

# Book Reviews

STUDIES IN LAW AND POLITICS. By Harold J. Laski. New Haven: Yale University Press. 1932. pp. 299. \$3.

It is difficult for Mr. Laski to touch a subject without informing it with his learning, his critical insight and his warm and generous spirit. It is therefore scarcely necessary to say that these studies furnish examples of all his qualities, particularly those which have made him an eminent authority in his field at an age when most of us were barely through our apprenticeship.

A book of this sort is peculiarly difficult to review. It consists of essays written at different times and for different purposes. Nor is there a single thread of argument or policy that runs through them except in so far as they are all written by a man of pronouncedly individual temperament on related topics. But because some of them are what the French call of the highest actuality, it would have been helpful in the case of all the essays, as well as in the one on "The Problem of the Second Chamber" (p. 104) to have had the date of original publication. In these urgent questions, a change of government makes a kaleidoscopic shift in the background and appreciably redistributes emphasis. The fact that this discussion of the function of the House of Lords is reprinted as it was written in 1925 precludes an examination of the plan for reorganization presented by the Baldwin ministry in 1927 and deprives us of hearing the caustic comment with which Mr. Laski doubtless greeted the proposal by a Tory ministry to limit the royal prerogative. It was a strikingly clear example of the way in which the interests of an economic class override a professed political ideal.

Several of these essays are historical, dealing with the "Age of Reason," "Diderot," and "The Socialist Tradition in the French Revolution." When Mr. Laski writes on such topics, he is certain to be delightful. The theme gives him an opportunity for trenchant phrases and illuminating epigrams and it leaves us with a feeling of astonished admiration at a style that can dart from allusion to allusion without fatiguing either the writer or the reader. Who but Mr. Laski could refer without pedantry to the "Utopias of Vairasse and Sadeur" (p. 26), names which for most of us are not even words in a dictionary for the simple reason that they are not to be found in most accessible dictionaries? It is a ground on which Mr. Laski is thoroughly at home and in which one could have no better guide.

The eighteenth century was, as he reminds us, a complicated period, one that does not lend itself to formulation in a sentence. But, by the same token, one may be permitted to doubt whether Mr. Laski has not made his contrast between the eighteenth and seventeenth centuries (pp. 16-19) a little too easy by over-simplifying the latter. The beginnings of modern experimental science and the temper that the experimental method presupposes were in the seventeenth century. Again, it is to the seventeenth century that we must go for the first real challenge of authority as such; a challenge, that the Renaissance did not offer. At any rate, while we all have our favorite centuries and while I share what I suspect is Mr. Laski's partiality for the eighteenth, a champion of its

predecessor might well charge Mr. Laski with ignoring complexities and nuances, important in other connections.

A second group of essays deals with specific and practical matters: "The Problem of a Second Chamber," "The Technique of Judicial Appointment," "The Personnel of the British Cabinet (1801-1924)," "Judicial Review of Social Policy," and "The Procedure for Constructive Contempt." The last two are really sharp criticisms of the House of Lords' judgments in *Rex v. Roberts*;<sup>1</sup> and in *Rex v. Editor of the "New Statesman."*<sup>2</sup>

On these two decisions, I for one find it difficult to disagree with Mr. Laski. In *Rex v. Roberts*, the "Poplar" case, the Borough Council of Poplar was personally charged with wages paid to employees on the ground that though paid in good faith and with full honesty of purpose, they were "unreasonably" excessive. The majority of the Court substituted its own opinion of reasonableness for that of an elective and responsible body, and the situation renders plausible the assertion that the majority "opinion" was an unconscious function of economic prejudices.

In discussing *Rex v. Editor of the "New Statesman,"* Mr. Laski properly uses vigorous language against an obsolete judicial prerogative which lends itself to abuse, has frequently been abused and has perhaps never been so obviously abused as in the case of the "New Statesman." The matter of constructive contempt is peculiarly important in American Law, where the little that can be said for the doctrine in England loses most of its force by the mere fact of difference in space and time.

When Mr. Laski speaks of the technique of judicial appointment, he has in mind chiefly American conditions. He is for an appointive rather than an elective judiciary, and he has worked out a rather elaborate scheme of appointment and promotion. A reviewer would be more than human if he neglected to point out that Mr. Laski's scheme would have excluded from the Supreme Court both Justice Holmes and Justice Brandeis, the two men whom he admires most as men and judges. It might further be pointed out that there are possibilities he does not consider, such as the election by popular vote out of a list of eligibles, or the plan of the Commonwealth Club of San Francisco whereby an incumbent is so strongly favored that reelection is practically certain, except in cases of violent popular feeling. The plan further gives the people the power of rejection but not of selection. Both plans meet some of the objections to the elective system and on both we should be glad of Mr. Laski's comment and criticism.

In the essays on political and legal theory, entitled "The State in the New Social Order," "Law and the State" and "Justice and the Law," Mr. Laski presents to us doctrines that we should expect of him. Though he is a pluralist and a realist in political philosophy, he is not afraid of announcing a moral purpose. "If I am told," he says (p. 296), "that law is not morals, I can only answer that it is then so much the worse for law, for the degree of their separation, as our law of divorce so notably shows, is always the measure of its failure." We may start at "always"—a word which should always be avoided—and doubt the completeness of the correlation, but in this as in so many other matters, it is the great merit of Mr. Laski and of those who like him are decried as radicals and iconoclasts, that they will not barter their humanity for the empty symmetries of a fine technique and do not shrink from the conclusion

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1. [1925] A. C. 578.

2. 44 T. L. R. 301 (1928).

that a technique which issues in hardship and cruelty is terribly in need of justifying itself.

None the less, it may well be that the theoretical basis of Mr. Laski's philosophy still needs pruning. Words like "state" and "sovereign" are dangerous and anyone who uses them should keep his fingers crossed, and pray that the connotations of his various terms have not got themselves inextricably confused. Most modern publicists can subscribe to the doctrine that the "State" is one form of association like other forms and not a super-entity. But evidently one can hold such a doctrine and still speak of the "State" in such terms as those which Mr. Laski uses in the twelfth essay, terms which would suit as well a State that professed a religion, loved its subjects and had interests and satisfactions independent of theirs.

It might be questioned whether our thinking would not be clarified by removing the "State" altogether from even this qualified tendency to mythopoesis. Suppose we consider the word "State" not as a form of association like any other, but merely as a verbal or quasi-mathematical symbol for the fact that people do associate in various ways and that in a given territory it is normally convenient for certain men or groups of men—the governors in all their phases—to have the final decision when the interests of different associations and different individuals come into conflict. The principal use of the term "State" would have reference to the relations between the people of one territorial unit and another. When the word is used without such external reference, it would merely mean that some as yet undetermined—but quite determinable—governmental agency is involved.

In this way governors who act for their own interest alone without reference to the governed, would have to avow their purpose as boldly as did Thrasymachus, and could not well interpose a screen of the so-called "interests of the state" as such. Mr. Laski's moral purpose in law and politics would gain from being clearly stated as the moral purposes of specific and recognizable individuals. It is too bad that we cannot borrow symbols from the astronomers or the symbolic logicians. Perhaps to do so would dispel the last wraith-like streaks of Hegelian fog which pupils of T. H. Green find it a little impious to exorcise altogether.

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CASES ON ADMINISTRATION OF INSOLVENT ESTATES. By Thomas C. Billig and Homer F. Carey. Chicago: Callaghan and Company. 1932. pp. xiii, 810. \$6.

A PROMINENT referee in bankruptcy told me at the recent dinner of the National Association of Referees in Bankruptcy that he supposed most of the referees while at law school had not had an opportunity to study bankruptcy. The referees as a body are on the young rather than the elderly side of middle age. The statement was a surprising illustration of the comparatively late entry of the study of insolvency problems into law school curricula. The publication of a succession of new casebooks on credit and security transactions and the prompt acceptance of these books in our leading law schools seems to indicate that the study of bankruptcy by itself is not enough to satisfy modern demands in legal education. One solution is to expand the corporation courses to include a detailed consideration of reorganization and dissolution, supplemented perhaps

with a brief technical course on bankruptcy. Another is to incorporate the insolvency topics into a course or courses dealing with security devices. A third plan is to supplement existing courses on contracts, sales and procedure, including equity, with a law administration outline, covering enforcement of judgments, fraudulent conveyances, general assignments, receiverships, and bankruptcy. Such a course may itself be followed by a more functional grouping dealing with security. A fourth suggestion is to segregate problems of insolvent administration and deal with them on a functional basis. Professors Billig and Carey have chosen the fourth method.

This new book is based upon the notion that the lawyer's approach to insolvency cases is a factual one. The arrangement of materials parallels the sequence of practical problems which would confront the lawyer if he were called upon to decide which legal methods were appropriate in dealing with any given situation. Instead of taking up *seriatim* devices of court-help and self-help as more or less integral systems, the Billig-Carey volume contemplates a comparative study of general assignments, equity receiverships, and bankruptcy in connection with each problem presented from the very first.

The book opens with a short narrative statement about friendly adjustment, receiverships, and bankruptcy. This is followed in the first chapter by an interesting series of documents and cases, both reported and unreported, illustrating the factual and legal interrelation of the three methods. In this first chapter the student may follow several cases from the inception to distribution. Chapter II, discussing "The Problem of the Debtor," opens with a definition of insolvency, considers the applicability to different business units of various methods of insolvency administration and concludes with a somewhat conventional treatment of the acts of bankruptcy. Chapter III, entitled "The Problem of the Creditors," considers both the technical requirements for instituting the various methods of administration and the practical question of obtaining the cooperation of creditors. Much of Chapter IV, "The Problem of 'Jurisdiction'," is devoted to the topics of original and ancillary administration in equity and bankruptcy. Chapter V, entitled "Some Problems of Administration," contains materials concerning possible conflicts over the control of assets, the operation of an insolvent business, claims in receivership and bankruptcy, and discharge of debtor and property. The cases chosen, mostly recent ones, not only bring out points of legal controversy, but also illustrate the contemporary business scene. The brief text discussions are illuminating; the notes are helpful and informative without attempting to be exhaustive; valuable references to non-legal material are included; and the best of law review discussion is cited. The bankruptcy cases succeed in covering most of the technical phases of bankruptcy. Though I am inclined to disagree with the authors, from the standpoint of their own outline, about the omission of *Isaacs v. Hobbs Tie and Timber Co.*<sup>1</sup> as a leading case, it is at least named in a footnote.

The book is somewhat shorter than the average casebook for advanced students. However, comparisons of casebooks on the basis of length are easily misleading. While one book will omit, for the most part, historical text material and will place its forms and statistics in an appendix in eight point type, and another will print historical and other text discussions that any careful student would have to read, whether in the book or not, and will intersperse the cases with forms and statutes printed in ten point type, the actual material for daily assignment often differs much less between two casebooks than the nominal

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1. 282 U. S. 734 (1931).

length would indicate. Moreover, when a book is intended for use throughout the United States, it is often advisable to include a certain amount of material which is of considerable utility in some jurisdictions, but which will be passed over rapidly elsewhere.

Messrs. Billig and Carey belong distinctly to the advanced school of casebook authors and editors. They require the student from the first day to decide what legal solutions are most appropriate for stated business difficulties. All the new casebooks on creditors' problems in one way or another stimulate the student to compare legal and other devices of administration. The tendency up to the publication of this book has been to introduce the student first to different legal methods of dealing with creditors' rights and remedies, and to leave to individual research and advanced study some of the matters which these authors introduce at the outset. There is considerable question as to how often practitioners can expect an opportunity to decide whether an estate will be administered under a general assignment, a receivership, or in bankruptcy. More likely, perhaps, the lawyer comes in only when the field of legal combat has been designated by others or by circumstances. This casebook imposes a considerable responsibility on the instructor to make sure that the student has a coherent idea of the general scheme of the three devices compared. Whether the plan and arrangement are accepted enthusiastically or tentatively there is no doubt that the authors have made a challenging and important collection of materials. Five or ten years from now when the new credit transactions and security books are being revised it will be interesting to observe how far these authors have been paid the flattery of imitation. Certainly, none of us can be confident that they will not have determined the technique for covering the material in their field.

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**THE DIVORCE COURT.** Volume I, Maryland. By Leon C. Marshall and Geoffrey May. Baltimore: The Johns Hopkins Press. 1932. pp. 355. \$3.

THE authors' pioneer research in judicial statistics presents to the lawyer, the sociologist, and the statistician a lucid picture of 3306 Maryland divorce suits in 1929,—from the time applications are first made, through the various court ramifications, till the aftermath of alimony and attorneys' fees. As one divorce occurs every two minutes in the United States, the Institute of Law of The Johns Hopkins University, in its study of the machinery and expenses of law courts, the delays in litigation, and its inauguration of a system of judicial records and statistics, has properly made this court of human relations a subject of intimate scrutiny.

In Maryland, divorce is adjudicated by the courts of equity. Three officials handle every divorce case: an Examiner takes testimony; an Auditor offers recommendations; and the Judge gives the final decision. Infidelity and desertion are the chief grounds for divorce. And, since two years residence in the state is required, migratory divorce as a means to evade state laws is not a problem of any consequence in Maryland. Maryland's history of separation, divorce, annulment, and alimony legislation is traced for three hundred years with a copious citation of cases in the foot notes.

The year 1929, an abnormally prosperous year, no doubt affected many of the results of the study such as the average amounts allotted for alimony and attorneys' fees and the volume of divorce cases which, as sociologically established, rises with prosperity and falls with depression. Though the material

in this study, on a miniature scale, is available in the annual U. S. Marriage and Divorce Reports, Professors Marshall and May have focused the searchlight on evidence behind divorce court records, facts gleaned from studying the testimony in divorce cases, and classifying the data on form schedules bearing several hundred questions. The book is well filled with tables, charts, and graphs portraying the "human grist" of the divorce problem.

The Maryland divorce rate is only about one-half that of the United States' average rate. The marriage tie is dissolved with reasonable speed in this state, three months being about the median average time. Another interesting nugget of information is that alimony is sought in only one-fourth of the cases and granted only one-eighth of the time, and the median average sum allowed is only \$33 a month for alimony including support of children. Still more penetrating is the knowledge that the most frequent attorney's fee is \$50, the second most popular \$100, and the third, \$25; while in one-tenth of the cases, fees were \$200 or over. Additional costs of litigation average about \$40 per case. The monopoly on divorce practice is shown in that 2% of Baltimore's lawyers handle 60% of the city's divorces.

A chapter entitled "The Mirage of Judicial Controversy" points out that though divorce is supposed to be an adversary proceeding, an agreement between the parties legally amounting to collusion, 44% of Maryland divorces are but *technically* contested, (some answer being filed as a matter of form), only 3% of Maryland divorces are *really* contested in an actual attempt to block the divorce, and only 1% of divorce petitions are refused by the courts. The authors conclude that "even if there is not technically collusion, it is at least true that a goodly proportion of all divorces reflect the consent, the agreement of both parties to the severance of the tie."

The most interesting chapter is called "Beyond a Reasonable Doubt," and demonstrates the flimsy evidence offered to sever the marriage tie. Abandonment is the most popular ground for divorce in Maryland. Yet almost half of these desertion cases had little or nothing in supporting charges, a simple statement being submitted to the court such as "Just packed up and left" with a little verbiage often added.

"From the legal point of view, then, the evidence advanced in divorce litigation meets the requirements of the situation, and it is probably futile, and it may well be undesirable to plan any considerable change in the character of the evidence, if the fiction—for in the great bulk of cases it is a fiction—is to be maintained that divorce is an adversary proceeding."

Professors Marshall and May openly disagree with a conclusion reached in the reviewer's own book "Statistical Analysis of American Divorce" that children helped preserve the home since divorces occur nine times as frequently in childless marriages. They contend that divorces take place in the early years of marriage often before children have by natural course arrived. Nevertheless, it is evident from the U. S. Census statistics that 63% of divorces come from the childless marriage group, and also that half of the divorces are awarded to couples married seven years or longer. The facts are that as children increase arithmetically, divorce decreases at a geometrical ratio.

In conclusion, the authors have no program of improvement and are not prepared to offer any panacea for the divorce problem. They frankly admit that they cannot suggest whether divorce should be stricter or more lax without studying other states. The lawyer and the sociologist can well profit by further social studies in judicial statistics.

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ALFRED CAHEN.

A BIBLIOGRAPHY OF ABRIDGMENTS, DIGESTS, DICTIONARIES AND INDEXES OF ENGLISH LAW TO THE YEAR 1800. By John D. Cowley. London: Quaritch. 1932. pp. xcv, 187.

WHEN Lord Coke, in the preface to one of his Reports, advised law students to seek the fountains, he was drawing a distinction between the "books at large," namely law reports and statutes, and abridgments of them. Of the latter, including indexes and dictionaries, one hundred items had already been published. His advice, good when given, and still good, did not, however, reduce the demand for such books, for they continued to be published and used. Cowley lists 294 of them published before 1800, and their present day bibliographical descendants are among the most important facilities required by the lawyer. Such books are now accepted as necessities, not as substitutes for the "books at large," but as means of approach to them. Without them, search in the multiplicity of source books would be an endless task. In Coke's day, some abridgments were themselves source books, because they digested cases not available in printed reports. Since the distribution of reports and statutes was not wide, as compared to later practice, a legitimate demand existed for substitutes for them. Moreover, the latter responded to a human trait, still evident in the habits of lawyers, leading them to seek the path of least resistance by accepting the work of others in lieu of their own.

Mr. Cowley's Bibliography is therefore significant as a means of picturing the method of work of early English lawyers and judges. In this picture perhaps may be found explanation of mystifying developments both of doctrine and legal institutions. Summaries of statutes and decisions actually used and relied upon, even when they were inaccurate, perhaps contain the answers to many a mooted question of legal history.

Without any such practical *raison d'être*, the bibliography justifies itself in the eyes of book-lovers, for the books listed include some of the monuments of English printing. The work is expertly done, solves some difficult bibliographical problems concerning important items and is preceded by an introduction which is both scholarly and interesting to read. It contains facsimiles of title and text-pages, and is itself an example of fine printing, upholding the traditions of the Selden Society, under whose auspices it is issued.

Users of the book should note that the author did not attempt to list all American copies of the books described. Many other libraries than those indicated are rich in this material.

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FREDERICK C. HICKS.

LEGAL DUTIES AND OTHER ESSAYS IN JURISPRUDENCE. By Carleton Kemp Allen. Oxford: At the Clarendon Press. 1931. pp. xvi, 318. \$5.

WITH one exception all the papers in this volume have previously appeared in print in the legal periodicals. They cover a wide range of topics, as the titles show: Jurisprudence—What and Why?; Status and Capacity; The Judge as Man of the World; The Phlegmatic Englishman in the Common Law; Legal Morality and the *Jus Abutendi*; The Young Bentham; Maine's 'Ancient Law'; Legal Duties; The Nature of a Crime; The Presumption of Innocence.

As always, Mr. Allen writes with vigor and entertainingly, at times brightening his pages with a bit of quiet humor. Obviously it is not possible within

the limits of a review to discuss adequately the various theses advanced by the author in a collection of papers dealing with so many different subjects, and no attempt will here be made to do so. A few general comments which apply to all the essays may, however, be in order. The first is that in his attempts at the clarification of various definitions and classifications, such as *status*, *capacity*, *crime*, *tort*, etc., the author gives the impression that he is tacitly assuming that the scope of such terms, or better of the concepts for which the terms stand, can be arrived at *in vacuo*, so to speak, that is, without keeping constantly in mind the purpose or purposes for which the definitions or classifications are being made. For example, in the paper on Status and Capacity Mr. Allen discusses these terms, or concepts, for some twenty pages, and reaches his conclusions as to the scope of each, before he reveals definitely that he is interested in defining them in order to clarify certain parts of the Conflict of Laws, or Private International Law as he prefers to call it. It may be that the author is fully aware that the limits of general concepts are in our actual thinking processes arrived at in connection with the solution of concrete problems, and that the precise scope of more or less similar concepts denoted by the same words may to some extent vary as different problems present themselves, but on the whole his essays leave an impression to the contrary. This is especially true of the otherwise valuable discussion of The Nature of a Crime, the opening sentence of which reads: "Nothing in jurisprudence has led to more inconclusive discussion than the true ground of distinction between tort and crime." Later on he remarks that many of the distinctions which have been drawn by writers between tort and crime are "concerned with incidentals, not with essentials at all." (p. 226). What needs emphasizing, as the reviewer sees it, is that what is an "essential" attribute of anything whatever for one purpose is merely "incidental" for another. If, for example, one wants to put water into some category, he must know what the purpose of the classification is. The "essential nature" of water for the fire department is that it puts out fires; for the mariner, that it floats boats; for the thirsty man, that it quenches thirst. There are, to be sure, passages which suggest that the author is aware of all this, but on the whole his treatment leaves something to be desired. In spite of this the essay in question, and the other essays as well, are well worth the attention of the serious student of "jurisprudence".

To an American it is interesting to note that the author is familiar with or at least knows of the work of an American writer like Hohfeld. If space permitted, one who is skilled in the use of Hohfeld's so-called "fundamental legal conceptions" could show that Mr. Allen could have used them to great advantage in some of his discussions. An example is the paper on Legal Morality and the *Jus Abutendi*. Mr. Allen asks: "Is there any limit to the *exercise of a legally recognized right*?" (p. 221). (The italics are the reviewer's). Our hypothetical "Hohfeldian" would at once point out that until one knows which one of the several more specific meanings of the ambiguous word "right" is here involved, no clear discussion of the real problem involved is possible, for we do not know just what is being asked. Limitations of space prevent the reviewer from doing more than make this suggestion, leaving it for those interested in Hohfeld's analysis to read Mr. Allen's essay with the suggestion in mind.

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LYING AND ITS DETECTION. By John A. Larson. In collaboration with George W. Haney and Leonarde Keeler. Chicago: University of Chicago Press. 1932. pp. xxii, 453. \$5.

THE differentiation of truth from lying in criminological investigation is a desideratum which makes any serious attempt to accomplish it worthy of attention. Though this is undertaken in Dr. Larson's book in what the author ostensibly considers a "scientific" manner, the volume falls short of adequate exposition. This general criticism applies especially to Parts I and II of the volume in which the prevalence and occurrence of lying, the psychological components of emotion, and ancient and modern forensic methods of lie-detection (*e.g.*, ordeal, torture, third degree, judge, jury) are presented. The reader will be excused if he loses his way in the welter of lengthy quotations which the author does not evaluate critically, and which, although they furnish suitable background for what is to follow, may be omitted without great loss to the contributory value of the book. Part III, entitled "Modern Scientific Methods", continues the presentation of lengthy quotations from Lombroso and Munsterberg with similar excerpts from other investigators, describing the word-association, reaction-time, the scopolamin ("truth serum") and "miscellaneous" experiments, all of which the author disposes of too cavalierly with the criticism that such methods are of academic significance only, or are "not the least bit scientific". In Part IV he presents his own "Cardio-pneumo-psychograph experiments" in which his apparatus and technique of lie-detection are described and a large number of representative cases discussed.

While, early in the book the author frequently takes the stand that his technique is only a tool for preliminary investigation, he later becomes extremely defensive of the suitability of his methods and the diagnostic value of the results which he has obtained. However, one gains the impression that apparently these methods and results are not above the reproach of workers in the same or allied fields. His description of the apparatus and procedure is not sufficiently complete to make possible accurate duplication of either. The fundamental assumption is that the emotional upset due to deception may be found in recordable qualitative changes in blood pressure and respiration, as against minimal or at least different changes by truth. Yet he regards slight similar changes found in the work of another investigator under conditions of truth-telling as possibly due to extraneous factors (p. 265). Following confession the records present no disturbance indicative of emotional upset. Statistical treatment of data he claims to be of little value, but despite this and despite his assertions that accurate quantitative readings are not possible with his technique (p. 266) he does not hesitate to present quantitative data (p. 262) whose statistical difference the reader will find significant.

The author, apparently basing his conclusions upon evidence of qualitative changes in smoked paper records, many of which are confusing or unconvincing, does present some graphs in which the changes lend credence to his view. Although he is of the opinion that similar experiments under laboratory, rather than police-station conditions are artificial, one feels that by laboratory studies the fundamental significance of the kymographic changes (upon which the author bases his claims) might be discovered. By such studies one may evaluate recorded emotional changes under conditions controlled for such factors as fatigue, pain, hunger, number and character of witnesses, manner of questioning, and especially fear of the innocent. With this as a basis, the criminological application of such methods would probably be of greater value. Altogether