will work to protect the person who actually is innocent of the crime. The number of confessions actually proved to be true, it is said, bears out this contention. In short, it is claimed that the police will apply the third degree only to the guilty person, or to one who has actual knowledge of who is the guilty person, with the result that no guilty persons are allowed to escape into free society.

To either of these arguments can be offered the English example of another system. From what has been stated above, it provides both the protection necessary to the citizen and a better degree of effectiveness to police criminal detection. It is believed that the adoption in the United States of the English law with regard to questioning prisoners would be effective in answering both of the above arguments. It can be added, however, that the police might be forced to work a little harder, and a little more efficiently, to ferret out the criminals.

In line with the English view is the suggestion that it might be wise to exclude all extra-judicial confessions as evidence of guilt—to permit self-incrimination only in the court room under the watchful eyes of the court. Coercive tactics would not be permitted in the court room, and the incentive for third degree outside of the court room would be destroyed. This suggestion hits directly at the primary evil, the infliction of the illegal treatment.

A suggested compromise between the present system and the above-mentioned exclusion of all extra-judicial confessions system, would be to permit confessions only before magistrates, in the presence of the accusers, at the time of the arraignment.

Another suggestion would be to be more careful in the selection of the men with whom we entrust the duty of protecting the citizens from crime. Higher pay would lure better men. An added requirement of at least a high school education could also guarantee to a greater degree the quality of our policemen.

Summing up all of these suggestions, it is believed that the most effective way to rid society of the dangers of the third degree, in prac-

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63 Watts v. Indiana, supra note 42, Jackson dissenting at p. 60. See also 22 TENN. L. REV. 1011, fn. 74, where the author suggests sound film recording the taking of a confession, to guarantee the state's case. It is believed that this could be of help except for the fact that a confession could be coerced before making the actual recording, with mere formality of the movie making following an already broken defendant's confession.


65 Id. at 32.
tice, as well as in theory, is to completely exclude all extra-judicial confessions. The police ought to "have no right to interrogate arrested persons with reference to any charge against any one of them nor to invite from one co-defendant a statement against another."

History has shown that the third degree is a dangerous weapon in the hands of police. It should be done away with, and it is believed that the best way to do this is to hit at the incentive—the acquisition of a legal confession—thus destroying the value of the fruit of the third degree. Exclusion of extra-judicial confessions would answer the problem. To permit even a confession before an examining magistrate is dangerous, for the reason that the third degree could be applied just before the examination with the same coercive effect. Suggested legislation is now offered embodying the complete exclusion rule.

Series of Statutes Which Should Help to Eliminate The Third Degree

I. Coercion of prisoners for purposes of confession—felony—Any public officer, or any peace officer, or any judge or justice of the peace, or any sheriff, under sheriff, deputy sheriff, constable, warden or jailer, or any chief of police, police magistrate, police officer, policeman or detective, or any person who shall have authority to arrest or to detain in custody, who, by threats either in words or physical acts, or by foul, violent or profane words or language, or by exhibitions of wrath or demonstrations of violence, or by the display or use of any club, weapon, or instrument, place, or thing of torture, shall put in fear, submission, or under duress, or shall assault, beat, strike, slap, kick or lay violent hands upon, or threaten to assault, beat, slap, kick or lay violent hands upon, any person, for the purpose of inducing or compelling such person to make any statement of fact, or revelation, about any transaction, or to make a confession or statement of his knowledge of the commission of any crime, or alleged, or suspected crime, shall be deemed to be guilty of a felony, and upon conviction thereof shall be imprisoned in the penitentiary for not less than one year nor more than five years.

II. Additional penalty—In addition to the imprisonment for conviction of the preceding felony, the defendant shall never thereafter be allowed to hold any office of profit or trust under the laws of this state, or any subdivision thereof, nor any city or town thereof.

III. Not to prevent other criminal prosecution—The fact that acts of police officers may constitute a violation of this statute shall not prevent a trial and conviction of assault and battery under another criminal statute.

68 Rex v. Grayson, supra note 58.
IV. Extra-judicial confessions excluded as evidence—Confessions obtained as a result of police questioning shall not be admissible as evidence of guilt in any court. The only confessions of guilt which shall be admissible will be those made in the trial court during the course of a trial.

V. Evidence obtained by methods prohibited in this statute not to be admissible as evidence of guilt—Any evidence obtained either directly or indirectly by the methods prohibited in this statute (Section I) is not admissible as evidence of guilt in any court. The trial judge shall determine the competence and admissibility of any alleged evidence under the provisions of this statute from evidence heard by him, independent of and without the hearing of the jury trying the case.

V. Suppressing alleged criminal evidence—A defendant in a criminal case may raise by preliminary motion a question concerning the competence of alleged evidence secured through violation of this statute (Section I) and if the trial judge finds the alleged evidence incompetent he shall so rule and shall suppress it at that time. Alleged evidence suppressed pursuant to this section may not be offered or received into evidence upon the trial of the case. Failure to make a preliminary motion as provided in this section or a ruling adverse to the defendant upon such a motion shall not prejudice the defendant's right to show incompetency of the alleged evidence at the time it is offered into evidence.

VII. High school diploma required—No person shall be appointed as any public officer, or any peace officer, or any judge or justice of the peace, or any sheriff, under-sheriff, deputy sheriff, constable, warden or jailer, or any chief of police, police magistrate, police officer, policeman or detective, under the laws of this state, or of any subdivision thereof, or of any city or town thereof, until and unless that person shall have a high school diploma.87

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87 Although this section of the statute is not aimed directly at the third degree abuses, it is felt that it will serve a purpose of added safety to the citizen.