void in its inception, has subsequently been made valid by removal of the original impediment under an applicable curative statute.[39]

In the light of the general policy to encourage marriage as the basis of organized society,[40] we must proceed to examine the various objections to particular marriages that may be interposed on behalf of some contradicting policy of the domicile which is sufficiently strong for the domicile to refuse to predicate the status on a valid contract of marriage.[41]

It has been pointed out frequently that the proxy aspect of the celebration of a proxy marriage is merely a matter of form, and that the marriage relationship created by it is in no way different from the same relationship created in the more usual manner.[42] While many states refuse to give recognition to marriages performed within their borders which do not conform to the statutory requirements of the state as to mode of celebration, they ordinarily do not refuse to recognize similar marriages performed in other states which are valid by the laws of the latter.[43] Since the courts have frequently held that a proxy marriage is neither contrary to the laws of Christendom nor violative of public policy,[44] we may assume that such a marriage, valid by the laws of the place of celebration, would be recognized in all states[45] with the exception of those cases in which the parties were domiciled in a state having a "Marriage Evasion Act"[46] which they have sought to circumvent. These statutes purport to invalidate all marriages by persons domiciled within the state which are performed elsewhere in any manner other than that authorized by the laws of the

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[39] IOWA CODE § 595.19(4) (1950), Pickard v. Pickard, 241 Iowa 1307, 45 N.W.2d 269 (1950).

[40] KEEZER, *op. cit. supra* note 15, at 740.

[41] Beale, Laughlin, Guthrie and Sandomire, *supra* note 24, at 507. See also Hall v. Industrial Commissioner, 165 Wis. 364, 162 N.W. 313 (1917).

[42] See, *e.g.*, Barrons v. United States, 191 F.2d (9th Cir. 1951); Lorenzen, *Marriage by Proxy and the Conflict of Laws*, 32 HARV. L. REV. 473, 483 (1919).

[43] "If . . . the statutory inhibition relates to matters of form or ceremony, and in some respects to qualification of the parties, the court would hold such marriages valid here; but if the statutory prohibition is expressive of a decided state policy as a matter of morals, the court must adjudge the marriage void here, as *contra bonos mores*." Pennegar v. State, 87 Tenn. 244, 10 S.W. 305, 307 (1889). See also Pierce v. Pierce, 379 Ill. 185, 38 N.E.2d 990 (1942); RESTATEMENT, CONFLICT OF LAWS § 134, comment b (1934); Beale, Laughlin, Guthrie and Sandomire, *supra* note 24, at 521.

[44] Barrons v. United States, 191 F.2d 92 (9th Cir. 1951); U.S. *ex rel.* Modianos v. Tuttle, 12 F.2d 927 (E.D. La. 1925); Ferraro v. Ferraro, 77 N.Y.S.2d 246, 251 (1948) (against public policy to deny the validity of the proxy marriage when performed in compliance with the laws of the District of Columbia); Hardin v. Davis, 30 Ohio Ops. 524, 527, 16 Ohio Supp. (1945); Apt v. Apt, [1947] P. 127, *aff'd*, [1948] P. 83 (C.A.).

[45] Hardin v. Davis, 30 Ohio Ops. 524, 527, 16 Ohio Supp. 19 (1945); Lorenzen, *Marriage by Proxy and the Conflict of Laws*, 32 HARV. L. REV. 473, 487 (1919).

[46] The text of the Uniform Marriage Evasion Act and other facts concerning it may be found in 9 U.L.A. 479 *et seq.* (1942).

state of domicile.[47] Unless the marriage would be valid in the state of domicile, such a marriage performed elsewhere would not be recognized as valid there. This is not a problem unique to proxy marriages, however, and further consideration is beyond the scope of this article.

[47] Royal v. Royal, 324 Mass. 613, 87 N.E.2d 850 (1949); Atwood v. Atwood, 297 Mass. 229, 8 N.E.2d 916 (1937); *In re* Canon's Estate, 221 Wis. 322, 266 N.W. 918 (1936).

THE LIE DETECTOR

Recent newspaper reports indicate that the lie detector is being used fairly extensively in police investigation in Iowa.[1] Since there are no Iowa decisions on the question of the admissibility in evidence of the results of lie-detector tests, a brief description of the lie detector and a review of its legal status are in order.

Experimentation in the detection of deception dates back as far as 1895, but the field was largely undeveloped until 1926 when Leonarde Keeler designed a portable detector known as the polygraph.[2] This is the detector most frequently used today although the original device has undergone considerable improvement. Four methods of detection are used in the Keeler machine. A blood pressure cuff attached to the subject's upper right arm controls a pen which records changes in pulse and blood pressure. A harness is placed around the upper part of the subject's chest; this is connected with a pen which records changes in the rate of breathing. Two metal plates adjusted to the left wrist pick up electrical changes in the skin which are recorded by a third pen. The three pens make their records simultaneously on a moving roll of paper about eight inches wide.[3] The most important recent development in instrumentation came as the result of research conducted in 1945 by John E. Reid. Reid found that a subject's blood pressure could be changed by various forms of unobserved muscular activity to such an extent as to affect seriously the accuracy of the exam-

[1] Des Moines Register, Feb. 23, 1952, p. 1. During a preliminary hearing on a rape charge, the accused with the approval of his attorneys was given a lie-detector test by Professor Richard L. Holcomb, chief of the police science bureau of the State University of Iowa. Apparently the Keeler polygraph was used, and a series of six tests were run. It was the opinion of the examiner that the accused told the truth when he denied having committed the crime. The account also states that Professor Holcomb performs about 12 tests a month. For another instance of the use of the lie detector in recent years in Polk County, see Des Moines Register, Feb. 24 and 25, 1948. Leonarde Keeler, inventor of the polygraph, gave the test to several persons.

[2] For a short history of lie detector experimentation, see INBAU, LIE DETECTION AND CRIMINAL INTERROGATION 2-5 (2d ed. 1948).

[3] *Id.* at 5-8.

iner's diagnosis. The instrument devised to record this muscular activity not only minimizes possible error in the other methods but also acts as a detector itself.[4]

It is desirable to conduct the test in a room free from any distractions which might interfere with an accurate diagnosis. The examiner customarily tells the subject of the importance of the lie-detector test in the case and advises him that the instrument will indicate whether he is telling the truth and that if he is lying, he will be asked for an explanation. A list of ten or eleven questions is prepared by the examiner after he has acquainted himself with the facts of the case. Four or more irrelevant questions are included in this list, and all questions are worded to elicit only yes or no answers. The questions are brief and to the point. The conventional method of questioning consists of asking two or three irrelevant questions at intervals of ten to fifteen seconds followed by pertinent questions and then another irrelevant question. The response to the irrelevant questions establishes the subject's norm, *i.e.*, his distinctive kind and degree of activity. Usually three or four lie-detector records are sufficient to make a deception diagnosis.

After the main series of tests are completed, a control test is run to serve as a yardstick for evaluating the preceding records. This is done by asking the subject to select a card from several ordinary playing cards, look at it and then put it with the rest. He is told to answer "no" to every question, including the one about the card he chose. Thus one answer will be a lie.[5] In addition to the conventional test described above, others such as the "peak of tension" test and the "alternative test procedure" developed by John E. Reid have been used.[6] Since little is being written about the techniques of interrogation, it has been said that the art of questioning is being relegated to a secondary status and further that too much reliance is placed today on what laboratory tests show rather than on the actual questioning of the suspect.[7]

The lie detector has substituted a high degree of certainty for guess-work in the detection of lying. Inbau reports that over a period of approximately sixteen years during which several thousand examinations were given, the Scientific Crime Detection Laboratory maintained by Northwestern University and later by the Chicago Police Department reported optimistic results from their tests. In 75% of the cases, the operator was able to make a definite and accurate diagnosis. In 15 to 20% of the cases, the records

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[4] A technical description of the most recent model of the Reid polygraph may be found in 41 J. CRIM. L. & CRIMINOLOGY 707 (1951).

[5] INBAU, *op. cit. supra* note 2, at 9-12.

[6] See Reid, *A Revised Questioning Technique in Lie Detection Tests*, 37 J. CRIM. L. & CRIMINOLOGY 543 (1947).

[7] Holcomb, Book Review, 34 IOWA L. REV. 730, 731 (1949). Professor Holcomb believes that 90% of all cases are solved by competent interrogation and that the various scientific aids to criminal investigation are "best utilized only as aids to proper interrogation".

were too indefinite to permit a cautious examiner to reach any conclusion. In 5% of the cases, even a competent examiner might make an erroneous diagnosis, although the actual number of known errors may be as low as 1 or 2%. The mistakes which occurred invariably were in failing to detect the guilty rather than in misinterpreting the innocent's record.[8]

These encouraging results of the Chicago experts should not, however, lead to indiscriminate acceptance of the lie detector as a means of detecting deception. The success of the test depends ultimately upon the competence of the examiner. The minimum period necessary to train a man to operate the machine competently is six months, and no one can become competent to operate it unless he has the proper educational background and personal characteristics.[9] Moreover, it is recognized that the test cannot be successfully employed where the person examined has been subjected by the police to extensive interrogation or physical abuse.[10] It also appears that the test has little validity when used on persons who possess certain abnormal personality traits.[11]

THE LEGAL STATUS OF THE LIE DETECTOR

During the early period in the development of the lie detector, the courts with considerable justification held that the instrument had not gained such general scientific recognition as to justify the admission in evidence of expert testimony of the test results.[12] In several of these cases no attempt was made to lay an adequate foundation for the expert's testimony.

The question of admissibility continues to be raised in the recent cases, but there is little indication that the courts will accept the lie detector without further technical improvement in lie detection or without some type of state supervision of the testing.[13] In 1945 Missouri held that the defendant in a murder trial was not entitled to demand at the beginning of the trial that all witnesses for the prosecution be compelled and the defendant himself permitted to submit to lie-detector tests in the courtroom.[14] The court quite properly felt that the tests would distract the jury and impede the progress of the trial. Moreover, it has also been pointed

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[8] INBAU, *op. cit. supra* note 2, at 76-78. See also Inbau, *The Lie Detector*, 26 B.U.L. REV. 264, 268-269 (1946).

[9] Inbau, *Some Avoidable Lie-Detector Mistakes*, 40 J. CRIM. L. & CRIMINOLOGY 791 (1950).

[10] *Ibid.*

[11] Floch, *Limitations of the Lie Detector*, 40 J. CRIM. L. & CRIMINOLOGY 651 (1950) (criticizing the use of the lie detector in parole investigations).

[12] Frye v. United States, 293 Fed. 1013, 34 A.L.R. 145 (D.C. Cir. 1923) (systolic blood pressure test); State v. Bohner, 210 Wis. 651, 246 N.W. 314, 86 A.L.R. 611 (1933); People v. Forte, 279 N.Y. 204, 18 N.E.2d 31 (1938); People v. Becker, 300 Mich. 562, 2 N.W.2d 503 (1942). *Contra:* People v. Kenny, 167 Misc. 51, 3 N.Y.S.2d 348 (Co. Ct. 1938).

[13] For a discussion of the possibility of licensing and supervising lie-detector operators by the state, see Smallwood, *Evidence: Lie Detectors and Proposals*, 29 CORN. L.Q. 535 (1944).

[14] State v. Cole, 354 Mo. 181, 188 S.W.2d 43 (1945).

out that if the principals in the trial could be compelled to take the test, it would be unnecessary to test the witnesses.[15]

The Kansas court in a carefully considered opinion in 1947 granted a new trial in a larceny case when the *prosecution* permitted the lie-detector operator to testify that in his opinion the defendant was guilty.[16] The complaining witness as well as the defendant had submitted to the test. The court believed that the results might be inaccurate since the subjects were not laboring under the same emotional strain. Moreover, the tests were said to be inadmissible because the vital function of cross examination would be impaired; the test is not sufficiently reliable; it would be extremely difficult to impeach the competency of the expert; and only tests favorable to the litigant would be introduced in evidence by him. Two years later, this case was relied upon to support a dictum by the Nebraska court that it was not error to refuse the detector test results offered by the *defendant* in a forgery case.[17] It is significant that the majority was eager to seize upon a technical objection to an instruction given by the trial judge in order to reverse the conviction and that two judges vigorously dis-

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[15] INBAU, *op. cit. supra* note 2, at 85.

[16] State v. Lowry, 163 Kan. 622, 185 P.2d 147 (1947). In several other recent cases, the prosecution has attempted to introduce the results of the test in criminal cases. In People v. Wochnick, 98 Cal. App.2d 124, 219 P.2d 70 (1950) partial test results introduced by the prosecution were held inadmissible on the ground that they were prejudicial because of the unreliability of the test. The state may not introduce evidence of defendant's refusal to take the test on the theory that it tends to show his consciousness of guilt. State v. Kolander, 52 N.W.2d 458 (Minn. 1952). In People v. Sims, 395 Ill. 69, 69 N.E.2d 336 (1946), a conviction for murder was reversed because the defendant was given a lie detector test against her will. Before the machine was turned on, the defendant confessed. Only the confession was introduced in evidence by the State. The court gave as the sole reason for reversal that ". . . the lie detector was used illegally. . . ." *Id.* 69 N.E.2d at 338. Whether the court had the privilege against self-crimination in mind is not clear. There is considerable doubt as to whether the privilege against self-crimination is violated by a compulsory lie detector test. Can an analogy be drawn to compulsory fingerprinting, for example? Can it be argued that the privilege presents no obstacle here because the physiological reactions and the answers to the questions asked by the examiner are not used testimonially, *i.e.*, to show their truth? These questions are discussed in INBAU, SELF-INCRIMINATION 67-68 (1950). If the privilege is involved at all, at least one court has held that it may be waived by a stipulation regarding admissibility entered into before the test is given. People v. Houser, 85 Cal. App.2d 686, 193 P.2d 937 (1948).

Confessions obtained after using the lie detector are not inadmissible simply because the test was used. Commonwealth v. Jones, 241 Pa. 541, 19 A.2d 389 (1941); Commonwealth v. Hipple, 333 Pa. 33, 3 A.2d 353 (1939); State v. Collett, 144 Ohio 639, 58 N.E.2d 417 (1944); State v. DeHart, 242 Wis. 562, 8 N.W.2d 360 (1943). In the last case, although the court did not make a point of it, it appears that no objection to the admissibility of the confession was made at the trial. See [1943] WIS. L. REV. 430, 439. The confession will not be admitted if there are other circumstances indicating fraud or duress. Bruner v. People, 113 Colo. 194, 156 P.2d 111 (1945). A threat to use the lie detector is not such undue influence as will render the ensuing confession inadmissible. Pinter v. State, 34 So.2d 723 (Miss. 1948).

[17] Boeche v. State, 151 Neb. 368, 37 N.W.2d 593 (1949).

agreed with the dictum.[18] The Nebraska case offers the only recent indication that some judges may be prepared to give serious consideration to the lie-detector test. Recent cases from North Dakota and Oklahoma, however, present undivided courts which refuse to admit in criminal cases the defendant's testimony of the results of the test.[19]

Although the judicial sentiment reflected in the recent cases is overwhelmingly opposed to according the lie-detector test results the status of expert testimony, the question remains whether such evidence may be received if the parties voluntarily stipulate for its admissibility before the test is given. A stipulation of this type has been held to be binding on the defendant in a criminal case by a California court.[20] Wisconsin, on the other hand, appears to have adopted the rule that the stipulation is not binding on the state, although the reasoning of this case has been severely questioned.[21] A recent Michigan case is of special interest.[22] The plaintiff sought to establish ownership of a truck which the defendant claimed he had purchased from the plaintiff for $6,500 paid in cash. After hearing hopelessly conflicting testimony, the trial judge rather pointedly suggested that the parties submit to lie-detector tests. The parties and their counsel then agreed to this procedure. When the hearing was resumed, the operator of the lie detector testified that in his opinion the defendant was and the plaintiff was not telling the "whole truth". In finding for the defendant, the trial judge stated that he felt the polygraph tests were a "definite aid . . . in supporting what appeared to be the preponderance of evidence". Apparently realizing that it would be futile to reverse, the appellate court held that since the trial court had already concluded that the evidence favored defendant's version of the transaction there was no prejudicial error in considering the results of the test. By way of dictum, however, the court reaffirmed an earlier case which rejected the lie detector as being too experimental[23] and also stated that the evidence of the

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[18] *Id.*, 37 N.W.2d at 597. Chappel, J., concurring, agreed with the majority opinion that no proper foundation was laid in the present case. If this had been done, the results should have been admitted. "That complicated and difficult questions may arise therefrom in the trial of cases should be no reason for the exclusion of such evidence. Modern court procedure must embrace recognized modern conditions of mechanics, psychology, sociology, medicine, or other sciences, philosophy, and history. The failure to do so will only serve to question the ability of courts to efficiently administer justice." *Id.* 37 N.W.2d at 600.

[19] Henderson v. State, 230 P.2d 495 (Okla. 1951); State v. Push, 46 N.W.2d 508 (N.D. 1950). In the latter case the court also refused to admit in evidence the results of certain hypnotic tests performed on the defendant. *Accord:* People v. Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L.R.A. 269 (1897).

[20] People v. Houser, *supra* note 15.

[21] LeFevre v. State, 242 Wis. 416, 8 N.W.2d 288 (1943), discussed in [1943] WIS. L. REV. 430, 436-439.

[22] 50 N.W.2d 172 (Mich. 1951).

[23] People v. Becker, *supra* note 11.

results of the tests was incompetent even if the parties stipulated for its use. It is difficult to see how the lie detector can be regarded as so completely unreliable that the parties cannot voluntarily stipulate that the results of the test shall be admissible.[24]

[24] See State v. Lowry, 163 Kan. 622, 185 P.2d 147, 152 (1947).

SELF-INCRIMINATION OR SEARCH AND SEIZURE?

Three deputy sheriffs, suspecting Rochin of selling narcotics, forced their way into his bedroom without benefit of a search warrant. He immediately swallowed two capsules that were in the room despite the efforts of the officers forcibly to prevent it. He was taken to a hospital, where his stomach was "pumped" with emetics under the direction of the officers and the capsules recovered. In a prosecution for possessing narcotics, the capsules were admitted in evidence over Rochin's objection and a conviction obtained. The conviction survived review in the California appellate courts. The Supreme Court of the United States granted certiorari and held that the judgment be reversed. The Due Process Clause of the Fourteenth Amendment prohibits the utilization of such methods in the enforcement of state penal codes. The brutal methods used to obtain the evidence shock the conscience and offend a sense of justice. Such evidence may be likened to coerced confessions, which are inadmissable under the Due Process Clause even though independently established as true.

Justices Black and Douglas, in separate concurring opinions, reiterate their views that the Fifth Amendment, applied to the states through the Fourteenth, prevents the use of such tesimony.[1]

The extent to which the limitations on the federal government arising from the Fourth and Fifth Amendments also apply to the states has been a vexed one. The "series of recent cases" dealing with coerced confessions, referred to by Justice Frankfurter in the *Rochin* case, have marked out to a limited degree the applicability of Fifth Amendment principles.[2] A case decided in the same term as the *Rochin* case, *Gallegos v. Nebraska*,[3] raised the problem in a new form. It was alleged that Texas police officials had pressured from an alien in wrongful detainment a confession of murder com-

[1] Rochin v. California, 72 Sup. Ct. 205 (1952).

[2] Stroble v. California, 72 Sup. Ct. 599 (1952); Gallegos v. Nebraska, 72 Sup. Ct. 141 (1951); Watts v. Indiana, 338 U.S. 49 (1949); Malinski v. New York, 324 U.S. 401 (1945); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Lyons v. Oklahoma, 322 U.S. 596 (1944); Chambers v. Florida, 309 U.S. 227 (1940); Brown v. Mississippi, 297 U.S. 278 (1935).

[3] 72 Sup. Ct. 141 (1951).

mitted in Nebraska. A Nebraska conviction, based in part upon the confession, followed. While the majority of the Court found no violation of standards of decency and justice, Justice Jackson pointed out that the reason these confessions are excluded rests upon a dual ground. To the extent that such evidence is inherently unreliable, it is objectionable no matter by whom obtained, Texas or Nebraska. But insofar as the purpose of exclusion is to regulate police methods, it would not apply ". . . where a state of confession sought no conviction and the state of conviction did not seek the confession."[4]

In the *Gallegos* case Justice Jackson expressly disclaims resolving the question. In the *Rochin* case Justice Frankfurter seems to decide it by *dictum* at least. Writing for a six man majority, he says, "Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true."[5]

While the *Gallegos* case, involving a confession, would seem to be a Fifth rather than a Fourth Amendment problem, the *Rochin* case might well be characterized as a search and seizure question. The evidence was not in the form of extra-judicial verbal utterances, but was "real" evidence highly probative of the possession of narcotics.

The decision in the latter case would seem to cut down the possible scope of the recent decisions on the extent to which state courts may utilize evidence obtained by unlawful search and seizure. In *Wolf v. Colorado*[6] private records of a physician were discovered and seized by state officers acting without a warrant. The entire court agreed that the liberties afforded by the Fourth Amendment were implicit in the Fourteenth, but the majority denied that due process required the exclusion of the evidence. Even Justice Black, who conceives of due process as incorporating the first eight amendments of the Bill of Rights, agreed that the exclusionary rule is solely federal in its application.[7] The majority indicates that if a state were to "affirmatively sanction" such an

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[4] *Id.* at 150 (concurring opinion).

[5] 72 Sup. Ct. 205, 210 (1952).

[6] 338 U.S. 25 (1949) (6-3 decision). Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties,* 45 ILL. L. REV. 1 (1950); Fraenkel, *Search and Seizure,* 33 IOWA L. REV. 472, 491 (1948); Comment, *Due Pocess and the Admissibility of Evidence,* 64 HARV. L. REV. 1304 (1951).

[7] 338 U.S. 25, 39-40 (1949) (concurring opinion). The statement in State *ex rel.* Kuble v. Bisignano, 238 Iowa 1060, 1066, 28 N.W.2d 504, 508 (1947), that ". . . the Fourth and Fifth Amendments to the Federal Constitution . . . do not apply in the state courts." is in accord when it is noted that the court deals specifically with the exclusionary rule.