THE STATE AND THE ACCUSED: BALANCE OF ADVANTAGE IN CRIMINAL PROCEDURE

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THE principal objective of criminal procedure, like that of procedure generally, is to assure a just disposition of the dispute before the court. But because time, resources and the ability to determine what is just are limited, a procedural system inevitably represents a series of compromises. Justice to society is sometimes taken to require that a given case be used not only to deal with the situation immediately before the court but also to serve a larger public interest. In criminal cases, the accused may get relief, not so much out of concern for him or for the "truth," but because he is strategically located, and motivated, to call the attention of the courts to excesses in the administration of criminal justice.¹ The underlying premise is that of a social utilitarianism. If the criminal goes free in order to serve a larger and more important end, then social justice is done, even if individual justice is not. For example, if the police beat an offender in order to extract a confession, the social interest is held to require that the confession be excluded from evidence, even if amply corroborated. The same is true, in varying extents in the several states, when evidence is illegally seized, or telephones "tapped," or counsel denied, or jurors selected improperly, or judges biased.² In each of these cases, terminating the proceeding against the accused, regardless of his guilt or innocence, shifts the focus of deterrence from the accused to his prosecutors.

Though this idealized conception of procedure, as a means of shaping institutions involved in the administration of substantive law, has a place in civil cases as well as in criminal, it shows up most clearly and dramatically in the criminal cases. The reasons are several: the threat of imprisonment makes the criminal sanction an especially grave and terrifying one; an inherited tradition, reflected in constitutional law, makes more specific requirements for criminal cases than it does for civil;³ there is a general feeling that

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1. Compare *Associated Indus. v. Ickes*, 134 F.2d 694, 705 (2d Cir. 1943).

2. The leading cases are collected and discussed in MCCORMICK, *EVIDENCE* §§ 109-19, 137-42 (1954); MORELAND, *MODERN CRIMINAL PROCEDURE* ch. 6-9, 16, 17 (1959); Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1 (1956); Scott, *Federal Restrictions on Evidence in State Criminal Cases*, 34 MINN. L. REV. 489 (1950); Boskey & Pickering, *Federal Restrictions on State Criminal Procedure*, 13 U. CHI. L. REV. 266 (1946).

3. The sixth amendment to the United States Constitution is applicable only to criminal cases. Similarly, most of the fifth amendment sounds in criminal law. Though the fifth and sixth amendments are expressly applicable only to the federal government, some of their

most cases find state and defendant mismatched—with the state having far the better of it in prestige and resources; and perhaps most important of all, the criminal trial serves complex psychological functions. In addition to satisfying the public demand for retribution and deterrence,⁴ it permits the ready identification of the same public, now in another mood, with the plight of the accused. Both demand and identification root deep in the view that all men are offenders, at least on a psychological level. And from the moment the offender is perceived as a surrogate self, this identification calls for a “fair trial” for him before he is punished, as we would have it for ourselves.

For centuries, the criminal trial has been held out as the most distinctive embodiment of societal interest in the “process” of administering law. In the presumption of innocence accorded the accused, in the requirement that the state prove him guilty beyond reasonable doubt, in the elaborate pretrial evidentiary screens—arrest, preliminary hearing, and grand jury—through which the charge had to pass, in the rigorous pleading and evidentiary standards of the trial itself, it had given detailed content to an accusatorial system. By doing so, this formal system of criminal procedure had effectively resisted the seemingly inexorable logic which had, on the Continent, made state control of prosecution synonymous with reliance upon the accused as the principal source of the evidence against himself.⁵

In the past generation, perhaps out of a feeling that our formal system of criminal procedure is more than adequate, the interest of the courts and commentators has shifted to other areas, usually constitutional in nature. Chief among them have been the problems of police excess in interrogation, search and seizure and wiretapping; the assurance of counsel to all; and the creation of an effective system of appeal for the indigent.⁶ Unfortunately, during the

specific provisions have been made applicable, in whole or in part, to the states through selective incorporation into the due process clause of the fourteenth amendment. See, *e.g.*, *Rochin v. California*, 342 U.S. 165, 169-74 (1952); *Betts v. Brady*, 316 U.S. 455, 461-65 (1942); *Brown v. Mississippi*, 297 U.S. 278, 285-86 (1936); Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957); see also note 2 *supra*. Of course, the statute and case law of many jurisdictions may add protections for the defendant in a criminal case beyond what due process requires. A now conventional method of seeking greater procedural protection is to have an administrative proceeding classed as “criminal” in nature, so that the more specific constitutional protections can be brought into play. See generally Hughes, *The Concept of Crime: An American View* (pts. 1-2), 1959 CRIM. L. REV. (Eng.) 239, 331.

4. ALEXANDER & STAUB, *THE CRIMINAL, THE JUDGE, AND THE PUBLIC* 220-22 (rev. ed. 1956); cf. Hall, *Objectives of Federal Criminal Procedural Revision*, 51 YALE L.J. 723, 728 (1942) (“The easier it is made to prove guilt, the more difficult does it become to establish innocence.”).

5. On the Continent, particularly in France, the “public” interest in convicting those who violated the laws of the state was taken to mean that the state should use all means logically required to secure their conviction. See generally HOWARD, *CRIMINAL JUSTICE IN ENGLAND* ch. 7 (1931); Ploscowe, *The Development of Present-Day Criminal Procedures in Europe and America*, 48 HARV. L. REV. 433 (1935).

6. See note 2 *supra*. See also *Griffin v. Illinois*, 351 U.S. 12 (1956); Allen, *Griffin v. Illinois: Antecedents and Aftermath*, 25 U. CHI. L. REV. 151 (1957).

very period when tremendous strides were being made in dealing with these newly recognized problems, the bastion itself—the formal system of criminal procedure—was being eroded. In a series of “technical” decisions, each dealing in fragmentary fashion with limited parts of the total process, widespread changes were being wrought. These changes were designed to correct a serious imbalance allegedly existing in a process which gave to the accused “every advantage.”⁷ In the words of a leading spokesman for the position, Judge Learned Hand in *United States v. Garsson*:

While the prosecution is held rigidly to the charge, [the accused] need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. . . . Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.⁸

This “hard-boiled” and “modern” view of criminal procedure has come to affect a myriad of issues in criminal cases, such as the place of the presumption of innocence; how much variance is fatal and how much not; how closely the grand and petit jury should be supervised by the courts; the scope of harmless error and plain error; and, perhaps most important, the availability

7. *United States v. Garsson*, 291 Fed. 646, 649 (S.D.N.Y. 1923) (motion to inspect grand jury minutes denied).

8. *Ibid.* The view is widely held and, indeed, serves in considerable part as a model of the total criminal process. See, e.g., *State v. Tune*, 13 N.J. 203, 210-11, 93 A.2d 881, 884-85 (1953) (opinion of Chief Judge Vanderbilt) (quoted in note 144 *infra*); MORGAN, MAGUIRE, & WEINSTEIN, *CASES ON EVIDENCE* 1 (4th ed. 1957) (“in criminal cases the rules are designed so that errors almost always favor the accused”); Yankwich, *Concealment or Revelation?*, 3 F.R.D. 209, 210-11 (1943); Williams, *Advance Notice of the Defense*, 1959 CRIM. L. REV. (Eng.) 548; May, *Reasonable Doubt in Civil and Criminal Cases*, 10 AM. L. REV. 642, 661 (1876) (“it may fairly be said, that, so soon as a man is arrested on a charge of crime, the law takes the prisoner under its protection, and goes about to see how his conviction may be prevented”). The late Professor Dession described the phenomenon in these terms:

[T]he criminal law . . . [has] acquired a rather bad name. It is not only that punishment is inherently repellent; the prevailing impression is that the whole system is ridden with inefficiency. Too few of the really serious offenders are caught, and of those caught far too few are convicted and appropriately sentenced, or so our not infrequent crime surveys would have one believe. This is popularly ascribed to criminal procedure, the thought being that the safeguards of the accused operate as unreasonably technical obstacles to conviction of the guilty. The notion is, of course, balderdash, as all who have any experience in the trial of criminal cases well know. To prosecute is far easier than to defend. The prosecutor is normally assumed to represent right and justice, and on top of that he almost invariably enjoys far more investigative assistance and resources generally. But the notion persists.

Dession, *The Technique of Public Order: Evolving Concepts of Criminal Law*, 5 BUFFALO L. REV. 22, 40 (1955).

of pretrial discovery of issues and evidence. It has done so principally by measuring the "formal" criminal procedure against its more efficient and flexible civil counterpart.

If Judge Hand's view represented an accurate appraisal of the formal system of criminal procedure, it would be difficult to join issue with his conclusion, except on broad philosophical grounds. But the fact is that his view does not accurately represent the process. Both doctrinally and practically, criminal procedure, as presently constituted, does not give the accused "every advantage" but, instead, gives overwhelming advantage to the prosecution. The real effect of the "modern" approach has been to aggravate this condition by loosening standards of pleading and proof without introducing compensatory safeguards earlier in the process. Underlying this development has been an inarticulate, albeit clearly operative, rejection of the presumption of innocence in favor of a presumption of guilt.

The purpose of this Article is to examine in some detail the two major problems of the criminal trial following indictment—that of the sufficiency of evidence to take a criminal case to the jury and that of disclosure, by prosecution and defense, of the issues and evidence to be presented by them at the trial. Each of the problems will be placed in the context of the entire process, principally in order to determine the lines which reform should take before it can become realistic to talk of removing "advantage" to the accused from the system.⁹

PROOF BEYOND REASONABLE DOUBT

When the jury system first evolved in the seventeenth century into a method of trial by fact-witnesses, the procedural rights of the defendant were few in number. He had no right to counsel or even to a copy of the indictment against him. The freest use was made by the state of admissions elicited from him before trial, often under torture or the threat of it. And hearsay was regularly used as a means of establishing guilt. Before the century was out, there was added to these disadvantages the incompetency, because of interest, of the accused as a witness in his own behalf. Fairly clearly, the dominant strain in such a system of trial was the assumption that the accused was guilty and that it was of great importance to the state to prove him so.

Such an approach may well have served the needs of an expanding national state seeking to conserve its new gains and to deter as forcefully as possible any and all challenges to its authority. But with the consolidation of those gains in the eighteenth century, what had previously seemed essential instruments became oppressive ones. Grand and petit juries stepped into the breach. By refusing to return indictments or to find defendants guilty, they succeeded in considerable part in forcing a redress of the imbalance in favor of the state.

9. This Article draws principally upon federal cases because they are generally representative of the whole and because their national character makes them of greatest potential influence. Where there is a departure from the general view, illustrative references will be made in text or notes.

And their actions directed attention to the substantive and procedural inadequacies of the criminal law. A whole series of institutions and practices, designed to safeguard the person accused of crime, appeared in response, principally in the nineteenth century. The spirit underlying these new developments was perhaps best reflected in the rule that the accused brought with him a "presumption of innocence" and that his guilt must be proved "beyond a reasonable doubt." Those two phrases symbolize today, as they did in their beginnings, the special place of the accused in our system of criminal procedure. They cast in evocative language the deeply-held feeling that the combination of all-too-fallible witnesses and serious sanctions requires that the sanctions should be imposed only where guilt seems virtually certain. They also suggest substantial advantage to the defendant and disadvantage to the prosecution. Yet, on analysis, it soon becomes clear that the degree of advantage or disadvantage depends upon the use to which those words are put. Those uses have been undergoing substantial change.

Conventionally, the phrases appear in the trial judge's instructions to the jury, much as they did a century ago. The jury is told that the defendant is presumed innocent; that the mere fact that he has been charged with crime is not to be taken as evidence against him; and that his guilt must be proved beyond reasonable doubt.¹⁰ Now and then, controversy has arisen about

10. Illustrative cases are collected in ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 453-56 (1947); 1 UNDERHILL, *CRIMINAL EVIDENCE* §§ 26, 27, 42 (5th ed. 1956); 1 BRANSON, *INSTRUCTIONS TO JURIES* § 62 (repl. 1960); Mathes, *Some Suggested Forms for Use in Criminal Cases*, 20 F.R.D. 231, 238 (1958), and the range of comment presented in Slovenko, *Establishing the Guilt of the Accused*, 31 TUL. L. REV. 173 (1956); Note, 10 MINN. L. REV. 539 (1926). See also *Commonwealth v. Donough*, 377 Pa. 46, 51-52, 103 A.2d 694, 697 (1954); *Commonwealth v. Anderson*, 245 Mass. 177, 183, 139 N.E. 436, 440 (1923); cf. *State v. Boswell*, 194 N.C. 260, 264, 139 S.E. 374, 375-76 (1927); *State v. Johnson*, 156 S.E. 351, 352 (S.C. 1930); *Helton v. United States*, 231 F.2d 654 (5th Cir. 1956). A classic statement, often used in instructions to juries, is that of Chief Justice Shaw in *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 320 (1850):

[R]easonable doubt . . . is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved guilty.

For discussion of variations in the definition given for "reasonable doubt," see *Holland v. United States*, 348 U.S. 121, 140 (1954); *Commonwealth v. Kloiber*, 378 Pa. 412, 422-23, 106 A.2d 820, 827-28 (1954); *United States v. Farina*, 184 F.2d 18, 20 (2d Cir.), cert. denied, 340 U.S. 875 (1950) (declining to reverse, in absence of exception by defense counsel, a charge that "A reasonable doubt is a doubt . . . for which a juror . . . can give a reason for entertaining") (note Judge Frank's dissent, 184 F.2d at 21); 9 WIGMORE, *EVIDENCE* § 2497 (3d ed. 1940); McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242 (1944); Note, 22 YALE L.J. 622 (1913).

whether the presumption of innocence is to be treated by the jury as "evidence,"¹¹ or whether it is reversible error to omit all reference to the presumption¹² or to water it down,¹³ or whether "proof beyond reasonable doubt" may be entirely eliminated from the charge.¹⁴ For the most part, how-

11. In *Coffin v. United States*, 156 U.S. 432, 460 (1895), Justice White described the presumption as "evidence in favor of the accused" and "reasonable doubt" as "the condition of mind produced by the proof resulting from the evidence in the cause. [T]he presumption of innocence is one of the instruments of proof, going to bring about the proof, from which reasonable doubt arises." Professor Thayer disagreed with this view, suggesting instead that the "presumption of innocence" was merely a caution to the jury to disregard the fact that the defendant had been charged with crime and to base its decision solely on the evidence produced before it in court. THAYER, EVIDENCE 563, 565, 572-75 (1898). His view was adopted in *Agnew v. United States*, 165 U.S. 36, 51-52 (1897), which upheld the refusal of the trial judge to charge that the presumption of innocence was "evidence" in the defendant's favor. See 9 WIGMORE, EVIDENCE § 2511 (3d ed. 1940) (collecting cases); 1 UNDERHILL, CRIMINAL EVIDENCE § 40 (5th ed. 1956) ("The presumption of innocence is generally not regarded as evidence, although there is a strong minority view.").

12. In contrast to the usual view, the rule in Kentucky is that the charge as to "reasonable doubt" is the only instruction properly given to the jury, *Mink v. Commonwealth*, 228 Ky. 674, 676, 15 S.W.2d 463, 464 (1929), and that a charge as to the presumption of innocence is "more favorable to the accused than he deserves," *Brown v. Commonwealth*, 198 Ky. 663, 665, 249 S.W. 777, 778 (1923). See also *State v. Boswell*, 194 N.C. 260, 139 S.E. 374 (1927); *State v. Johnson*, 156 S.E. 351, 352 (S.C. 1930). This view seems to accord with the Thayer and Wigmore position which treats the presumption grudgingly, arguing that it should be used solely as a procedural device to regulate the prosecution's duty to come forward with the evidence. Once that requirement is satisfied, the presumption "vanishes" and it is unnecessary to instruct the jury on the presumption of innocence. The charge that guilt must be proved beyond reasonable doubt suffices. Their position has not been adopted by the great majority of courts, state and federal, which hold that the jury must be told of the presumption if counsel for the defense requests the charge. But failure of the court to give the charge, in the absence of request, is not error. 1 UNDERHILL, CRIMINAL EVIDENCE § 40 (5th ed. 1956); see *Establishing the Guilt of the Accused*, 31 TUL. L. REV. 173 (1956) (discussing the problem in detail); note 10 *supra*.

13. In *United States v. Farina*, 184 F.2d 18 (2d Cir.), *cert. denied*, 340 U.S. 875 (1950), the trial judge instructed the jury that "... every defendant is entitled to rest upon the presumption of innocence in his favor." He then added that "[the presumption] was designed for the protection of the innocent. It was not intended as a bulwark behind which the guilty might hide." The appellate court, while recognizing that "perhaps it was unwise to vary the customary formulae employed in charging juries upon the presumption of innocence, ..." held that such a deviation was not reversible error when the accused had not objected to the charge at trial. Judge Frank filed a vigorous dissent, 184 F.2d at 21, citing, *inter alia*, *Gomila v. United States*, 146 F.2d 372 (5th Cir. 1944). His position was adopted in *Reynolds v. United States*, 238 F.2d 460, 462-63 (9th Cir. 1956); *cf. Shaw v. United States*, 244 F.2d 930, 938-39 (9th Cir. 1957).

14. This last has been an exclusively English episode. In *Regina v. Summers*, 36 Crim. App. R. 14, 15 (1952), the Court of Criminal Appeal held proper a trial judge's instruction to the jury which omitted any reference to "reasonable doubt," and which substituted in its stead: "You must not convict unless you are *satisfied by the evidence* that the offence has been committed." (Emphasis added.) See *Regina v. Onufrejczyk*, 1 All E.R. 247, 249 (Ct. Crim. App. 1955). A more recent case, *Regina v. Murtagh*, 39 Crim.

ever, there has been little tampering with either phrase at the jury stage. Whatever inroads have been made are found in the criteria fashioned by the courts to decide the question of sufficiency of evidence to take the case to the jury.

These criteria are applied by the trial judge in passing upon the motion for a judgment of acquittal at the close of the prosecution's case, or at the close of the entire case, or after the jury has returned its verdict. With rare exceptions, they are also used by the appellate court in deciding whether the trial judge erred in sending the case to the jury.¹⁵ The decision of trial and appellate judge is ordinarily described as a decision on a matter of law: Did the prosecution offer "enough" evidence to enable the jury to act rationally? Or, to use Judge Frank's terminology, is there enough F (facts) to permit application of R (rule of law)?¹⁶ The jury's decision is contrasted to that of the judge and is said to be on an issue of fact. Yet both, fairly clearly, involve a sifting of the evidence.

The judge sifts to delimit a zone within which the jury may act. He must take all facts offered in evidence by the prosecution as true and from those

App. R. 72 (1955), makes it clear, however, that while there may be no particular magic in the phrase "guilty beyond a reasonable doubt," the trial court must apprise the jury accurately as to the burden of proof resting on the crown. The form of words suggested by it was "whether, upon the whole of the evidence in the case, [the jury] . . . were sure" that the defendant committed the crime. The court reversed the conviction because of the trial court's instruction that ". . . if you do not think it is safe to reject the explanation of this accident put forward by the defendants, acquit them both." See WILLIAMS, *PROOF OF GUILT* 159-62 (2d. ed. 1958); Note, 68 L.Q. REV. 314 (1952). The prior rule instructing the jury to find guilt beyond a reasonable doubt, which has probably been revived by *Murtaugh*, was set forth in *Rex v. Woolmington*, [1935] A.C. 462, 481, and *Rex v. Mancini*, [1942] A.C. 1, 11.

, 15. See, e.g., FED. R. CRIM. P. 29 (the motion is to be granted "if the evidence is insufficient to sustain a conviction"); ALI, *CODE OF CRIMINAL PROCEDURE* § 321 & commentary at 960-62 (1931); ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 434-38 (1947); 5 WHARTON, *CRIMINAL LAW AND PROCEDURE* §§ 2073, 2076 (12th ed. 1957); notes 23-26 *infra*. But cf. *Christen v. State*, 228 Ind. 30, 37-40, 89 N.E.2d 445, 447-49 (1950) (distinguishing between duty of trial court to review evidence to determine whether it excludes every reasonable hypothesis of innocence, and duty of appellate court to determine whether there is any substantial evidence of probative value from which a jury could have inferred guilt). The motion for a new trial, on the ground that the verdict is against the weight of the evidence, will not be considered here. Though it, too, may involve questions of the sufficiency of evidence, it is doctrinally addressed in large part to the discretion of the trial judge. "On such an application, the Court may weigh the evidence and consider the credibility of witnesses [*cf.* text accompanying note 17 *infra*]." *People v. Porter*, 105 Cal. App. 2d 324, 330, 233 P.2d 102, 106 (Dist. Ct. App. 1951). "If the Court reaches the conclusion that the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted, the verdict may be set aside and a new trial granted. Naturally, this authority should be exercised sparingly and with caution." *United States v. Robinson*, 71 F. Supp. 9, 10 (D.D.C. 1947). It should be noted, of course, that the motion for new trial, if granted, does not finally dispose of the case, as do the motions discussed in the text.

16. FRANK, *COURTS ON TRIAL* 14-16 (1950).

facts he must draw all reasonable inferences in favor of the prosecution.¹⁷ When, therefore, *X* testifies that he saw the accused aim at and shoot *Y*, and there is no question of defense or justification, the trial judge has no alternative but to submit the case to the jury, unless *X* or his testimony are inherently incredible.¹⁸ In this context of direct evidence of each element of the offense, the presumption of innocence means no more than that the prosecution must go forward first with the evidence and that the fact of indictment should not be taken as in any way determinative of guilt. "Proof beyond a reasonable doubt" can then mean only that the jury should be very certain that *X* is telling the truth—though it may also be viewed as a form of words inviting the jury to exercise its inherent power to dispense with law.

But when the prosecution's case, or any essential element of it, is built on circumstantial evidence, the role of the trial judge (and of the appellate court on review) in passing upon the sufficiency of evidence becomes much more significant. By definition, circumstantial evidence requires the assistance of an inference to make it probative of guilt.¹⁹ The handkerchief located at the scene of the crime must first be found to belong to the defendant; it must then be inferred, or proved, that it was in his possession at the time of the crime. There then remain the problems of placing the defendant at the scene of the crime at the time it was committed; and of making him the criminal, rather than a casual bystander. To the extent that a case is built up of a series of fragments of this kind, the trial judge may follow one of several courses: he may leave for the jury the problem of drawing inferences from each item of evidence, limiting his role to little more than ascertaining that there is "some" evidence of each element of the offense; or he may make an effort to trace inferences, or a sequence of inferences, flowing from each item of evidence to the point of determining whether it could be adopted by a rational man; or he may incorporate the standard of ultimate persuasion into the legal

17. *Yoffe v. United States*, 153 F.2d 570, 573 (1st Cir. 1946); *United States v. Morley*, 99 F.2d 683, 685 (7th Cir. 1938), *cert. denied*, 306 U.S. 631 (1939); *United States v. Gasomiser Corp.*, 7 F.R.D. 712, 720 (D. Del. 1947); *United States v. Schneiderman*, 106 F. Supp. 906, 921 (S.D. Cal. 1952); *United States v. Robinson*, 71 F. Supp. 9, 10 (D. D.C. 1947); *cf. United States v. Randall*, 164 F.2d 284, 286 (7th Cir. 1947), *cert. denied*, 333 U.S. 856 (1948); *Dowdy v. United States*, 46 F.2d 417, 421 (4th Cir. 1931); *Christen v. State*, 228 Ind. 30, 33, 89 N.E.2d 445, 446 (1950).

18. UNIFORM RULE OF EVIDENCE 19; see James, *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667, 672-73 & n.25-29 (1949) (collecting civil cases). An interesting criminal case on the point is *People v. Carvalho*, 112 Cal. App. 2d 482, 489, 246 P.2d 950, 955 (Dist. Ct. App. 1952). Compare the criminal cases in which courts hold vague and uncertain identification of the defendant by eye witnesses insufficient to support conviction. *People v. Davino*, 284 N.Y. 486, 488, 31 N.E.2d 913, 914 (1940); *People v. Botulinski*, 383 Ill. 608, 50 N.E.2d 716 (1943). See generally Dow, *Judicial Determination of Credibility in Jury-Tried Actions*, 38 NEB. L. REV. 835 (1959).

19. See generally 1 WIGMORE, EVIDENCE § 25 (3d ed. 1940); MORGAN, MAGUIRE & WEINSTEIN, CASES ON EVIDENCE 326-28 (4th ed. 1957); James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689 (1941).

test of sufficiency of evidence.²⁰ For example, in the civil context, he would try to assess whether the evidence is such that a reasonable jury could find it to preponderate in favor of the party bearing the burden of proof; in the criminal case, he would test the evidence to determine whether a reasonable jury could find that guilt had been proved beyond reasonable doubt.

Whichever approach is adopted, it seems fairly clear that none of the tests can be applied with precision or with confidence that any of them will materially affect the decision in any given case. Judges are too varied in personality, in perception, in analytical ability, and in their conception of themselves to make such abstract tests serve reliably in the many fact situations to which they will be applied. "The authoritative language of nice and scientific precision in which such conclusions are cast is after all only the language of delusive exactness. . . . [T]hroughout the field of circumstantial proof there is not a little room for considerations of policy and expediency to play a part in choosing between two very fallible and equally undemonstrable generalizations about the balance of probability."²¹

It is precisely because "policy and expediency" do play a part in the decision whether to keep cases from the jury that the forms of words in which the legal tests are cast can be said to be important. The shade of meaning connoted by a word or phrase is itself a statement of policy which may tip the scales in the direction of acquittal or of further exposure to conviction. Whether the shades inherent in either the "presumption of innocence" or "proof beyond a reasonable doubt" shall be used is the substantive problem posed by cases dealing with sufficiency of evidence.

Almost from the time judges began to determine the sufficiency of the evidence in criminal cases, a development little more than a century old,²² they have included the standard of ultimate persuasion as part of their criterion of sufficiency. The earliest and the most common of the formulae is that set out

20. See discussion of the "tests" of sufficiency invoked in criminal cases, notes 23-26 *infra* and accompanying text.

21. James, *Accident Liability: Some Wartime Developments*, 55 YALE L.J. 365, 388 (1946); James, *supra* note 18, at 673-74.

22. It was not until the eighteenth century that judges asserted the power to direct verdicts of juries. *Syderbottom v. Smith*, 1 Strange 649, 93 Eng. Rep. 759 (K.B. 1725). The practice appears to have arisen first in civil cases and then was apparently applied only when there was *no* evidence offered by a party. See *Richardson v. Boston*, 60 U.S. (19 How.) 263, 268-89 (1856). By 1857, the courts were passing on the question whether "sufficient evidence"—more than a "scintilla"—had been presented to warrant passing the case on to the jury. See, e.g., *Toomey v. London, B. & S.C. Ry.*, 3 C.B. (n.s.) 145, 140 Eng. Rep. 694, 696 (C.P. 1857); *Improvement Co. v. Munson*, 81 U.S. (14 Wall.) 442, 448 (1872). See also THAYER, EVIDENCE 207-11, 360-61 (1898). A parallel development took place in criminal cases, *Commonwealth v. Merrill*, 80 Mass. (14 Gray) 415, 417-18 (1860); *United States v. Fullerton*, 25 Fed. Cas. 1225 (No. 15176) (S.D.N.Y. 1870). In the criminal cases, however, the "right" to a jury trial and the right of the defendant to be proved guilty have always been construed to require submission of the prosecution's case to the jury even when the accused puts forward no case at all, so long as he pleads "not guilty." Annot., 72 A.L.R. 899 (1931).

in *Isbell v. United States*, holding it to be the trial judge's function to assure that the jury could reasonably find that the evidence of the prosecution negated "every other hypothesis but that of guilt."²³ In effect, such a formula places both "presumption of innocence" and "proof beyond reasonable doubt" in the legal test and invites trial judges to give them a place among the "considerations of policy and expediency" inevitably accompanying their decisions in cases based on circumstantial evidence. More recently a formula seemingly less strict, but inclining in the same direction, was set forth in *Curley v. United States*.²⁴ It imposed upon the judge the obligation to decide whether

23. 227 Fed. 788, 792 (8th Cir. 1915) ("There was a legal presumption that [the defendant] . . . was innocent until he was proved to be guilty beyond a reasonable doubt. Evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a judgment against him."); *Rodriguez v. United States*, 232 F.2d 819, 821 (5th Cir. 1956) ("because of the fact that . . . [the evidence] is circumstantial and that a grave wrong may be done to an innocent man by reasoning from circumstances not sufficiently cogent in themselves or as connected, and particularly not sufficiently exclusive of every innocent hypothesis, the courts have been very sedulous to prevent an innocent man being found guilty"); *United States v. Dolasco*, 184 F.2d 746, 748 (3d Cir. 1950); *Paul v. United States*, 79 F.2d 561, 563-64 (3d Cir. 1935); *Parnell v. United States*, 64 F.2d 324, 329 (10th Cir. 1933); cf. *Lempie v. United States*, 39 F.2d 19, 21 (9th Cir. 1930); *United States v. Gasomiser Corp.*, 7 F.R.D. 712, 718-21 (D. Del. 1947) (note especially the court's point that the "reasonable hypothesis other than guilt" may arise from the defendant's evidence) (compare note 17 *supra*). One commentator has pointed out, however, that "[t]he federal practice is unclear, most circuit courts alternating between" *Isbell* and what is described *infra* as the Second Circuit rule. Note, *Sufficiency of Circumstantial Evidence in a Criminal Case*, 55 COLUM. L. REV. 549, 550 & n.9 (1955) (collecting cases indicating that both tests may exist concurrently in several jurisdictions). Many of the precedents predate the developments discussed in text accompanying notes 24-26 *infra*, and may well be reexamined in the future. Illustrative state cases in accord with *Isbell* are *Ellison v. State*, 254 Ala. 428, 432, 48 So. 2d 176, 179 (1950); *Taylor v. State*, 211 Ark. 1014, 1018-19, 204 S.W.2d 379, 381 (1947); *Lombardi v. People*, 124 Colo. 284, 236 P.2d 113 (1951); *Mayo v. State*, 71 So. 2d 899 (Fla. 1954); *Lorman v. Commonwealth*, 269 S.W.2d 243 (Ky. 1954); *Commonwealth v. Shea*, 324 Mass. 710, 713, 88 N.E.2d 645, 647 (1949); *State v. Allen*, 151 Me. 486, 121 A.2d 342 (1956); *People v. Foley*, 307 N.Y. 490, 492-93, 121 N.E.2d 516, 517 (1954); *People v. Taddio*, 292 N.Y. 488, 489, 55 N.E.2d 749, 750 (1944); *State v. Bradley*, 267 Wis. 87, 89, 64 N.W.2d 187, 188 (1954). I am indebted here, and at several other points in this section, to an unpublished paper written in 1959 by a former student, Robert Kennedy, of Cleveland, Ohio, entitled *The Function of the Motion for Judgment of Acquittal*.

24. 160 F.2d 229, 232 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947) (in the course of rejecting the *Isbell*-type formulation previously used in the District of Columbia, Judge Prettyman said, "If the evidence is such that reasonable jurymen must necessarily have [a reasonable doubt], the judge must require acquittal, because no other result is permissible within the fixed bounds of jury consideration. But if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury . . ."); *Freidus v. United States*, 223 F.2d 598, 600 (D.C. Cir. 1955); *Collis v. United States*,

the prosecution's case would permit reasonable jurymen to conclude guilt beyond reasonable doubt.

The newest look, which promises to be an influential one because of the preeminence of its sponsors, has been developed most systematically by the judges of the Court of Appeals for the Second Circuit. Apparently a part of the correcting process foreshadowed in *Garsson*, it would eliminate from the judge's determination of when a case should be kept from the jury both the concept of "proof beyond reasonable doubt" and the presumption of innocence. Briefly stated, the Second Circuit rule, already followed in several other federal and state jurisdictions, confines "proof beyond reasonable doubt" to the role of an admonition to the jury regarding the assurance it should have before finding a man guilty. The *Isbell* language is permissible so long as its use is confined to the court's instructions to the jury.²⁵ For the judge ruling on the sufficiency of the evidence, however, there is to be no distinction between civil and criminal cases.²⁶ If there is substantial circumstantial evidence of each element of the offense, the case is to go to the jury.²⁷

247 F.2d 566, 567 (D.C. Cir. 1957); *People v. Huizenga*, 34 Cal. 2d 669, 675-76, 213 P.2d 710, 713-14 (1950) (*but cf.* California cases cited note 26 *infra*); *People v. Taylor*, 410 Ill. 469, 477-78, 102 N.E.2d 529, 533 (1951); *People v. Susanec*, 398 Ill. 507, 512-13, 76 N.E.2d 33, 36-37 (1947); *State v. Torello*, 100 Conn. 637, 643-44, 124 Atl. 375, 378 (1924). *But cf.* *Maryland & Va. Milk Producers Ass'n v. United States*, 193 F.2d 907, 917 (D.C. Cir. 1951).

25. See, *e.g.*, *United States v. Schneiderman*, 106 F. Supp. 906, 928 (S.D. Cal. 1952); *State v. Fouts*, 169 Kans. 686, 691, 221 P.2d 841, 845 (1950); *State v. Sheppard*, 100 Ohio App. 345, 385-86, 128 N.E.2d 471, 496-97 (1955); Note, 55 COLUM. L. REV. 549, 558 (1955) (citing cases). For criticism of such an instruction as "confusing," see *Holland v. United States*, 348 U.S. 121, 139-40 (1954); *State v. Murphy*, 124 Conn. 554, 1 A.2d 274, 278 (1938).

26. The leading opinions are those of Judge Clark in *United States v. Valenti*, 134 F.2d 362, 364 (2d Cir.), *cert. denied*, 319 U.S. 761 (1943): ("The requirement of proof beyond a reasonable doubt is a direction to the jury, not a rule of evidence; . . . it cannot be accorded a quantitative value other than as a general cautionary admonition. . . . It is the court's function to decide whether evidence is competent to justify certain inferences."), and of Judge Learned Hand in *United States v. Feinberg*, 140 F.2d 592, 594 (2d Cir.), *cert. denied*, 322 U.S. 728 (1944) ("given evidence from which a reasonable person might conclude that the charge in an indictment was proved, the court will look no further, the jury must decide, and the accused must be content with the instruction that before finding him guilty they must exclude all reasonable doubt"). *But cf.* note 23 *supra*. See also *United States v. Castro*, 228 F.2d 807 (2d Cir.), *cert. denied*, 351 U.S. 940 (1956); *United States v. Spagnuolo*, 168 F.2d 768, 770 (2d Cir.), *cert. denied*, 335 U.S. 824 (1948) ("the court cannot properly take the case from [the jury] or limit its powers by trying to state conditions or quanta of proof"); *United States v. Cohen*, 145 F.2d 82, 86 (2d Cir. 1944), *cert. denied*, 323 U.S. 799 (1945); *United States v. Andolschek*, 142 F.2d 503, 505 (2d Cir. 1944) ("the accused at bar do not argue that the evidence was not strong enough to support a verdict in a civil case, and it certainly was; that being true, our review ends"); *United States v. McCarthy*, 196 F.2d 616, 619 (7th Cir. 1952). For a strong dissent by Judge Frank, see *United States v. Masiello*, 235 F.2d 279, 288 (2d Cir.), *cert. denied sub nom.* *Stickel v. United States*, 352 U.S. 882 (1956). ("[I]f, for the judge, the beyond-a-reasonable-doubt test can have no 'quantitative value' greater than the 'preponderance'

The potential difference of the various tests, in application to similar facts, is illustrated by *Barton v. United States*²⁸ and *Girgenti v. United States*,²⁹ both of which involved charges of illicit possession or operation of a still. In *Barton*, the defendant and others were arrested just after arriving at the scene of an illegal distillery. Federal officers testified that they had heard the defendants discuss operation of a still, though it was uncertain whether they were discussing this one. In *Girgenti* too, the defendants were arrested when they arrived at the scene of the still. They had in their possession a hydrometer, old clothes and a revolver. The hydrometer was of the type used in testing the specific gravity of liquids heavier than water, particularly alcohol from mash.

The *Barton* court, adopting an approach similar to that of the Second Circuit and affirming a verdict against the defendant, said:

[T]he proximity of the accused to the place of the crime and [to] the unlawful apparatus used in the perpetration, may by a reasonable inference raise the presumption of possession, and that the party so found was guilty of a participation in the crime charged, which required the possession and use of the property. It is entirely a question for a jury whether this inference is . . . sufficient to convict the defendant beyond a reasonable doubt.³⁰

The *Girgenti* court, apparently following *Isbell*, reversed the conviction and ordered acquittal, saying:

test, and therefore he may not use the criminal test as either a pre-verdict or post-verdict check on the jury—then, if the jury finds the accused guilty, we may easily have a case where the judge must let the verdict stand although he is sure that guilt could not reasonably have been proved by anything more than a preponderance of the evidence.") For state cases substantially in accord with the Second Circuit view, see *People v. McCree*, 128 Cal. App. 2d 196, 201, 275 P.2d 95, 99 (Dist. Ct. App. 1954) ("the court will not examine the jury's conclusion unless there is no evidence whatever that a crime has been committed"); *State v. Fouts*, 169 Kans. 686, 696, 221 P.2d 841, 845 (1950); *State v. Ragland*, 170 Kans. 346, 226 P.2d 251 (1951); *State v. Sheppard*, 100 Ohio App. 345, 385-86, 128 N.E.2d 471, 496-97 (1955); *Clark v. State*, 83 Okla. Crim. 137, 141, 173 P.2d 750, 752 (1946); *State v. O'Shea*, 28 N.J. Super. 374, 378, 100 A.2d 772, 774 (1953), *aff'd*, 16 N.J. 1, 105 A.2d 833 (1954); *Holland v. State*, 129 Fla. 363, 367, 176 So. 169, 171 (1937). *But cf.* *Farmer v. State*, 96 Okla. Crim. 144, 147, 250 P.2d 229, 230 (1952); note 24 *supra* (later conflicting cases). For earlier Second Circuit cases following *Isbell*, see *Nosowitz v. United States*, 282 Fed. 575, 578 (2d Cir. 1922); *Romano v. United States*, 9 F.2d 522, 524 (2d Cir. 1925).

The "Second Circuit rule," designated the "substantial evidence" test, sometimes alternates with the *Isbell* test in several circuits. See Note, 55 COLUM. L. REV. 549, 550 n.9 (1955); *cf.* *Sloan v. Commonwealth*, 258 Ky. 461, 467-68, 80 S.W.2d 553, 556 (1935).

27. *United States v. Sherman*, 171 F.2d 619, 621 (2d Cir. 1948), *cert. denied sub nom. Grimaldi v. United States*, 337 U.S. 931 (1949) (will the evidence "rationally support a finding in favor of the party having the affirmative?"). See generally Note, 55 COLUM. L. REV. 549 (1955).

28. 267 Fed. 174 (4th Cir. 1920).

29. 81 F.2d 741 (3d Cir. 1936).

30. 267 Fed. at 175.

[T]he presence of the appellants at or near the premises where the still was in operation is not sufficient to sustain a conviction on counts charging them with possession of an unregistered still or the manufacture of mash, in the absence of any testimony that they were in charge of, or were doing work in connection with, the still. The possession of old clothes . . . and a revolver is as consistent with innocence of the offenses charged as with guilt. . . . The unexplained possession of the hydrometer supports an inference that the appellants were concerned with testing liquor in some form, but was not in itself sufficient evidence to warrant the conclusion that they were connected with the operation of the still in question. To mention but a few of the possibilities, the appellants might have been purchasers of liquor, or sold liquor, or even had some connection with a still other than the one described in the indictment.³¹

If words in opinions can be said to reflect or to shape attitudes, it seems fair to say that the *Isbell* rule, or the *Curley* rule, invite more careful judicial scrutiny of evidence in criminal cases than in civil. In contrast, the Second Circuit rule tells trial judges they are under no obligation to approach criminal cases as involving especially opprobrious or painful sanctions. Criminal prosecutions are not to be viewed as qualitatively different from the usual civil cases, even though society's interest in civil litigation may be no more than to provide an orderly means of resolving disputes.

By removing "proof beyond a reasonable doubt" from the legal test of the sufficiency of evidence, the Second Circuit rule has gone a long way toward completing the work begun by Thayer and Wigmore when they decreed that the "presumption of innocence" was no longer to have any evidentiary significance.³² For, if that presumption is to be more than a requirement that he who charges liability must prove it, it must be given content by judges in areas subject to their control. The instructions to the jury are, of course, one such area. But far more important, because far more subject to judicial control, is the power to keep cases from the jury. Assertion of that power, with its insistence upon a "fact" role for court as well as jury, serves not only to minimize "convicting the innocent"³³ but also to keep the pressure on judge, prosecutor, and police to act as responsibly as possible in screening out cases not fit for trial. Placing the prestige of the judiciary directly on the scales in favor of strict standards of proof, it announces that the sufficiency of evidence will be ruled upon, deliberately, by a judge and will not simply pass into the anonymity of the general verdict.³⁴

31. 81 F.2d at 742.

32. 9 WIGMORE, EVIDENCE § 2511 (2) (3d ed. 1940); THAYER, EVIDENCE 566-76 (1893).

33. For a demonstration that such a possibility is a real one, both in direct and circumstantial evidence cases, see BORCHARD, CONVICTING THE INNOCENT (1932); FRANK & FRANK, NOT GUILTY (1957).

34. "The general verdict is as inscrutable and essentially mysterious as the judgment which issued from the ancient oracle of Delphi. Both stand on the same foundation—a presumption of wisdom. The court protects the jury from all investigation and inquiry as fully as the temple authorities protected the priestess who spoke to the suppliant votary

Even if societal interests were put to one side and attention confined to the particular case, the serious nature of the criminal sanction would seem to be ample reason for insisting upon standards of proof more rigorous than those which prevail in civil cases. It has already been pointed out that no finding of fact in a case based upon circumstantial evidence is simply an exercise in computing whether there is "enough" evidence. Inevitably, mood and inclination play a considerable part. The perceptions of judge and jury, as witnesses of the witnesses, are as much influenced by the manner of men they are and the attitudes with which they set out to perceive as are the impressions of the witnesses themselves.³⁵ Why, then, the seeming refusal to concede that the criminal case, being more serious, calls for an admonition to the judge comparable to that addressed to the jury?

The explanation which appears most plausible is that intimated by Thayer.³⁶ It rests upon the assumption that "natural inference" indicates that he who is charged is guilty. This is, in turn, based upon the seeming plentitude of screens through which the charge against an accused must pass before he can be brought to trial. The large numbers of persons who do not pass through the screens—either because they have pleaded guilty or because there have been findings of insufficient evidence—appear to leave for the trial process only the guilty—indeed, those who are most adamant in denying their guilt. To accord this residuary group the benefit of a standard of proof more rigorous than in civil cases would seem, under the Thayer view, to be both inappropriate and undeserved.

This image represents only a small part of the reality. Largely overlooked in this "model" of the accused at trial are those defendants who deal in "good faith" with the system—those who have factual or legal defenses reasonably believed by them to be valid. From their ranks are drawn a substantial portion of the twenty-three to thirty-six per cent of defendants who actually stand

at the shrine." Sunderland, *Verdicts, General and Special*, 29 YALE L.J. 253, 258 (1920); FRANK, *LAW AND THE MODERN MIND* 170-85 (1935); *Skidmore v. B. & O. Ry.*, 167 F.2d 54, 56-70 (2d Cir. 1948). Special verdicts are rarely used in criminal cases, see *Stein v. New York*, 346 U.S. 156, 178 (1953); *United States v. Ogull*, 149 F. Supp. 272, 275-78 (S.D.N.Y. 1957), *aff'd, sub nom. United States v. Gernie*, 252 F.2d 664 (2d Cir.), *cert. denied*, 356 U.S. 968 (1958); Note, *Special Verdicts in Criminal Cases*, 12 TEXAS L. REV. 327 (1934). If the transfer from judge to jury of the principal responsibility for giving effect to the "presumption of innocence" and "proof beyond a reasonable doubt" were coupled with some means of policing the jury—of assuring that it did with nice discrimination the job left for it—there might be some mitigation of the impact of the "Second Circuit view," though other serious problems would be posed. But the inscrutability of jury verdicts in criminal cases—guarded by the doctrines which favor the general verdict, *supra*, and prohibit impeachment of jury verdicts, Note, 25 U. CHI. L. REV. 360 (1958)—seems to put such a compensatory development beyond the pale.

35. FRANK, *COURTS ON TRIAL* 20-24 (1950).

36. THAYER, *EVIDENCE* 562 (1898); ALLEN, *LEGAL DUTIES* 255 (1931). But see the penetrating comments of Professor Hall in *Objectives of Federal Criminal Procedural Revision*, 51 YALE L.J. 723, 728-32 (1942).

trial and are acquitted.³⁷ But even more important, in assessing the image, are the very limited protections afforded by the pretrial screening agencies—police, prosecutor, magistrate, and grand jury. The minimal standards of proof employed by these agencies give very little assurance that persons passed on by them to a later screen are indeed guilty of the offenses charged against them.

The Pretrial Screens

Arrest

The screening process begins the moment evidence of conduct designated criminal is discovered by policeman or private party. In the decision to make such conduct the basis of a formal charge, there exists the initial *de facto* screen which passes some persons further along the path towards ultimate adjudication of guilt or innocence, while taking others out of it.³⁸ This decision first finds itself subjected to judicial scrutiny when the police officer seeks a warrant of arrest from a magistrate.³⁹ If the officer arrests without a warrant, as he may for serious offenses, his decision will not be reviewed until the arrest has been consummated and its legality challenged.⁴⁰ In both situations,

37. In federal courts, during the period from 1955 to 1957, about 33% of jury verdicts and 31% of court verdicts were acquittals. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS ANN. REP. 208 (1955); *id.* at 256 (1956); *id.* at 220 (1957). In California, from 1952 to 1956, acquittals in jury trials ranged from 23% to 29% and from 25% to 29% in court trials. See BUREAU OF CRIM. STATISTICS, CAL. DEP'T OF JUSTICE, CRIME IN CALIFORNIA 38 (1952); *id.* at 34 (1953); *id.* at 51 (1954); *id.* at 46 (1955); *id.* at 58 (1956). Statistics show that by far the heaviest percentage of convictions obtained by the state and federal governments (ranging as high as 98% in Rhode Island) are obtained by pleas of guilty or *nolo contendere*. See, e.g., BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, JUDICIAL CRIMINAL STATISTICS 4 (1945); *id.* at 4 (1944); *id.* at 4 (1943); *id.* at 4 (1942); ALLI, A STUDY OF THE BUSINESS OF FEDERAL COURTS 52 (1934); CRIME IN CALIFORNIA, *op. cit. supra*, at 30 (1952); *id.* at 24 (1953); *id.* at 39 (1954); *id.* at 44 (1955); ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 297-98 (1947).

38. This exercise of "discretion" not to arrest is subject to no judicial scrutiny, except in the unlikely context of prosecution for misfeasance or misprision. It may, however, be matter for administrative action or public comment. In any event, if we assume that all the participants are acting in good faith, it is likely that police will not tolerate serious violations except as such toleration bears a relationship to a larger administrative policy. See J. Goldstein, *Police Discretion Not to Invoke the Criminal Process*, 69 YALE L.J. 543, 562-73 (1960). In the ordinary course, the criminal conduct not reported (or arrested for) will include offenses which are *not* perceived as seriously disturbing or as contrary to significant moral values.

39. FED. R. CRIM. P. 4(a). See also *Giordenello v. United States*, 357 U.S. 480, 486 (1958); FED. R. CRIM. P. 3; ALLI, CODE OF CRIMINAL PROCEDURE §§ 1, 2 & commentary at 173-82 (1930); ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 10-11 (1947); MORELAND, MODERN CRIMINAL PROCEDURE ch. 2 (1959); Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 213-14 (1940).

40. Ordinarily, the legality of the arrest will be challenged at the preliminary hearing on the ground that the prosecution has not presented enough evidence to warrant holding the accused either for the grand jury or for trial (where there is no grand jury). There are occasions when the remedy has been by way of habeas corpus, note 46 *infra*.

the nature of the showing required of the officer is substantially the same. The arrest is legal if it is made upon "probable cause"—information which would have moved a reasonable man, under the circumstances, to believe that the crime in question had occurred and that it was committed by the accused.⁴¹ When the arresting officer is himself an eye-witness, no substantial problem arises. But when he acts on the basis of information supplied by others, his decision involves an embryo adjudication. He must weigh the probative value of the information, make judgments about the credibility of his informants, balance the probabilities, and determine the extent to which deviational conduct should be tolerated and law nullified.

The courts take note of the preliminary nature of the policeman's adjudication by requiring less formal, and less credible, evidence to validate his judgment than they require of the subsequent, more formal, screens. The word of the unidentified informer suffices, for example, if he has been shown to be reliable in the past.⁴² The lateness of the hour, the shape of the bag being carried, the reports of crimes in the neighborhood, the criminal records of the persons involved—all are permitted a weight in this determination which they would not receive at the trial itself.⁴³ Such loose standards are entirely consistent with the primary concern of the police, at this early stage, which is to

41. The rule stated in the text is generally applicable to felonies. Ordinarily, arrests may be made without a warrant for misdemeanors only if they are committed in the officer's presence. See, e.g., *Garske v. United States*, 1 F.2d 620, 622 (8th Cir. 1924); *Sennett v. Zimmerman*, 50 Wash. 2d 649, 650-52, 314 P.2d 414, 415-16 (1957); *Coverstone v. Davies*, 38 Cal. 2d 315, 320-21, 239 P.2d 876, 879 (1952); ALI, CODE OF CRIMINAL PROCEDURE § 21 & commentary at 231-34 (1930). See generally 4 WHARTON, CRIMINAL LAW AND PROCEDURE §§ 1595 to 1599 (12th ed. 1957); MORELAND, MODERN CRIMINAL PROCEDURE ch. 1 (1959); Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 331-32 (1942); Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 228-40 (1940).

42. *Draper v. United States*, 358 U.S. 307, 310-12 (1959).

43. The Supreme Court, in *Carroll v. United States*, 267 U.S. 132, 162 (1925), found that reasonable cause for arrest existed (thereby authorizing the search incident to arrest) where "the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile . . ." Among the relevant circumstances were the knowledge of the arresting officers that the defendants "were so-called 'bootleggers' in Grand Rapids" and that "[t]hey were coming from the direction of the great source of supply for their stock to Grand Rapids where they plied their trade." *Id.* at 160. Again, in *Brinegar v. United States*, 338 U.S. 160, 174-75 (1949), the Court said "[I]f those standards [of admissibility and competency of evidence] were to be made applicable in determining probable cause for an arrest or for search and seizure, . . . few indeed would be the situations in which an officer, charged with protecting the public interest by enforcing the law, could take effective action toward that end. . . . In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." The circumstances giving rise to "probable cause" are set out *id.* at 168-70. See generally Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 238-40 (1940); Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U. PA. L. REV. 1182, 1188-1202 (1952).

investigate, not adjudicate. But for that very reason, even the best enforced police evidentiary "screen" cannot be treated as a substantial one.

What makes the process of arrest even less rigorous a screen than it might be is the extent to which the illegal arrest may go unchallenged.⁴⁴ Between the time of arrest and the appearance before a magistrate at a preliminary hearing (on the question of bail and of "probable cause" to hold for further proceedings), the alleged offender ordinarily need not be informed of his right to counsel, nor allowed access to counsel if he asks for it, nor supplied with counsel if he is indigent.⁴⁵ If he does have counsel who knows of his arrest, a petition for habeas corpus might conceivably bring his release; but it is far more likely that he will have to defer his challenge until the preliminary hearing.⁴⁶ In any event, since most persons arrested for crime neither know their rights nor have ready access to a lawyer, the deterrent effect of this remedy upon the illegal arrest is bound to be slight.⁴⁷ The same is true, for a variety of reasons, of the civil suit for false arrest.⁴⁸

44. The illegality of the arrest, without more, is no defense to a charge of crime following from the arrest. *Frisbie v. Collins*, 342 U.S. 519 (1952).

45. It would perhaps be more precise to say that though some of these omissions may violate statutes, none will, without considerably more, either render inadmissible admissions or confessions obtained during this period or invalidate any subsequent proceedings. *Crooker v. California*, 357 U.S. 433, 437-41 (1958); *Brown v. Allen*, 344 U.S. 443, 475-76 (1953); *Galleghos v. Nebraska*, 342 U.S. 55, 64-65 (1951); *United States ex rel. Rogers v. Cummings*, 154 F. Supp. 663, 666 (D. Conn. 1956), *rev'd on other grounds sub nom. United States ex rel. Rogers v. Richmond*, 252 F.2d 807 (2d Cir. 1958); *McCreery v. State*, 122 Md. 394, 89 Atl. 1100, 1103 (1914); *INBAU, LIE DETECTION AND CRIMINAL INTERROGATION* 128 (1942); Note, 44 Ky. L.J. 103, 106-10 (1955). Attempts to deal with the problem of lack of representation by counsel at the police stage have generally been directed toward immediate arraignment of the accused rather than toward elaborate pre-arraignment protections, see, e.g., FED. R. CRIM. P. 5(a); *McNabb v. United States*, 318 U.S. 332 (1943); *Mallory v. United States*, 354 U.S. 449 (1957), but the so-called McNabb-Mallory rule is only relevant to federal prosecutions, see Comment, *Prearraignment Interrogation and the McNabb-Mallory Miasma*, 68 YALE L.J. 1003 (1959). As to unavailability of counsel for the indigent, see SPECIAL COMMITTEE TO STUDY DEFENDER SYSTEMS, *EQUAL JUSTICE FOR THE ACCUSED* 38-39 (1959).

46. Regarding habeas corpus (1) as a remedy for illegal arrest, see *Johnson v. Hoy*, 227 U.S. 245, 247 (1913); *State ex rel. Green v. Capehart*, 138 Fla. 492, 496, 189 So. 708, 709-10 (1939); (2) as a remedy for insufficiency of evidence at the preliminary hearing, see *Cotner v. Solomon*, 163 Neb. 619, 80 N.W.2d 587 (1957); *State v. Gottwalt*, 209 Minn. 4, 8, 295 N.W. 67, 69 (1940); *Price v. Johnston*, 144 F.2d 260, 261 (9th Cir. 1944), *cert. denied*, 323 U.S. 789; *State v. Foell*, 37 Idaho 722, 217 Pac. 608 (1923); *Ex parte Sanders*, 23 Ariz. 20, 201 Pac. 93 (1921).

47. See generally Dash, *Cracks in the Foundation of Criminal Justice*, 46 ILL. L. REV. 385, 388-90, 393 (1951); Note, *Metropolitan Criminal Courts of First Instance*, 70 HARV. L. REV. 320, 326-28 (1956).

48. Among the difficulties inevitably involved in deterring false arrests by civil suits for damages for the tort of false imprisonment, 1 HARPER & JAMES, TORTS §§ 3.6-3.9 (1956); RESTATEMENT, TORTS § 35 (1934), are the doctrines which have grown up to make recovery either unlikely or insubstantial. For example, the municipal or state employer is generally held to be immune from suit for torts committed by officers in the

The Preliminary Hearing

Pressure on the arresting officer to act responsibly in screening the charges of crime would ordinarily come in the preliminary hearing before the magistrate. It is the magistrate who must determine whether the policeman's "reasonable belief," when made visible, constitutes "probable cause" to believe a crime has been committed; or a "prima facie" case; or sufficient evidence to warrant a jury's finding the accused guilty.⁴⁹ Almost everywhere, however, the showing is held to be sufficient if the prosecution presents a skeletal outline of evidence admissible in court to support each element of the offense. This skeletal quality is virtually assured by certain grim facts. In most jurisdictions, no provision is made for appointment of counsel at this stage. Neither the due process clause of the fourteenth amendment nor state constitutional provisions have been held to require it.⁵⁰ And most states make no statutory

performance of "governmental" functions. Only when the officer "abuses" or "acts outside the scope of his authority" is he liable, because he is then acting in his individual capacity. See Borchard, *Government Liability in Tort*, 34 YALE L.J. 229, 240-41 (1925), which criticizes the extension of sovereign immunity to the most willful, negligent, and illegal acts of police officers, even where the city ratified the acts or failed to bond the police officer. Some states, however, have expressly consented to suit. 18 McQUILLIN, *MUNICIPAL CORPORATIONS* §§ 53.79, 53.80 (1950). But the Federal Tort Claims Act does not. Note, 56 YALE L.J. 534, 547 (1947). Where the victim of an illegal arrest seeks damages against a police officer, in his individual capacity, he meets a number of obstacles. Among them are (1) a reluctance to penalize an officer for what appears to be a good faith exercise of his authority; (2) the difficulty of proving damages, either because of the limited nature of the detention or the prior arrest record of the complainant, see, e.g., *Butcher v. Adams*, 310 Ky. 205, 208, 220 S.W.2d 398, 400 (1949); (3) the interpretation of bonds as applicable only to injury following from action within the authority of the officer, see *State v. Fidelity & Deposit Co.*, 147 Md. 194, 196-98, 127 Atl. 758, 759-60 (1925); but see Ky. REV. STAT. ANN. § 95.750 (1953); (4) the general rule, either statutory or judicial, that the salaries of public officers and employees are not subject to garnishment, so that judgments against them become difficult to collect, 17 McQUILLIN, *op. cit. supra* at § 49.86 (1950). It has been estimated that several million persons are illegally arrested in the United States each year. Hall, *Police and Law in a Democratic Society*, 28 IND. L.J. 133, 152, 154 (1953). See generally Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955); Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. CHI. L. REV. 345, 346-53 (1936); Note, 100 U. PA. L. REV. 1182, 1206-12 (1952).

49. The Court in *People v. Bernstein*, 95 N.Y.S.2d 696, 699 (N.Y.C. Magis. Ct. 1950), said, "A committing magistrate" should dismiss a complaint when on the evidence presented "a trial court would . . . be bound to grant a motion to acquit as matter of law." The view has also been advanced that the magistrate "may require more evidence than is needed to establish a prima facie case and less than would prove the defendant's guilt beyond a reasonable doubt," *People v. Bieber*, 100 N.Y.S.2d 821, 824 (N.Y.C. Magis. Ct. 1950). Statutes stating the quanta of proof necessary to "bind over" are collected in ALI, *CODE OF CRIMINAL PROCEDURE* 308-11 (1930). See also FED. R. CRIM. P. 5(c); ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 67-68 (1947); Comment, *Preliminary Hearings on Indictable Offenses in Philadelphia*, 106 U. PA. L. REV. 589, 590 (1958).

50. The sixth amendment, guaranteeing the right to both retained and assigned counsel at every stage of a federal criminal prosecution, *Johnson v. Zerbst*, 304 U.S. 458, 462-

provision for appointment of counsel, though a considerable number require that he be advised of his right to retain counsel.⁵¹ Since, therefore, defense counsel is usually either not present, or insufficiently informed to play his role properly, it ordinarily falls to the magistrate, almost alone, to test the suffi-

63 (1938), attaches only upon arraignment, which initiates prosecution. Federal courts have held that since "there is no constitutional right to a preliminary hearing," *Clarke v. Huff*, 119 F.2d 204 (D.C. Cir. 1941), "it follows that there is no invasion of constitutional rights if the accused is not represented by counsel" at the hearing, *Burall v. Johnston*, 53 F. Supp. 126 (N.D. Cal. 1943), *aff'd*, 146 F.2d 230 (9th Cir. 1944), *cert. denied*, 325 U.S. 887 (1945). The fourteenth amendment has, of course, demanded no higher standard from state courts. See *Utah v. Sullivan*, 227 F.2d 511, 513-14 (10th Cir. 1955), *cert. denied*, 350 U.S. 973 (1956); *United States ex rel. Rogers v. Cummings*, 154 F. Supp. 663, 666 (D. Conn. 1956), *rev'd on other grounds sub nom. United States ex rel. Rogers v. Richmond*, 252 F.2d 807 (2d Cir. 1958). It has been held on at least one occasion that the absence of counsel at a preliminary hearing may violate due process if it prejudices the defendant at trial, *Wood v. United States*, 128 F.2d 265 (D.C. Cir. 1942), but the practical effect of such a decision has been vitiated by subsequent decisions sharply constricting the idea of "prejudice" to the accused, see *McJordan v. Huff*, 133 F.2d 408, 409 (D.C. Cir. 1943); *Canizio v. New York*, 327 U.S. 82, 86-87 (1946). Forty-seven state constitutions contain provisions regarding counsel similar to that in the sixth amendment, though most have been construed more narrowly—that is, "as giving to a defendant the right to appear in court with retained counsel." Only seven states appear to have had their constitutions interpreted to impose an obligation to advise an accused of his right to counsel and to appoint counsel for an accused who does not have one. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 80-84 (1955). Considerably more jurisdictions have enacted statutes imposing such an obligation on the courts, note 51 *infra*, but they have generally been construed as inapplicable to the preliminary hearing. *E.g.*, *Steele v. State*, 189 Tenn. 424, 432, 225 S.W.2d 260, 263 (1949); *Fry v. Hudspeth*, 165 Kan. 674, 676, 197 P.2d 945, 947 (1948); *Roberts v. State*, 145 Neb. 658, 661, 17 N.W.2d 666, 668 (1945); *Skiba v. Kaiser*, 352 Mo. 424, 426, 178 S.W.2d 373, 374 (1944).

51. California requires assignment of counsel for indigent defendants at a preliminary hearing. *People v. Williams*, 124 Cal. App. 2d 32, 268 P.2d 156 (Dist. Ct. App. 1954) (violation of the statutory requirement resulted in illegal commitment, and an information for burglary was set aside). Assignment of counsel at preliminary hearings has been deliberately omitted in the Federal Rules, see note 2, *Notes of Advisory Committee on Rules*, following 18 U.S.C.A. rule 44 (1951). The same is true in most states. See, *e.g.*, *State v. Calkins*, 63 Idaho 314, 318-20, 120 P.2d 253, 254-55 (1941); *State ex rel. Bednarik v. Alvis*, 140 N.E.2d 59 (Ohio App. 1952). Most statutes are similar to FED. R. CRIM. P. 5(b), which provides: "The commissioner shall allow the defendant reasonable time and opportunity to consult counsel . . ." See, *e.g.*, ARIZ. R. CRIM. P. 16 (1956); IND. STAT. ANN. § 9-704(a) (1956); N.Y. CODE CRIM. P. § 188. Some statutes dealing with preliminary hearings omit all mention of defendant's right to even his own counsel, KAN. GEN. STAT. ANN. §§ 62-603, 62-610 (1949); N.H. REV. STAT. ANN. § 596 (1955). See generally BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 85-86 (1955); note 50 *supra*. Although FED. R. CRIM. P. 5, requires that the accused be advised of his right to be represented by counsel, it does not require appointment of counsel for those who are unrepresented, even if they are indigent. See *Notes of Advisory Committee on Rules*, 18 U.S.C.A. rule 44 (1951). Occasionally, committing magistrates, though not required to do so, undertake to find counsel for unrepresented defendants, without regard to indigency. Letter From Myron Ehrlich, Chairman, Committee on Criminal Procedure, to David G. Bress, President, Bar Association of the District of Columbia, January 15, 1958, describing practice of judges of Municipal Court of District of Columbia.

ciency of the evidence to warrant holding the accused for the grand jury, or for trial where there is no grand jury. Yet, most magistrates are either unskilled, or too busy, or too closely linked with police or prosecutor, or insufficiently mindful of the "judicial" nature of their role to perform this function adequately.⁵² And the sole review of the sufficiency of the evidence before them is the limited one afforded by habeas corpus, which looks only for some "legally competent evidence" to support the order committing the accused for trial.⁵³ But even that is a limited safeguard because the unrepresented, or poorly represented, defendant may not learn until after his trial that there was insufficient evidence at the preliminary hearing to warrant passing the case on to trial. If the case has proceeded to trial, no remedy is available to the accused for the defect in the preliminary hearing. He must then look, on appeal, solely to the inadequacy of the evidence at trial.⁵⁴

In practical effect, therefore, the preliminary hearing in the United States does not add significantly to the police evidentiary screen which has preceded it. As in the case of arrest, the point is not to suggest that the screening func-

52. See MOLEY, *OUR CRIMINAL COURTS* 3-13, 29-36 (1930); Dession, *From Indictment to Information—Implications of the Shift*, 42 YALE L.J. 163, 168-69 (1932); Dash, *Cracks in the Foundation of Criminal Justice*, 46 ILL. L. REV. 385 (1951); Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U. PA. L. REV. 1182, 1183 (1952) ("few of the magistrates of Philadelphia are aware of their rights and duties; the consensus . . . among those interviewed is that the mere act of swearing out a complaint furnishes probable cause, and they automatically issue a warrant upon the complaint of an officer"); Note, *Metropolitan Criminal Courts of First Instance*, 70 HARV. L. REV. 320, 325-29 (1956); Note, *Preliminary Hearings on Indictable Offenses in Philadelphia*, 106 U. PA. L. REV. 589 (1958).

53. See cases cited note 46 *supra*; State *ex rel.* Styles v. Beaverstad, 12 N.D. 527, 530-31, 97 N.W. 548, 550 (1903); State *ex rel.* Durner v. Huegin, 110 Wis. 189, 236, 85 N.W. 1046, 1057 (1901). There are, of course, instances of cases where courts, on petitions for habeas corpus, have found no legally admissible evidence and have discharged the prisoner. See, e.g., Priestley v. Superior Court, 319 P.2d 796, 803-04 (Cal. Dist. Ct. App. 1957), *aff'd*, 50 Cal. 2d 812, 330 P.2d 39 (1958); *In re Flodstrom*, 277 P.2d 101, 102-03 (Cal. Dist. Ct. App. 1954); State v. Smith, 138 Ala. 111, 113, 35 So. 42, 43 (1903). Probably most magistrates do not strictly apply the rules of evidence to the proceedings before them, although there is authority for the proposition that they are obligated to do so. Comment, *Preliminary Hearings on Indictable Offenses in Philadelphia*, 106 U. PA. L. REV. 589, 592-93 (1958).

54. No defect or irregularity in . . . the preliminary hearing, shall constitute prejudicial error and the defendant shall be conclusively presumed to have waived any such defect . . . unless he shall before pleading to the information or indictment specifically and expressly object . . . on such ground.

UTAH CODE ANN. § 77-16-2 (1953); Howell v. Keiter, 104 Ohio App. 28, 29, 146 N.E.2d 452, 453 (1957); see People v. Nitzberg, 289 N.Y. 523, 530, 47 N.E.2d 37, 40 (1943). The traditional method of challenging a defect in, or failure to accord, a preliminary hearing has been a motion made before trial to quash the indictment. State v. Boehm, 68 N.D. 340, 342, 279 N.W. 824, 825 (1938); State v. Pay, 45 Utah 411, 425, 146 Pac. 300, 306 (1915); Meyers v. State, 104 Neb. 356, 177 N.W. 177 (1920). Once an indictment has been returned, even habeas corpus will ordinarily be unavailable to test the legality of the preliminary hearing. State v. Gottwalt, 209 Minn. 4, 7, 295 N.W. 67, 69 (1940) (*dictum*).

tion of the preliminary hearing should be made more rigorous; or that every "error" requires a remedy. It is merely to indicate first, that the institutions empowered to do the screening job do it in quite limited fashion and, second, that the cumulation of noninterventionist attitudes serves to make very slight indeed the external pressures on policeman, prosecutor and magistrate to act as responsible screens. Entirely too much is left to self-discipline and tradition, which have been notoriously slow in developing in most American police forces and magistracies.⁵⁵

It would be misleading to leave the inference that there are not a substantial number of drop-outs at the arrest and preliminary hearing stages. What is not at all clear, however, is whether they are the result of the formal evidentiary screen, thereby reinforcing the probability of guilt, or whether they derive from something else—for example, the virtually undefined and unreviewable exercise of discretion by police and prosecutor not to proceed further, in accordance with criteria so subjective as to afford no assurance that the rule of law is being applied equally to all.⁵⁶

The Grand Jury

In perhaps half the states, mostly in the West, the preliminary hearing is the last formal screening device before trial.⁵⁷ But in the remaining states and in the federal system, the grand jury stands as yet another screen.⁵⁸ Though it may serve as an initiator of investigation and accusation, by far the greatest proportion of matters coming before it has already passed through arrest and preliminary hearing.

55. See sources cited note 52 *supra*; SMITH, *POLICE SYSTEMS IN THE UNITED STATES* 2-16 (rev. ed. 1949); FOSDICK, *AMERICAN POLICE SYSTEMS* 379-80 (1920); Hall, *Police and Law in a Democratic Society*, 28 IND. L.J. 133 (1953).

56. See generally J. Goldstein, *Police Discretion Not To Invoke the Criminal Process*, 69 YALE L.J. 543 (1960).

57. The Supreme Court has ruled that the due process clause of the fourteenth amendment does not prevent a state from proceeding with a criminal prosecution without a grand jury indictment. *Hurtado v. California*, 110 U.S. 516 (1884). All states *permit* a grand jury hearing. See statutes collected in Comment, *The Propriety of the Grand Jury Report*, 34 TEXAS L. REV. 746, 747 n.6 (1956). Where indictment by grand jury has been eliminated as a mandatory requirement, the usual procedure authorizes the prosecutor to proceed by information *after* the defendant has been committed by a magistrate at a preliminary hearing. The preliminary hearing ordinarily follows a complaint filed by police or prosecutor. See, e.g., CAL. PEN. CODE § 738; IDAHO CODE ANN. § 19-1303 (1948); KANS. GEN. STAT. ANN. § 62-805 (1949); MICH. STAT. ANN. § 28.982 (Supp. 1959); MINN. STAT. ANN. § 628.31 (1947); MO. ANN. STAT. § 544.250 (1953); NEB. REV. STAT. § 29.1607 (1948). A few states allow the prosecutor to file an information even in the absence of a preliminary hearing, providing only that the information must then be verified, ARIZ. R. CRIM. P. 111 (1956). See generally ALI, *CODE OF CRIMINAL PROCEDURE* 434-40 (1930).

58. See, e.g., U.S. CONST. amend. V; MASS. CONST. § 13, and *Jones v. Robbins*, 74 Mass. (8 Gray) 329, 342 (1857); N.J. CONST. art. I, ¶ 8; N.Y. CONST. art. 1, § 6; see Comment, 34 TEXAS L. REV. 746, 747 (1956); ALI, *CODE OF CRIMINAL PROCEDURE* 414-34 (1930).

The grand jury is unquestionably the most celebrated of the pre-trial screening devices. Originally conceived as an extension of the royal authority over the citizen, it reached its greatest glory as a barrier against the state, refusing to indict for crime where the evidence was inadequate or the law creating the crime unpopular.⁵⁹ During the nineteenth century, a great many jurisdictions set about to "judicialize" the grand jury proceeding, principally because the return of an indictment, without more, was recognized as bringing serious extra-legal sanctions with it. Beginning with a hearing restricted to the prosecution's case alone, with a firm ban on calling the defendant or his witnesses, most states soon authorized the grand jury to hear them if it chose.⁶⁰ A considerable number enacted statutes providing that the grand jury was to hear only "legal evidence," or that it "ought" to indict only on the basis of such evidence.⁶¹ And those requirements were frequently enforced through the granting of motions to quash indictments based on no evidence at all, or no evidence as to an element of the crime, or "utterly insufficient" evidence.⁶² The nature of the judicial inquiry tended to resemble the manner in which courts now review the action of administrative agencies—to ascertain whether they are acting within the limits of their authority. The net effect of this de-

59. EDWARDS, *THE GRAND JURY* 28-32 (1906); 1 HOLDSWORTH, *HISTORY OF ENGLISH LAW* 321-23 (5th ed. 1931); Kennedy & Briggs, *Historical and Legal Aspects of the California Grand Jury System*, 43 CALIF. L. REV. 257, 257-58 (1955).

60. The early rule was that the grand jury had no right to question either the defendant or any of his witnesses, EDWARDS, *THE GRAND JURY* 140 (1906); *Republica v. Shaffer*, 1 U.S. (1 Dall.) 236, 237 (Pa. 1788), even upon request by the accused, *United States v. Terry*, 39 Fed. 355, 361-63 (N.D. Cal. 1889). Some later cases and statutes conceded power to the grand jury to call the defendant if he were willing to testify, *In re Morse*, 42 Misc. 664, 666, 87 N.Y. Supp. 721, 722 (N.Y.C. County Ct. 1904); *People v. Bradshaw*, 253 App. Div. 405, 406, 3 N.Y.S.2d 58, 59 (1938); N.Y. CODE CRIM. P. § 250; CAL. PEN. CODE § 1323.5; ARIZ. R. CRIM. P. 104; IOWA CODE ANN. § 771.15 (1950); LA. REV. STAT. ANN. § 15:214 (1951).

61. See Justice Field's Charge to Grand Jury, 30 Fed. Cas. 992, 993 (No. 18255) (C.C.D. Cal. 1872) ("In your investigations you will receive only legal evidence, to the exclusion of mere reports, suspicions and hearsay evidence."); *In re Grand Jury*, 62 Fed. 840, 846 (N.D. Cal. 1894); *Nanfito v. United States*, 20 F.2d 376, 378 (8th Cir. 1927); *Cooper v. United States*, 247 Fed. 45, 47 (4th Cir. 1917); *Olmstead v. United States*, 19 F.2d 842, 845 (9th Cir. 1927), *aff'd*, 277 U.S. 438 (1928). In 1930, fourteen states had statutes providing that the grand jury was not to accept less than legal evidence. ALI, *CODE OF CRIMINAL PROCEDURE*, § 138 & commentary at 503-11 (1930). Varying constructions given such statutes are discussed in *State v. Chance*, 29 N.M. 34, 36, 221 Pac. 183 (1923) (describing the early decisions in which courts split sharply on the question of the degree to which the grand jury could be judicially policed, with the New York Courts showing the greatest disposition toward scrutinizing grand jury proceedings closely and toward enforcement of fairly strict rules of competency and sufficiency of evidence put before the grand jury). See also *United States v. Farrington*, 5 Fed. 343, 347-48 (N.D. N.Y. 1881).

62. See, e.g., *State v. Grady*, 84 Mo. 220, 223 (1884); *Brady v. United States*, 24 F.2d 405, 408 (8th Cir. 1928); *United States v. Farrington*, 5 Fed. 343, 348 (N.D.N.Y. 1881); Annot., *Quashing Indictment For Lack or Insufficiency of Evidence Before Grand Jury*, 59 A.L.R. 567 (1929) (collecting cases).

velopment was to impose upon the prosecution the obligation to proceed more cautiously and circumspectly with the business of prosecuting crime than it might otherwise have done.

In the late '20's and early '30's, a complete change in judicial attitude toward the grand jury took place. There came to be increasing feeling, manifested most clearly in the report of the Wickersham Commission, that the grand jury was an inefficient "rubber stamp" for the prosecutor who conceived its investigations, directed its secret proceedings, and drafted its indictment. Apart from its subpoena authority, which could conceivably be better lodged with the prosecutor who exercised the power *de facto*, the grand jury hearing seemed to serve no useful purpose.⁶³ The adjudication of probable guilt would have to be made again by a petit jury after a fuller and fairer hearing than the grand jury could possibly provide. And besides, there was the preliminary hearing, which could be used to do the screening job hitherto done by the grand jury. There came to be increasing reluctance on the part of the courts to examine the sufficiency of the evidence before the grand jury. That body became its own judge of the kind of evidence it would hear and the amount and quality of evidence it would require for indictment.⁶⁴

*United States v. Costello*⁶⁵ placed the imprimatur of the Supreme Court upon this conception of the grand jury. The Court held that an indictment based completely upon hearsay evidence is neither defective, dismissible on motion, nor ground for reversal of a conviction. The attempt by Justice Burton to place his concurrence on a narrower ground—that the hearsay was clearly reliable⁶⁶—and the failure of the Court to incorporate that ground into its opinion, indicated strongly that, henceforth, the federal grand jury was to police itself. Except for their very limited relationship to it before and during the proceedings, courts were no longer to interfere if the grand jury was "legally constituted and unbiased."⁶⁷ The reason for this approach, fairly clear-

63. NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION 34-37, 124 (1931); Morse, *A Survey of the Grand Jury System* (pts. 1-2), 10 ORE. L. REV. 101, 134-35, 295, 304-07 (1931); Miller, *Informations or Indictments in Felony Cases*, 8 MINN. L. REV. 379, 397-99 (1924); Vollmer, *Vestigial Organs*, 7 STATE GOV'T 91 (1934). For criticisms of the critics of the grand jury, see Dession, *From Indictment to Information—Implications of the Shift*, 42 YALE L.J. 163 (1932); Hall, *Analysis of Criticism of the Grand Jury*, 22 J. CRIM. L., C. & P.S. 692 (1932); Current Notes, *Dewey Speaks on Grand Jury*, 32 J. CRIM. L., C. & P.S. 217 (1941).

64. Compare Annot., 59 A.L.R. 567 (1929), with Annot., 100 L. Ed. 404 (1956), particularly with reference to the increasing willingness to end the judicial inquiry upon ascertaining that there was "some" evidence before the grand jury. See also the references in *Costello v. United States*, 350 U.S. 359, 361 n.4 (1956).

65. 350 U.S. 359 (1956).

66. *Id.* at 365.

67. *Id.* at 363. Although it is the court which orders a grand jury to be summoned "at such times as the public interest requires," FED. R. CRIM. P. 6(a), it has virtually no control over the grand jury proceedings from that point forward. Rule 6(d), while allowing attorneys for the government to be present at grand jury hearings, makes no provision for the presence of a judge. While the judge "charges" the jury, the charge "is

ly stated in *Costello*, is that the accused will get his fair, "judicial," hearing at his trial.⁶⁸ Due process, and the Supreme Court, require no more. Stated in somewhat more rhetorical fashion, why protect the defendant at the grand jury stage against an indictment based on little or no evidence when the exacting standards of the trial process will make such indictments meaningless?

The Relationships Among the Screens

In sum, the evidentiary standards of the pretrial screening process, implicitly relied upon by trial and appellate courts as a basis for relaxing trial standards, have themselves been relaxed in reliance upon the assumed vigor of the trial process. It by no means follows, however, that the pretrial process should be "judicialized" to assure that only the "really guilty" come to trial. Though a tightening of the screens might well decrease the danger that innocent men would be convicted, it might also distort other functions, such as investigation, which are perhaps equally important.

The point, simply stated, is this: the looseness of the pretrial screens makes questionable the move toward abandonment of the traditionally strict trial standards called for in *Isbell* and *Curley*. Only if the criminal sanction were to lose the special stigma associated with it in our society, or if the threat of imprisonment did not loom ominously in the background, or if there had been fewer instances in our history of conviction of innocent persons, would it be appropriate to treat the question of sufficiency of evidence in criminal trials in the same manner as in civil trials.

DISCLOSURE

Increased reliance upon the trial as the principal device for protecting the accused makes it imperative that the defense come to trial as well equipped as the prosecution to raise "doubt in the minds of any one of the twelve" men in the jury box.⁶⁹ Particularly in a system based, as is ours, upon a single trial held on a single occasion, the parties must come to trial prepared to make the most of their presentation on that occasion.⁷⁰ It is crucial, therefore, to deter-

usually in general terms and concerns itself to a large extent with the mere mechanics of grand jury duty." Lewin, *The Conduct of Grand Jury Proceedings in Antitrust Cases*, 7 LAW & CONTEMP. PROB. 112, 119 (1940). It was early held by Chief Justice Marshall, in the trial of Aaron Burr, that it would be improper for the judge to charge the grand jury specifically as to points of law likely to arise, 1 BURR'S TRIAL 174 (Robertson ed. 1808). See generally ALI, CODE OF CRIMINAL PROCEDURE §§ 127, 134 & commentary at 477-78, 492-93 (1930); *State v. Lawler*, 221 Wis. 423, 426, 267 N.W. 65, 67 (1936).

68. *United States v. Costello*, 350 U.S. at 363-64.

69. *United States v. Garsson*, 291 Fed. 646, 649 (S.D.N.Y. 1923).

70. In a system of "trial by interval," the discovery machinery proceeds apace with the actual trial. The need for comprehensive pretrial preparation is minimized because all participants are prepared to halt the proceedings when it seems useful to do so and to reconvene at a later date, meanwhile permitting the accumulation of additional evidence made necessary by the course of the earlier proceedings. See Kaplan, von Mehren & Schaefer, *Phases of German Civil Procedure*, 71 HARV. L. REV. 1193, 1211-49 (1958);

mine which of the parties is specially advantaged by the system of disclosure currently employed. In Judge Hand's view, it will be recalled, the accused enjoys every advantage. Not only is the prosecution handicapped by the obligation to prove guilt beyond "the least fair doubt,"⁷¹ it is further hampered in assembling the evidence to satisfy the obligation. "While the prosecution is held rigidly to the charge, . . . [the accused] need not disclose the barest outline of his defense. He is immune from question or comment on his silence. . . ."⁷²

Judge Hand is undoubtedly correct in tying proof of guilt or innocence to the problem of disclosure of issues and evidence. But he is quite wrong in his assessment of where the advantage lies. It has probably always been with the state, and is becoming even more so. Increasingly, the prosecution is being freed from restrictions on pleading and proof while the defendant and his case are, and always have been, far more accessible to the prosecution than Judge Hand's polemic would have it. To evaluate argument and counter-argument, it will be necessary to place the problem of disclosure in the perspective of the entire criminal procedural process, much as has been done with the problem of screening baseless charges.

"The Prosecution Is Held Rigidly to the Charge"

That persons accused of crime should be put on notice of the charge against them is fundamental in both a procedural and a substantive sense.⁷³ Notice serves not only to assure maximal participation by the parties in the adversary trial but also to aid in fulfilling the function of that trial—detering others from committing like crimes and instilling remorse in persons found guilty of the crime charged. Until fairly recently, notice (or disclosure) was afforded the accused by a series of devices. The indictment had to be drawn with precision;⁷⁴ it could neither be explicitly amended⁷⁵ nor would any variance be

note 96 *infra*. In our system, for him who comes unprepared, practical and legal obstacles stand in the way of reopening the proceedings at a later date. The doctrines which have developed in connection with motions for new trial, particularly on grounds of newly discovered evidence, have not been generously applied. See, e.g., Annot., FED. R. CRIM. P. 33, 18 U.S.C.A. (1951); cf. 6 MOORE, FEDERAL PRACTICE ¶ 59.03 (1953). So far as continuances during trial are concerned, lawyers of experience will attest to their reluctance to keep a jury waiting while leads to evidence are followed up.

71. *United States v. Garsson*, 291 Fed. 646, 649 (S.D.N.Y. 1923).

72. *Ibid.*

73. See generally A. Goldstein, *Conspiracy To Defraud the United States*, 68 YALE L.J. 405, 441-48 (1959).

74. The common law rule, requiring the criminal charge to be set out with sufficient precision and fullness to enable the defendant to make his defense and to avail himself of his conviction or acquittal in a subsequent prosecution for the same offense, has been crystallized in the United States Constitution [sixth amendment] and in the constitutions of a great majority of the United States.

MORELAND, MODERN CRIMINAL PROCEDURE 211 (1959); see *Cole v. Arkansas*, 333 U.S. 196, 201 (1948); *Berger v. United States*, 295 U.S. 78, 82 (1935); *United States v. Hess*,

permitted between its allegations and the proof offered to support them.⁷⁶ Only one offense could be charged in each count. If there were more, the count was "bad for duplicity."⁷⁷

These technical doctrines represented fairly crude devices for assuring that the decision of the magistrate or grand jury would be given effect—that, for example, the decision not to charge for larceny by trick but instead to charge for obtaining property by false pretenses⁷⁸ would be respected. Moreover, defendants would be given as clear an idea of what they would have to meet at trial as could be supplied by pleadings alone. This heavy reliance on the pleadings was made necessary, of course, because there was virtually no other way in which the defendant could compel disclosure of the prosecution's case.⁷⁹ An examination of pleading in modern criminal cases will show that the pleadings have lost their rigidity, and their specificity with it, while no compensatory increase has taken place in the amount of pretrial disclosure available to the defendant.

124 U.S. 483 (1888); *United States v. Cruikshank*, 92 U.S. 542, 557-58 (1875); *State v. Perley*, 86 Me. 427, 431, 30 Atl. 74, 75 (1894); *cf. Williams v. United States*, 131 F.2d 21, 23 (D.C. Cir. 1942); *Millar, The Function of Criminal Pleading*, 12 J. CRIM. L., C. & P.S. 500 (1922).

75. *Ex parte Bain*, 121 U.S. 1 (1887). *But see* references in notes 89, 92 *infra*.

76. Reversals because of variances led Hale to say, in the seventeenth century, that "in favour of life great strictnesses have been in all times required in points of indictments, and the truth is, that it is grown to be a blemish and inconvenience in the law, and the administration thereof; more offenders escape by the over easy ear given to exceptions in indictments, than by their own innocence . . ." 2 HALE, PLEAS OF THE CROWN 193 (1st Am. ed. 1847). Stephen made a similar comment almost two hundred years later. 1 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 283-84 (1883). As recently as 1923, a federal court held a variance fatal because the indictment in a narcotics case referred to "morphine sulphate" rather than what was shown by the proof to be "morphine hydrochloride." *Guilbeau v. United States*, 288 Fed. 731 (5th Cir. 1923). Even more recently, courts have found variances "material" and, therefore, "fatal," particularly in conspiracy cases. *See, e.g., United States v. Siebricht*, 59 F.2d 976, 978 (2d Cir. 1932); *Marcante v. United States*, 49 F.2d 156, 158 (10th Cir. 1931); *Dowdy v. United States*, 46 F.2d 417, 423 (4th Cir. 1931); *Wyatt v. United States*, 23 F.2d 791, 792 (3d Cir. 1928); *cf. United States v. Wills*, 36 F.2d 855 (3d Cir. 1929). *But cf. United States v. Howard*, 26 Fed. Cas. 388, 389 (No. 15403) (C.C.D. Mass. 1837). *See also* note 90 *infra* and accompanying text.

77. The term "duplicity" was used by Blackstone in the context of civil pleading. He said a plea must "be single and containing only one matter; for duplicity begets confusion." 3 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 408 (Hammond ed. 1890). It soon found its way into the criminal cases. *ARCHBOLD, PLEADING AND EVIDENCE IN CRIMINAL CASES* 25 (1st Am. ed. 1824); *WHARTON, CRIMINAL LAW* 96-99 (1846); *Miller v. State*, 6 Miss. (5 How.) 250, 251 (1840); *United States v. Nunnemacher*, 27 Fed. Cas. 202 (No. 15903) (C.C.E.D. Wis. 1876); *DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND* 132 (1958).

78. *People v. Noblett*, 244 N.Y. 355, 155 N.E. 670 (1927).

79. *See* discussion in text accompanying note 100 *infra*. For other explanations for the strictness with which pleadings were construed, *see* note 81 *infra*.

Indictment or Information

The Hand view of criminal pleading is, in large part, a reaction against the ridiculous lengths to which courts, armed with a constitutional principle, often carried the requirement that the indictment furnish the accused with notice of the charge against him.⁸⁰ It has become a commonplace to inveigh against the pleading of that day by referring to dismissals of indictments because names were spelled incorrectly, or times and places stated inaccurately.⁸¹ Because of these "horribles," and because of the impact of legal realism on legal thinking generally, criminal pleading was made looser and more flexible. Indictments could now follow the language of the statute creating the crime, provided the statute contained the "essential elements of the offense." Though the cases continued to pay lip service to constitutional doctrine regarding specificity, indictments came to be drafted in more general terms. Any loss to the defendant in the way of notice could be made up to him when he moved for a bill of particulars.⁸²

80. The discussion herein, though referring to indictments, is generally applicable to informations as well. I am indebted to a former student, Jeremy Butler, now of the Arizona bar, for an unpublished paper, written in 1959, entitled *Variance and Conspiracy*, for many of the references in this section.

81. See, e.g., *The King v. Durore*, 1 Leach 351, 352, 168 Eng. Rep. 278, 279 (K.B. 1784) ("This is a fatal variance. . . . [B]ut having averred that it was in the house of John Brewer and James Sandy, he is bound to prove it as it is laid: now the evidence is, that Mr. Brewer's Christian name is not John but James . . ."); *Rex v. Loom*, 1 Mood. 160, 168 Eng. Rep. 1225 (1827) (proof that lambs were stolen, rather than sheep as alleged, held a fatal variance). MORELAND, *MODERN CRIMINAL PROCEDURE* 206-09 (1959), refers to the frequently stated view that indictments were strictly construed at common law because so many offenses charged in them were punishable by death. Others attribute strictness of construction to the practice applicable to all pleadings throughout the nineteenth century. 4 HOLDSWORTH, *HISTORY OF ENGLISH LAW* 531 (3d ed. 1923). And it was said to be a necessary correlative of the looseness of definition of crime prevailing at common law. 1 STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 292-93 (1883).

82. FED. R. CRIM. P. 7(c) provides: "The indictment or information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." See, e.g., *United States v. Debrow*, 346 U.S. 374, 376 (1953); *Hagner v. United States*, 285 U.S. 427, 431 (1932); *United States v. Kushner*, 135 F.2d 668, 673 (2d Cir. 1943); *State v. Greer*, 238 N.C. 325, 77 S.E.2d 917 (1953); *State v. Needham*, 182 Miss. 663, 666-67, 180 So. 786, 787 (1938); *People v. Grogan*, 260 N.Y. 138, 142, 183 N.E. 273, 274-75 (1932); *State v. Moran*, 99 Conn. 115, 117-18, 121 Atl. 277, 277-78 (1923); *People v. Brady*, 272 Ill. 401, 112 N.E. 126 (1916). Rule 7(f) authorizes the trial court, in its discretion, to grant a motion for a bill of particulars. A comprehensive collection of cases on the exercise of that discretion in federal and state courts, is in Annot., *Right of Accused to Bills of Particulars*, 5 A.L.R.2d 444 (1949). The development of the short form of indictment in some states, a corollary of which is a *mandatory* bill of particulars, is discussed in MORELAND, *MODERN CRIMINAL PROCEDURE* ch. 15 (1959); Note, *Streamlining the Indictment*, 53 HARV. L. REV. 122 (1939); *People v. Bogdanoff*, 254 N.Y. 16, 171 N.E. 890 (1930) (upholding constitutionality of indictment containing only a statement of the name of the crime charged); *State v. Engler*, 217 Iowa 138, 251 N.W. 88 (1933). The text discussion does not purport to deal with the short form indictment or information or with the extent to which particulars granted in connection therewith afford any more notice than the indictment or information under the conventional procedure.

But here, as in the analogous erosion of the preindictment screens, the implicit dependence upon the ready availability of particulars has proved to be unwarranted. Court after court has undercut the notice-giving function of the bill of particulars by refusing to grant it. Most often, the grounds for refusal have been that the defendant is not entitled to obtain the government's "evidence" in advance of trial; or to embark on a "fishing expedition"; or, ironically, to get details when he knows very well "what he did."⁸³ Almost invariably, the shield for refusal has been the awareness of trial judges, because appellate courts have said it so often, that the application for a bill of particulars is "addressed to the sound discretion of the [trial] court."⁸⁴

Duplicity and Variance

In the wake of the indictment's decline in specificity has come the demise of the doctrine holding "bad for duplicity" any count which charged more than one offense. That doctrine had as its principal rationale the need for precise statement of the charge so that the accused could prepare his defense.⁸⁵ Inevitably, however, the logic of the position that defects in the indictment could be "cured" brought with it the willingness to accept as a remedy for the "error" of duplicity something less than dismissal of the indictment. Not only were fewer pleadings classed as duplicitous, but in most jurisdictions, once the trial had begun, prosecutors were permitted to elect the one offense on which they intended to rely for conviction;⁸⁶ in others, the indictment could be amended.⁸⁷

83. *Wong Tai v. United States*, 273 U.S. 77, 82 (1927); *Johnson v. United States*, 207 F.2d 314, 320 (5th Cir. 1953); *United States v. Kushner*, 135 F.2d 668, 673 (2d Cir. 1943), *cert. denied*, 320 U.S. 212 (1943); *United States v. Foster*, 80 F. Supp. 479, 486 (S.D.N.Y. 1948); *People v. Cox*, 340 Ill. 111, 114-15, 172 N.E. 64, 65-66 (1930); *People v. Brady*, 272 Ill. 401, 112 N.E. 126 (1916). *But cf.* *United States v. Onassis*, 125 F. Supp. 190, 213 (D.D.C. 1954). See generally Annot., 5 A.L.R.2d 444 (1949).

84. *Wong Tai v. United States*, 273 U.S. 77, 82 (1927); *United States v. Cohen*, 145 F.2d 82, 92 (2d Cir. 1944), *cert. denied*, 323 U.S. 799 (1945) (the denial of a bill of particulars is "seldom if ever a reversible error"); *Himmelfarb v. United States*, 175 F.2d 924, 935 (9th Cir. 1949); *Mellor v. United States*, 160 F.2d 757, 759-60 (8th Cir. 1947); *People v. Sims*, 393 Ill. 238, 242, 66 N.E.2d 86, 88 (1946); *Yankwich, Concealment or Revelation?*, 3 F.R.D. 209, 210 (1943) ("The Bill of Particulars, which is supposed to supply additional information, is of little assistance, because it is granted very seldom and the higher courts have, as a rule, supported the trial courts in most instances where there has been a denial."); Annot., 5 A.L.R.2d 444 (1949).

85. See sources cited note 77 *supra*; *Winkelmann v. State*, 114 Neb. 1, 205 N.W. 565 (1925); *People v. Klipfel*, 160 N.Y. 371, 374, 54 N.E. 788, 789-90 (1899); *Miller v. State*, 6 Miss. (5 How.) 250, 251 (1840); *Millar, The Reform of Criminal Pleading in Illinois*, 8 J. CRIM. L. C. & S.P. 337, 339 (1917).

86. For description of the many exceptions to the rule barring duplicity, see Lugar, *Duplicious Allegations in Indictments*, 58 W. VA. L. REV. 18 (1955); Note, 11 NEB. L. BULL. 458 (1933). There still do occur cases in which the indictment is quashed for duplicity. See, e.g., *United States v. Martinez-Gonzales*, 89 F. Supp. 62 (S.D. Cal. 1950); *People v. Trepel*, 207 Misc. 98, 139 N.Y.S.2d 513 (N.Y.C. County Ct. 1954); *State v.*

The concept of postindictment "cure" of an unfortunate pleading by the prosecution has also had an impact upon the doctrine of fatal variance between allegation and proof. Until recently, that doctrine prohibited any departure in the course of trial from the single offense alleged in each count; the prosecution was to be held strictly to the theory announced in the charging document.⁸⁸ If the proof did vary, the prohibition against "amendment" of indictments, which denied to prosecutor or judge the power to add to what the grand jury had charged, prevented correction of the error.⁸⁹

Within the past generation, the rigors of both "variance" and "amendment" doctrine have been considerably relaxed. The Supreme Court held in *Berger v. United States* that the charge of one conspiracy, and the proof of more than one, was "harmless error" so long as the defendant was not "surprised"—that is, that the departure from the allegation had not materially prejudiced the accused in making his defense.⁹⁰ Though the Supreme Court has not been al-

Kuhnley, 74 Ariz. 10, 16-17, 242 P.2d 843, 847-48 (1952); *Commonwealth v. Morgan*, 174 Pa. Super. 586, 587, 102 A.2d 194, 195 (1954); *Kirsner v. State*, 183 Md. 1, 5-7, 36 A.2d 538, 540 (1944). Most courts treat duplicity as "a fault of form only" and "at the conclusion of the state's evidence, where more than one offense is charged in the same count, and there is evidence to support two or more of the offenses charged, the defendant may, on motion, require the state to elect the offense on which it will stand for conviction." *State v. Perry*, 101 W. Va. 123, 132 S.E. 368 (1926). Defendant's failure to move for election constitutes a waiver of the point. *State v. Taylor*, 335 Mo. 460, 473-74, 73 S.W. 2d 378, 385 (1934). Often, it is only when the State has "produced its testimony that [it appears] that the State had intended to charge several different offenses . . . under the single count in the information. The error might [be] cured if the Court . . . required the State to elect which of these offenses it was relying upon." *Hamilton v. State*, 129 Fla. 219, 229, 176 So. 89, 93 (1937); see ALI, CODE OF CRIMINAL PROCEDURE § 185 (1930); 27 AM. JUR. *Indictments and Informations*, §§ 133-35 (1940).

87. *State v. Torrance*, 41 N.J. Super. 445, 451-53, 125 A.2d 403, 407 (1956); see note 92 *infra*.

88. See note 76 *supra*.

89. *Ex parte Bain*, 121 U.S. 1 (1887) (grant by trial court of motion by prosecution to strike words from indictment was held an invasion of the fifth amendment's requirement that "No person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a Grand Jury"); *United States v. Norris*, 281 U.S. 619 (1930); *Carney v. United States*, 163 F.2d 784, 788-90 (9th Cir.), *cert. denied*, 332 U.S. 824 (1947); *Stewart v. United States*, 12 F.2d 524 (9th Cir. 1926); *Dodge v. United States*, 258 Fed. 300 (2d Cir.), *cert. denied*, 250 U.S. 660 (1919); *Commonwealth v. Snow*, 269 Mass. 598, 604, 169 N.E. 542, 544 (1930). See generally Annot., *Power of Court To Amend Indictment*, 7 A.L.R. 1516 (1920); Annot., 68 A.L.R. 928 (1930). Where informations were concerned, it was impossible to treat departure from their original terms as *ultra vires*, and hence in some manner to be deterred, as was the case with the grand jury. For the very prosecutor who had drafted the information was presumably before the court, prepared to amend it. Restriction of the information to its original terms, which was the general practice, had, therefore, to be based either upon the former jeopardy grounds or upon considerations of "surprise."

90. 295 U.S. 78, 82-83 (1935). With the amendment in 1919 of what was then § 269 of the Judicial Code of the United States (FED. R. CRIM. P. 52(a)) which provided that errors "which [do] not affect the substantial rights" of the parties shall be disregarded, many previously "fatal" variances were treated as "harmless." But see note 76 *supra*. The principal decisions construing *Berger* are *Kotteakos v. United States*, 328 U.S. 750 (1946);

together consistent in its decisions, this reasoning has been extended by the courts and legislatures to a wide variety of cases. Amendments as to form have been held permissible.⁹¹ And, in many jurisdictions, amendments as to substance are authorized by special statutory or constitutional provision.⁹² Evidencing the same trend are the cases holding that the prosecution may prove any "offense" of which the indictment does in fact give notice, even if the indictment indicates, on its face, that it is dealing with another, similar offense category.⁹³

Blumenthal v. United States, 332 U.S. 539 (1947); see Note, 57 COLUM. L. REV. 387 (1957).

91. United States v. Denny, 165 F.2d 668, 669-70 (7th Cir. 1947) (relying principally upon federal statute providing that no indictment "shall be deemed insufficient, . . . by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant"); United States v. Fawcett, 115 F.2d 764, 766-67 (3d Cir. 1940); United States v. Reisley, 32 F. Supp. 432, 435-36 (D.N.J. 1940).

92. The statutory provisions vary in their detail: see, e.g., (1) amendment of the indictment to conform to the proof at trial unless it would be "prejudicial" to the defense, N.Y. CODE CRIM. P. § 295-j; N.D. REV. CODE §§ 29-1145-48 (1943); S.C. CODE § 17-410 (1952); WIS. STAT. ANN. § 957.16 (1958), (2) amendment as to form, so long as there is no change in the nature of the crime charged, ARK. STAT. ANN. § 43-1024 (1947); CAL. PEN. CODE § 6-1009; IDAHO CODE ANN. § 19-1420 (1948); IND. ANN. STAT. § 9-1133 (1956); MASS. ANN. LAWS ch. 277, § 35A (1956); N.H. REV. STAT. ANN. § 601.8 (1955); TEX. CODE CRIM. P. art. 533 (1954), (3) amendment to conform to the proof, apparently without statutory limitation, ARIZ. R. CRIM. P. 109 (1956); N.M. STAT. ANN. § 41-6-37 (1953); UTAH CODE ANN. § 77-21-43 (1953); ALI, CODE OF CRIMINAL PROCEDURE § 184 (1930), (4) amendment to remedy variance in name of person, place, etc. if not material, LA. REV. STAT. ANN. § 15:364 (1951); see Slovenko, *The Accusation in Louisiana Criminal Law*, 32 TUL. L. REV. 47, 88 (1957); MASS. ANN. LAWS § 2532 (1942); MONT. REV. CODES ANN. § 94-6430 (1949); PA. STAT. ANN. tit. 19, § 433 (1930); VT. STAT. ANN. § 36554 (1959); W. VA. CODE ANN. § 6174 (1955), (5) similar to (4), but consent of defendant is required, ALA. CODE tit. 15, § 253 (1941); TENN. CODE ANN. § 40-713 (1955), (6) amendment before or during trial unless it results in charging defendant with crime which grand jury had not contemplated, IOWA CODE ANN. §§ 773.42, 773.45 (1950); MICH. STAT. ANN. § 28.1016 (1953); OHIO REV. CODE ANN. § 2941.30 (Page 1954), (7) amendment in form or substance at any time prior to trial, MINN. STAT. ANN. § 628.19 (1947). In some of the states listed above, the dominant mode of prosecution is by information. See note 57 *supra*. It should be noted that where indictment remains the preferred procedure, huge numbers of defendants waive indictment and consent to have informations filed against them instead. See DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS ANN. REP. 212 (1957). Informations may ordinarily be amended. FED. R. CRIM. P. 7(e). But cf. State *ex rel.* Wentworth v. Coleman, 121 Fla. 13, 15-16, 163 So. 316, 317 (1935).

93. It is wholly immaterial what statute was in the mind of the district attorney when he drew the indictment, if the charges made are embraced by some statute in force . . . We must look to the indictment itself, and if it properly charges an offense under the laws of the United States, that is sufficient to sustain it, although the representatives of the United States may have supposed that the offense charged was covered by a different statute.

Capone v. United States, 51 F.2d 609, 616 (7th Cir. 1931); Williams v. United States, 168 U.S. 382, 389 (1897); Baker v. State, 200 Ark. 688, 691, 140 S.W.2d 1008, 1009-10 (1940).

Effective Notice to the Accused

Does this developing trend prejudice the defendant's preparation and trial of his case?⁹⁴ There can be no question that notice of the facts and legal theories to be litigated is essential to the effective operation of an adversary system. Without such notice, each party is precluded from making the most of the facts potentially at his disposal or of legal research. If, for example, defense counsel does not learn until late in the trial that two conspiracies are involved rather than one, he faces the problem of belatedly mustering his proofs or of having to re-call witnesses—at best inefficient procedures making for disjointed testimony. Difficulties also arise with respect to objections by counsel to the admissibility of evidence, or cross-examination, or the preparation of instructions to the jury. What is the criterion of relevance by which counsel can object, and the trial judge rule, on admissibility? Toward what version of the facts should defense counsel's examination press the witnesses for the prosecution? What "law" should the parties seek to have the judge pass to the jury in his instructions? Only some "theory of the case" can furnish such a guide.⁹⁵

Perhaps in a system of "trial by intervals," such as characterizes German civil procedure and some of our own administrative proceedings, the importance of initial notice is minimized.⁹⁶ Notice wanting on one occasion can be

94. The trend towards recognition of variance may place obstacles in the path of the defendant seeking to avail himself of the defense of former jeopardy. If the "charge" is fluid, it may at times be difficult to determine what "offense" was actually litigated. At a minimum, it would be necessary to look to the transcript of the earlier trial to determine whether the "offense" litigated was identical with the one now charged. Since the court reporter's notes are ordinarily not transcribed, as a matter of course, they may be unavailable at the time when the second indictment is handed down for what is allegedly the "same offense." See *Short v. United States*, 91 F.2d 614, 622 (4th Cir. 1937), which indicates some of the difficulties of comparing the earlier and the later defenses. See generally Lugar, *Criminal Law, Double Jeopardy and Res Judicata*, 39 IOWA L. REV. 317 (1954).

95. See CLARK, CODE PLEADING 265 (1947).

[S]ince facts do not exist apart from some hypothesis of the pleader, and since any "pleading of the facts" means a selection and interpretation of data according to some idea of the pleader, the problem is not whether a pleading must have a theory; it must, or else be a meaningless jumble. The problem is whether or not a theory originally chosen . . . may be abandoned for another theory . . . such a shift, at least where not too drastic, is not unfair to the opponent.

Cf. *United States v. Klein*, 247 F.2d 908, 916-18 (2d Cir. 1957), *cert. denied*, 355 U.S. 924 (1958) (opinion of Clark, J.); *United States v. Achtner*, 144 F.2d 49, 51 (2d Cir. 1944) (same); *United States v. Pape*, 144 F.2d 778, 781 (2d Cir.), *cert. denied*, 323 U.S. 752 (1944) (same) ("[T]he proper issues in a criminal case are whether the indictment fairly charges a crime as defined by a federal statute and whether the proof, adduced in a fair trial, supports the indictment, not what the prosecutor's legal theories of the case may have been.").

96. See Kaplan, Von Mehren & Schaefer, *Phases of German Civil Procedure*, 71 HARV. L. REV. 1193, 1211-12 (1958); *In re Fruitvale Canning Co.*, 3 P. & F. ADMIN. LAW (2d ser.) 227, 229-30 (FTC 1953); DAVIS, ADMINISTRATIVE LAW §§ 8.04-05 (1959).

supplied on another. But in the single event trial, initial notice is essential. This does not mean, of course, that all the rigors of the early "issue" pleading need be revived,⁹⁷ or that the "theory of the case" need be restricted to a single offense category. Indeed, a decent respect for the grand jury would seem to require that its indictment be taken to refer to any "legal theory," or "offense category," reasonably encompassed by the operative facts recorded in the indictment.⁹⁸ Too strict an adherence to the initial pleading is probably more likely to frustrate the intention of the grand jury than to effectuate it. But notice of issues and facts adequate to enable the defense to prepare for trial is made all the more essential if such a view of pleading is adopted. The real question is: How is notice to be afforded the parties?

The reasonably expansible pleading, recognizing as it does the difficulties of precise initial statement of either facts or legal theories, moves in an inevitable direction. But unless it is accompanied by the means to prepare for the shifts in prosecution theories, factual and legal, the expansible pleading significantly aggravates the plight of the accused. Unfortunately, no such means is ordinarily available.

Discovery by the Defendant

The elimination of precise pleading, the general unavailability of particulars, and the increasing elasticity given to indictments all leave a good deal of room for "surprise" at trial. And not all such "surprise" is readily curable by granting a continuance. Civil procedure seeks to minimize this problem by permitting each party to inform himself to the utmost about the other's case—to sift legal issues and evidence in detail before trial through depositions, requests for admissions, and discovery of documents.⁹⁹ This process has as its object the harnessing of the full creative potential of the adversary process, bringing each party to trial as aware of what he must meet as his finances and his lawyer's energy and intelligence permit.

Yet virtually no such machinery exists for the defendant accused of a crime.¹⁰⁰ No deposition or admissions procedure is ordinarily available to

97. See generally CLARK, CODE PLEADING 225-49 (1947); MILLAR, CIVIL PROCEDURE IN HISTORICAL PERSPECTIVE 171-200 (1951).

98. In the situations already posed, can it be said whether the grand jury intended to bring the accused to trial for one or both offenses set forth in a count which is "bad for duplicity?" Similarly, can it be said that the grand jury would have returned an indictment for each of the two smaller conspiracies found to exist in the *Berger* case? Or did the grand jury choose deliberately to indict for a single larger conspiracy? Even a careful reading of the grand jury minutes is not likely to solve the problem. As to the degree to which the prosecutor controls the grand jury, see note 63 *supra*.

99. FED. R. CIV. P. 26-37; 4 MOORE, FEDERAL PRACTICE ¶¶ 26.02-.03 (1950); CLARK, CODE PLEADING 567-72 (1947).

100. See generally Comment, *Pre-Trial Disclosure in Criminal Cases*, 60 YALE L.J. 626 (1951); Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293 (1960); Dowling, *Pre-Trial Inspection of Prosecution's Evidence by Defendant*, 53 DICK.

him.¹⁰¹ Though a motion for discovery of documents before trial is technically available, attempts to invoke it are rarely successful. When they are, they usually enable the defendant to get only materials which are not central to his task of preparing a defense. For example, motions for leave to subpoena before trial commercial records of various sorts—in short, materials in the hands of nongovernmental persons involved in the prosecution—are often granted.¹⁰² Confessions, guns, bullets, chemical analyses and autopsy reports are also beginning to be made available, albeit reluctantly and in only a few jurisdictions.¹⁰³ But the statement of a government witness—at best, a poor substitute for a deposition, since defense counsel was not there to cross-examine when it was made—is virtually unobtainable.¹⁰⁴ The few federal cases

L. REV. 301 (1949); Note, *Criminal Discovery—The State of the Law*, 6 UTAH L. REV. 531 (1959); Grady, *Discovery in Criminal Cases*, 1959 U. ILL. L.F. 827; 107 U. PA. L. REV. 562 (1959); Orfield, *Discovery and Inspection in Federal Criminal Procedure*, 59 W. VA. L. REV. 221, 312 (1957).

101. See, e.g., FED. R. CRIM. P. 15, which limits depositions to situations where the witness will be unavailable at trial. Their purpose is perpetuation, not discovery, of evidence.

102. See, e.g., *United States v. Ward*, 120 F. Supp. 57, 59 (S.D.N.Y. 1954); *State v. Bunk*, 63 A.2d 842 (N.J. 1949). See also cases collected in sources cited note 100 *supra* and notes 103-04 *infra*.

103. See Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293 (1960), discussing particularly *Powell v. Superior Court*, 48 Cal. 2d 704, 312 P.2d 698 (1957); *State v. Thompson*, 338 P.2d 319 (Wash. 1959); *In re Di Joseph*, 394 Pa. 19, 145 A.2d 187 (1958); *State v. Johnson*, 28 N.J. 133, 145 A.2d 313 (1958). Although the accused in a federal prosecution generally has more hope of obtaining pretrial inspection of his own prior statement or confession, than that of a co-defendant or a government witness, *United States v. Peace*, 16 F.R.D. 423 (S.D.N.Y. 1954); *United States v. Schluter*, 19 F.R.D. 372, 374 (S.D.N.Y. 1956); *United States v. Carter*, 15 F.R.D. 367 (D.D.C. 1954), many cases deny even such permission to the defendant, *United States v. Peltz*, 18 F.R.D. 394 (S.D.N.Y. 1955), *appeal dismissed*, 246 F.2d 537 (1957) (collecting large number of cases); *United States v. Louie Gim Hall*, 18 F.R.D. 384 (S.D.N.Y. 1956), *rev'd on other grounds*, 245 F.2d 338 (2d Cir. 1957); *United States v. Bennethum*, 21 F.R.D. 227, 229 (D. Del. 1957); *Shores v. United States*, 174 F.2d 838, 843-45 (8th Cir. 1949). See generally Kaufman, *Criminal Discovery and Inspection of Defendant's Own Statements in the Federal Courts*, 57 COLUM. L. REV. 1113 (1957). While some states have adopted the "discretionary" rule of the federal courts, Fletcher, *supra*, other jurisdictions intimate that there is no power in the court to order production of the defendant's confessions, *Commonwealth v. Lundin*, 326 Mass. 551, 555, 95 N.E.2d 661, 663 (1950); *Davis v. State*, 99 Tex. Crim. 517, 518, 270 S.W. 1022, 1023 (1925); *State v. Yeoman*, 112 Ohio St. 214, 218, 147 N.E. 3, 4 (1925). In Louisiana, the accused has been held to have a constitutional right to pretrial inspection of his confession. *State v. Dorsey*, 207 La. 928, 964-66, 22 So. 2d 273, 285 (1945).

104. Although the Supreme Court held in *Bowman Dairy Co. v. United States*, 341 U.S. 214, 219-21 (1951), that the trial court could, in its discretion, grant production for the defendant of "evidentiary materials" in the hands of the prosecution, this has almost uniformly been held not to apply to statements of prospective government witnesses. *United States v. Brown*, 17 F.R.D. 286, 288 (N.D. Ill. 1955); *United States v. Brockington*, 21 F.R.D. 104, 105-07 (E.D. Va. 1957); *People ex rel. Lemon v. Supreme Court*,

making such statements available before trial, such as *Fryer v. United States*,¹⁰⁵ have probably been overruled by the legislation which followed in the wake of *United States v. Jencks*.¹⁰⁶ Even before that legislation was enacted, *Jencks* had done little to open the government's files. It said no more than that defense counsel, at trial, must be given access to prior statements of a witness on the stand regarding the subject matter of that witness's testimony.¹⁰⁷ The case did not address itself either to the pretrial stage or to the statements, in government files at time of trial, of witnesses not testifying but potentially helpful to the defense. Only a handful of fairly limited due process cases deal with the latter problem—and none of them explicitly with the right to obtain such materials before trial.¹⁰⁸

If the defendant should wish to use his own resources in searching out those witnesses who have spoken to police, prosecutor, or grand jury, he will, more often than not, find that they have been advised not to discuss their testimony with him.¹⁰⁹ Without the subpoena, he can do nothing effective to break the wall of silence. If he should try, he runs the risk of being charged with tampering with witnesses. Even his search for evidence at large is inevitably restricted because he has neither a crime laboratory nor vast identification and

245 N.Y. 24, 29-31, 156 N.E. 84, 85-87 (1927); *Commonwealth v. Wable*, 382 Pa. 80, 86, 114 A.2d 334, 337-38 (1955); *State v. Payne*, 25 Wash. 2d 407, 411, 171 P.2d 227, 229-30 (1946); *State v. Johnson*, 28 N.J. 133, 140, 145 A.2d 313, 319 (1958); see note 100 *supra*. In California, a recent decision has allowed an accused access before trial, to statements made by a prosecution witness. *Funk v. Superior Court*, 42 Cal. 2d 436, 437-38, 340 P.2d 593, 594 (1959). In Connecticut, the defendant has a right to obtain statements made at a coroner's inquest. *Daly v. Dimock*, 55 Conn. 579, 580, 12 Atl. 405, 406 (1887). As to the general unavailability of grand jury minutes, see note 116 *infra*.

105. 207 F.2d 134 (D.C. Cir.), *cert. denied*, 346 U.S. 885 (1953). The *Fryer* case involved a first degree murder conviction. In capital cases, the accused is entitled, before trial, to a list of government witnesses. 18 U.S.C. § 3432 (1958). Several subsequent federal cases limited the *Fryer* holding to capital cases, *United States v. Carter*, 15 F.R.D. 367, 372 (D.C. Cir. 1954); *United States v. Brown*, *supra* note 104, at 288, although others held it generally applicable to all criminal cases, *United States v. Lorwin*, *Crim. No. 1923-53* (D.D.C. March 8, 1954) (order compelling government to produce all statements of witnesses to be produced by the United States).

106. 353 U.S. 657 (1957). The statute enacted in the wake of *Jencks* provides, in pertinent part: "(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case." 18 U.S.C. § 3500 (1958).

107. 353 U.S. at 672. See also *United States v. Palermo*, 21 F.R.D. 11, 14 (S.D. N.Y. 1957), *aff'd*, 258 F.2d 397 (2d Cir. 1958), *aff'd*, 360 U.S. 343 (1959); *United States v. Haug*, 21 F.R.D. 22, 26-27 (N.D. Ohio 1957); *United States v. Benson*, 20 F.R.D. 602, 604 (S.D.N.Y. 1957). *But cf.* *United States v. Hall*, 153 F. Supp. 661, 664 (W.D. Ky. 1957).

108. The leading case is *Mooney v. Holohan*, 294 U.S. 103, 110 (1935).

109. See, e.g., *Schindler v. Superior Court*, 161 Cal. App. 2d 513, 520, 327 P.2d 68, 73 (Dist. Ct. App. 1958).

fingerprint files available to him.¹¹⁰ Most often, he has no investigative assistance whatever.¹¹¹

The one institution on the scene which might be used to afford the accused effective pretrial discovery of the prosecution's case is the preliminary hearing. But American courts have consistently refused to shape it in the mold of its British counterpart, in which the prosecution is obligated to make complete disclosure of the evidence it will use at trial.¹¹² In its present form, the American preliminary hearing provides a minimal opportunity to discover the government's case and to confront and cross-examine witnesses. It requires only so much disclosure as is necessary to make out "probable cause" to believe that defendant committed the crime, or a "prima facie" case, or some other formulation of a minimal evidentiary burden.¹¹³

Even this obligation can be evaded through subtle pressures designed to maximize waiver—for example, through failure to provide for appointment of counsel at this stage, thereby making it less likely that a hearing will be requested by the defendant.¹¹⁴ Where indictment by grand jury remains the general rule, continuance of the preliminary hearing until the grand jury has re-

110. This wide discrepancy in the means effectively to uncover relevant evidence through the use of crime laboratories could, of course, be easily redressed by allowing the accused access to state equipment and files. However, the defendant is almost nowhere, by statute, specifically authorized to use "crime labs" or to discover reports emanating from these. See, e.g., WIS. STAT. ANN. § 165.04 (1957); CONN. GEN. STAT. REV. § 19-8 (1958). But see FLA. STAT. ANN. § 909.18 (1944). And judicial opinions allowing such use or discovery are rare, *State v. Perlin*, 268 Wis. 529, 537, 68 N.W.2d 32, 36 (1955); *Ezzell v. State*, 88 So. 2d 280 (Fla. 1956); *State v. Lackey*, 319 P.2d 610 (Okla. 1957); see Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293 (1960). Although the refusal by the state to provide an indigent defendant with the means (a stenographic transcript of the proceedings below) to appeal his conviction violates the fourteenth amendment, *Griffin v. Illinois*, 351 U.S. 12 (1956), failure to provide funds for scientific tests for the penniless accused is probably constitutional, *Schindler v. Superior Court*, 161 Cal. App. 2d 513, 327 P.2d 68 (Dist. Ct. App. 1958).

111. It has been estimated that at least 60% of those charged with crime cannot even afford to employ counsel. BROWNELL, *LEGAL AID IN THE UNITED STATES* 83 (1951); see TWEED, *THE LEGAL AID SOCIETY, NEW YORK CITY, 1876-1951*, at 87, 97 (1954). Although many states and cities have provided for public defender systems, this instrument has not been totally effective in solving the problem of the indigent accused. SPECIAL COMMITTEE TO STUDY DEFENDER SYSTEMS, *EQUAL JUSTICE FOR THE ACCUSED* 19-32, 38-39 (1959). Funds for investigation purposes are usually sharply limited; for example, in Connecticut, for the fiscal year 1950-1951, the total budget allowance for investigation in cases of indigent defendants was \$415.25; Callagy, *Legal Aid in Criminal Cases*, 42 J. CRIM. L., C. & P.S. 589, 599 n.7 (1952).

112. In England, since 1848, the prosecution must place before the magistrate all the evidence it intends to produce at trial. Indictable Offences Act, 1848, 11 & 12 Vict., c. 42; 9 HALSBURY'S LAWS OF ENGLAND 103-11 (1933); DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND* 112 (1958); HOWARD, *CRIMINAL JUSTICE IN ENGLAND* 330 (1931); Martin, *The Preliminary Hearing: Canadian Practice*, 1 J. CRIM. L. (Eng.) 107, 117-18 (1937).

113. See note 49 *supra*.

114. See notes 50-52 *supra*; Note, *Metropolitan Criminal Courts of First Instance*, 70 HARV. L. REV. 320, 326-28 (1956).

turned an indictment withdraws the limited opportunity for discovery at the preliminary hearing. For he who has already been indicted by a grand jury is not "entitled" to a preliminary hearing.¹¹⁵

Once the case is placed in the grand jury's hands, it is shrouded with secrecy. Only under the most extraordinary circumstances may the defendant obtain the minutes of that body,¹¹⁶ though the government may use them for

115. *United States v. Gray*, 87 F. Supp. 436 (D.D.C. 1949); Note, *supra* note 114, at 328.

116. Requests for pretrial inspection of grand jury minutes have most often been made incident to a plea in abatement or a motion to quash the indictment. The federal courts not only refuse to allow the defendant to inspect the grand jury minutes, but the court itself will refuse to inspect them *in camera* except "... where by a properly verified pleading there is a clear and positive showing of gross and prejudicial irregularity influencing the grand jury in returning the indictment. Averments on information and belief are universally held to be insufficient." *United States v. Sugarman*, 139 F. Supp. 878, 881 (D.R.I. 1956); *United States v. Garsson*, 291 Fed. 646, 649 (S.D.N.Y. 1923); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399, 400 (1959); *United States v. Geller*, 154 F. Supp. 727 (S.D.N.Y. 1957); *United States v. Brennan*, 134 F. Supp. 42, 52 (D. Minn. 1955), *aff'd*, 240 F.2d 253 (8th Cir.), *cert. denied*, 353 U.S. 931 (1957). The reasons ordinarily offered for preserving secrecy are set forth in *United States v. Rose*, 215 F.2d 617, 628 (3d Cir. 1954). The only major exception to the "indispensable secrecy" of grand jury minutes is presented where accused, in a perjury prosecution based on grand jury testimony, attempts to inspect his own statement to the grand jury. *United States v. Remington*, 191 F.2d 246, 251 (2d Cir. 1951), *cert. denied*, 343 U.S. 907 (1952); *United States v. Rose*, *supra* at 628. *But cf.* *United States v. Owen*, 11 F.R.D. 371 (W.D. Mo. 1951). The defendant's access to the grand jury minutes at trial is also sharply limited, *Pittsburgh Plate Glass Co. v. United States*, *supra* at 400, a position which runs counter to the views announced by the Court in *Jencks v. United States*, 353 U.S. 657 (1957). However, if he can persuade the trial judge that there may be inconsistency between testimony at trial and testimony before the grand jury, or that the witnesses' testimony is critical, he may succeed in having the trial judge read the minutes in a search for inconsistency. If the judge finds the inconsistency, he may turn over to defense counsel the pertinent portions of the minutes, or he may himself read them to the petit jury. *United States v. Zborowski*, 271 F.2d 661, 665-66 (2d Cir. 1959).

With the generally prevailing restrictive view of discovery of grand jury minutes in the federal system and most states, 6 WIGMORE, EVIDENCE § 1850(3) (3d ed. 1940); Comment, *Right of Defendant to Inspect Grand Jury Minutes*, 47 MICH. L. REV. 841 (1949), compare the statutes of at least four states which afford the accused the right to obtain grand jury transcripts, CAL. PEN. CODE § 925; IOWA CODE ANN. § 772.4 (1950); KY. CRIM. CODE § 110 (Baldwin 1948); MINN. STAT. ANN. § 628.04 (1953); see Greenberg v. Superior Court, 19 Cal. 2d 319, 121 P.2d 713 (1942). Two recent decisions, in Utah and Missouri, indicate that in some jurisdictions the case law is being liberalized and grand jury minutes being made available to the defendant. *State v. Faux*, 9 Utah 2d 350, 345 P.2d 186 (1959); *State v. James*, 327 S.W.2d 278 (Mo. 1959). Some states, of which New York is the leading example, are fairly liberal in requiring the court to inspect the minutes *in camera*, upon a motion by the defendant challenging the sufficiency of the evidence before the grand jury. See the discussion in *People v. Howell*, 3 N.Y.2d 672, 148 N.E.2d 867 (1958). In Connecticut, *Lung's Case*, 1 Conn. (Day) 428 (1816), reflects the practice of having the defendant in a capital case, but not his counsel, present during the grand jury hearing of witnesses. See *State v. Kemp*, 126 Conn. 60, 66, 9 A.2d 63, 67 (1939); Nahum & Schatz, *The Grand Jury in Connecticut*, 5 CONN. B.J. 111, 131 (1931).

many purposes.¹¹⁷ And neither defendant nor his counsel sees, nor is given the opportunity to examine, the witnesses against him. True, in many states the names of witnesses before the grand jury are required by statute to be endorsed on the ensuing indictment. But, in most of them, witnesses whose names are not endorsed will be permitted to testify.¹¹⁸ And in the others, there is nothing the defendant can do to make the named witnesses talk to him or to get copies of their statements to the prosecutor.

In sum, if police or prosecution choose to withhold from the defendant their evidence or legal theories, or if they continue the preliminary hearing until indictment, the defendant has only the notice given him by the indictment, the occasional bill of particulars, and the even more occasional pretrial discovery. Is the prosecution similarly handicapped?

Discovery by the Government

Denial of pretrial discovery to the defendant is justified most often as a necessary counterweight to the alleged fact that the accused "need not disclose the barest outline of his defense [and] . . . is immune from question or comment on his silence."¹¹⁹ The justification is unsatisfactory for two entirely separate reasons. First, by assigning a central tenet of our accusatorial pro-

117. At the time of trial, the government has in its possession the grand jury minutes. See, e.g., FED. R. CRIM. P. 6(e). Courts have allowed the prosecution to use the minutes at trial to refresh the recollection of witnesses, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 231-35 (1940), to impeach hostile witnesses, *Bosselman v. United States*, 239 Fed. 82, 85 (2d Cir. 1917); *Di Carlo v. United States*, 6 F.2d 364, 367-68 (2d Cir. 1925), and, in some cases, to read into evidence testimony given before the grand jury, *Metzler v. United States*, 64 F.2d 203, 206 (9th Cir. 1933). It has been recently held that the minutes of a grand jury which did not indict may be used by the United States to prepare a civil injunction suit. Ever then, only extraordinary circumstances will make the minutes available to the defendant. *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958).

118. If the prosecution omits entirely a list of witnesses on the indictment, the defense can usually obtain witnesses' names by appropriate motion, 8 ALI PROCEEDINGS 134, 136 (1930); 6 WIGMORE, EVIDENCE § 1851 at 400 (3d ed. 1940). However, if a list of witnesses is furnished, and the state later attempts to offer a witness not on the list, it is almost invariably successful; most courts construe statutes requiring lists of witnesses as "directory" rather than "mandatory." *State v. Edwards*, 54 N.M. 189, 192, 217 P.2d 854, 856 (1950); *Johnson v. State*, 151 Tex. Crim. 110, 112-13, 205 S.W.2d 773, 774 (1947); *State v. Joseph*, 100 W. Va. 213, 130 S.E. 451 (1925); *Thomas v. State*, 161 Ark. 644, 647, 257 S.W. 376, 378 (1924); *Mendolia v. State*, 192 Tenn. 656, 665-67, 241 S.W.2d 606, 610-11 (1951). But cf. *State v. Isaacson*, 8 S.D. 69, 71-73, 65 N.W. 430, 431 (1895); *Stevens v. State*, 19 Neb. 647, 648-49, 28 N.W. 304, 305 (1886). The federal statute, 18 U.S.C. § 3432 (1958), has been construed as "mandatory," but it applies only in capital cases. *Logan v. United States*, 144 U.S. 263, 304-06 (1892); *McNabb v. United States*, 123 F.2d 848, 853 (6th Cir. 1941), *rev'd on other grounds*, 318 U.S. 332 (1943), holding it to be harmless error, in particular circumstances, for government to fail to endorse names of two witnesses on the indictment. See generally 6 WIGMORE, EVIDENCE §§ 1850-55 (3d ed. 1940).

119. *United States v. Garsson*, 291 Fed. 646, 648 (S.D.N.Y. 1923).

cedure to the bargain-counter, the defendant is made to pay dearly for his privilege of silence, whether or not he makes use of it. Second, and more immediately relevant, the Hand view grossly exaggerates the protection which this "immunity" affords.

Though the defendant still need not file a detailed responsive pleading in most states, more and more require that the defenses of alibi and insanity be pleaded specially before trial.¹²⁰ Even at the trial, where the accused is most clearly immune from being called by the prosecution as its witness (or, in most jurisdictions, from having his failure to testify made the subject of comment by the prosecution),¹²¹ the protection means less to the defendant than appears: first, the accused will testify in his own behalf in most cases and thus subject himself to cross-examination; second, the prosecutor will rarely wish to make the accused his witness;¹²² third, the failure of the accused to testify is so conspicuous, particularly in this day of frequent invocation of the fifth amendment, that he is under the utmost pressure to take the stand to rebut the inference of guilt which will likely be drawn by the jury, whether or not his silence is explicitly called to their attention;¹²³ finally, admissions made by the accused to the police before trial are freely and regularly used at the trial, placing defendants under pressure to take the stand to explain the admissions away.

120. See, e.g., IND. ANN. STAT. §§ 9-1631, 9-1633, 9-1701 (1956) (alibi and insanity); MICH. STAT. ANN. §§ 28.1043, 28.1044 (1954) (alibi and insanity); ARIZ. R. CRIM. P. 192 (1956) (alibi and insanity); N.Y. CODE CRIM. PROC. § 295-1 (alibi); OHIO REV. CODE ANN. § 2945.58 (Page, 1953) (alibi); KAN. GEN. STAT. ANN. § 62-1341 (1949) (alibi); WIS. STAT. ANN. § 955.07 (1958) (alibi). These statutes usually provide that the prosecution may move for a bill of particulars regarding the defense pleaded. A recent article states that "[O]ver the period from 1927 to 1941, fourteen states adopted an 'alibi statute' requiring that the defendant give pre-trial notice if he intends to introduce evidence of an alibi. The usual sanction imposed for failure to give the notice is the possible exclusion of the evidence when offered. Other states have a similar requirement of notice of intention to plead insanity." Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 315 (1960). See also Dean, *Advance Specifications of Defense in Criminal Cases*, 20 A.B.A.J. 435 (1934); 21 VA. L. REV. 940 (1935).

121. 8 WIGMORE, EVIDENCE § 2272 (3d ed. 1940); Ratner, *Consequences of Exercising the Privilege Against Self-Incrimination*, 24 U. CHI. L. REV. 472, 473-74 (1957). State authorization of comment by judge or prosecutor does not violate the fourteenth amendment. *Adamson v. California*, 332 U.S. 46, 56 (1947); Comment, 58 YALE L.J. 268 (1949).

122. In most jurisdictions, if he should call the accused, the prosecutor would find himself limited in the range of impeachment techniques he could bring to bear against "his" witness. McCORMICK, EVIDENCE § 38 (1954).

123. See the assertion, based upon data from the Administrative Office of the United States Courts, that "in 99 per cent . . . of all the criminal cases tried in the eighty-six judicial districts at the federal level, defendants who did not take the stand were convicted by juries. I think this is perhaps the result of the organized assault by congressional committees that has been made on the constitutional privilege against self-incrimination over the past decade. The fact of the matter is that a defendant who does not take the stand does not in reality enjoy any longer the presumption of innocence." Williams, *The Trial of a Criminal Case*, 29 N.Y.S. BAR BULL. 36, 42 (1957).

If the accused's immunity at trial were all it is reputed to be, there would still remain his considerable amenability to interrogation before trial. Ordinarily, an accused person may be interrogated by the police up to the point of "coercion." So long as certain kinds of pressures—such as violence, threats of violence, intensive interrogation continuing over long periods of time, or promises of immunity—are not utilized, the ensuing admissions or confessions can ordinarily be used at trial.¹²⁴ This remains true even where the accused has neither been advised of his right to remain silent nor permitted access to counsel.¹²⁵ The *McNabb-Mallory* rule, excluding confessions obtained during the period before arraignment at a preliminary hearing, has had a mitigating effect in the federal courts. But no state court has followed it.¹²⁶ Moreover, in both state and federal courts, leads obtained as a result of concededly inadmissible confessions or admissions may be used to find evidence which does not share the infection of the original source.¹²⁷

124. See generally McCORMICK, EVIDENCE §§ 109-19 (1954); Maguire, *Involuntary Confessions*, 31 TUL. L. REV. 125 (1956). The cases fall into two categories: (1) those in which the methods used to obtain the admissions or confessions—including the first three of the four techniques enumerated in the text—are said to violate the due process clause of the fourteenth amendment. See discussion in *Blackburn v. Alabama*, 361 U.S. 199 (1960); *Fikes v. Alabama*, 352 U.S. 191 (1956); *Stein v. New York*, 346 U.S. 156 (1953); *Leyra v. Denno*, 347 U.S. 556 (1954); *Gallegos v. Nebraska*, 342 U.S. 55 (1951); *Watts v. Indiana*, 338 U.S. 49 (1949); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944); *Lisenba v. California*, 314 U.S. 219 (1941); *Chambers v. Florida*, 309 U.S. 227 (1940); *Brown v. Mississippi*, 297 U.S. 278 (1936); Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411 (1954); Scott, *Federal Control Over Use of Coerced Confessions in State Criminal Cases—Some Unsettled Problems*, 29 IND. L.J. 151 (1954). (2) Those in which the methods used violate state constitution, statute or case law requirements that the confession or admission be "voluntary" or "trustworthy" as a condition of admissibility. By definition, confessions which are "coerced" are neither. Collections of cases in the various jurisdictions are to be found in Comment, 14 LA. L. REV. 642 (1954); Comment, 20 U. KAN. CITY L. REV. 66 (1952); Note, 21 MISS. L.J. 135 (1949); Note, 26 ORE. L. REV. 62 (1946); Note, 21 NOTRE DAME LAW. 18 (1945); Note, 23 N.C.L. REV. 364 (1945). See generally 3 WIGMORE, EVIDENCE §§ 815-40 (3d ed. 1940).

125. In addition to references in note 124 *supra*, see *Hagan v. United States*, 245 F.2d 556, 558 (5th Cir. 1957); INBAU & REID, *LIE DETECTION AND CRIMINAL INTERROGATION* 223-25 (3d ed. 1953).

126. In the federal system, FED. R. CRIM. P. 5(a) requires the police to bring the arrested person before a magistrate "without unnecessary delay" so that he can be advised of his right to remain silent and to retain counsel. Confessions or admissions obtained from the accused during this period of "unnecessary delay" and before he has been advised of his rights, are excluded from evidence at trial. *Mallory v. United States*, 354 U.S. 449 (1957); *McNabb v. United States*, 318 U.S. 332 (1943); Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 GEO. L.J. 1 (1958); Comment, *Pre-Arraignment Interrogation and the McNabb-Mallory Miasma: A Proposed Amendment to the Federal Rules of Criminal Procedure*, 68 YALE L.J. 1003 (1958). Comparable statutes exist in a large number of states. See Comment, 1 CATHOLIC U.L. REV. 1, 2 n.16 (1950). But no state has yet adopted the McNabb-Mallory rule. *Id.* at 3-4.

127. See Matherne, *Pretrial Confessions—A New Rule*, 22 TENN. L. REV. 1011, 1022 (1953), which points out that there is no federal case dealing with the application of the "fruit of the poisonous tree" doctrine, *Nardone v. United States*, 308 U.S. 338 (1939),

In state prosecutions, and in federal prosecutions in which the accused has been brought promptly before a magistrate, the police may use methods of interrogation involving trickery, fabricated evidence, subtle threats, violations of confidence, and a myriad other techniques for manipulating the fearful or suggestible.¹²⁸ None of these conventional methods of interrogation is prohibited by law. None of them, alone, suffices to invalidate confessions or admissions following from its use. Each constitutes one among many factors to be considered in determining the complex issue of the "trustworthiness" or "voluntariness" of the confession.¹²⁹ And because that issue has been arbitrarily limited to permit just such methods, police are invited to press to the limits of interrogation. Nor does the preliminary hearing, with its advice of rights to counsel and to silence, necessarily end exposure of the accused to these pressures. In most states, the accused apparently remains accessible to the police for questioning until final disposition of the case.¹³⁰ The most impres-

to evidence obtained through leads afforded by the invalid confession, see Comment, 68 YALE L.J. 1003, 1005 n.10 (1959); cf. *Lyons v. Oklahoma*, 322 U.S. 596 (1944) (holding inadmissible a second confession because the coercion which elicited an earlier confession still persisted). Most of the cases supporting the text statement predate 1936, which marks the emergence of confession doctrine as an important part of Supreme Court law (see note 124 *supra*). See, e.g., *State v. Cocklin*, 109 Vt. 207, 212-13, 194 Atl. 378, 380 (1938); *State v. Simpson*, 157 La. 614, 102 So. 810 (1925); *Minton v. State*, 20 Ala. App. 176, 101 So. 169 (1924); *McQueen v. Commonwealth*, 196 Ky. 227, 235-37, 244 S.W. 681, 685 (1922); *Rusher v. State*, 94 Ga. 363, 364-67, 21 S.E. 593, 594 (1894).

128. See O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION ch. 9 (1956); DIENSTEIN, TECHNIQS FOR THE CRIME INVESTIGATOR ch. 7 (1952); INBAU & REID, LIE DETECTION AND CRIMINAL INTERROGATION 142-97 (3d ed. 1953); MULBAR, INTERROGATION ch. 3-4 (1951); UNITED STATES DEP'T OF THE ARMY, FM 19-20, CRIMINAL INVESTIGATION ch. 4 (1951); KIDD, POLICE INTERROGATION (1940).

129. *People v. Thompson*, 133 Cal. App. 2d 4, 13-15, 284 P.2d 39, 46 (Dist. Ct. App. 1955); *Commonwealth v. Johnson*, 372 Pa. 266, 271-75, 93 A.2d 691, 694-95 (1953); *Commonwealth v. Hipple*, 333 Pa. 33, 34-38, 3 A.2d 353, 355-56 (1939); *State v. Hofer*, 238 Iowa 820, 826-28, 28 N.W.2d 475, 479 (1947); *Osborn v. People*, 83 Colo. 4, 31-33, 262 Pac. 892, 902 (1927); *Harrison v. State*, 110 Fla. 420, 422-24, 148 So. 882, 883 (1933); *Burton v. State*, 107 Ala. 108, 122-25, 18 So. 284, 287-88 (1895); *State v. Westcott*, 130 Iowa 1, 5-7, 104 N.W. 341, 343 (1905); *State v. Wilson*, 172 Mo. 420, 428-30, 72 S.W. 696, 698 (1903); *People v. Utter*, 217 Mich. 74, 79-80, 185 N.W. 830, 832 (1921); *People v. Buffom*, 214 N.Y. 53, 55-57, 108 N.E. 184, 185 (1915); *Price v. State*, 18 Ohio St. 418, 419 (1868); *People v. Connelly*, 195 Cal. 584, 595-96, 234 Pac. 374, 379 (1925); *People v. White*, 176 N.Y. 331, 348-51, 68 N.E. 630, 635-36 (1903); *Lewis v. United States*, 74 F.2d 173, 176-77 (9th Cir. 1934); *Commonwealth v. Green*, 302 Mass. 547, 550-51, 20 N.E.2d 417, 419-20 (1939); see Maguire, *Involuntary Confessions*, 31 TUL. L. REV. 125, 140 (1956). Although there are intimations in *Leyra v. Denno*, 347 U.S. 556 (1954), that the court might hold certain kinds of deception to be violative of due process, the case cannot be said to go that far. At least one recent circuit court opinion has indicated that deceit alone would not violate the fourteenth amendment. *United States v. Murphy*, 222 F.2d 698, 700 (2d Cir.), cert. denied, 350 U.S. 896 (1955). But cf. Note, *The Investigative Procedure for Criminal Tax Evasion*, 27 FORD. L. REV. 48, 56 (1958) (collecting cases holding that the practice of deception by internal revenue agents upon taxpayers may render inadmissible the ensuing statements).

130. See *State v. Rogers*, 143 Conn. 167, 173-74, 120 A.2d 409, 412 (1956) (note dissent, *id.* at 178, 120 A.2d at 415); N.Y. CORRECTION LAW §§ 500-a(2), 500-j (prosecutor

sive indication that our criminal procedure regularly acts on the assumption that the defendant is very much available and usable for self-incrimination is the overwhelming proportion of cases (75 to 90 per cent) which are decided by pleas of guilty.¹³¹ Such pleas quite obviously follow in considerable part from a breach in the wall of silence allegedly surrounding the defendant—whether because he has been cajoled to do so, or because he sees his interest best served in that way, or for more obscure reasons, is very difficult to say.

The availability of the accused for self-incrimination does not end with police interrogation. For, if he is that unusual accused who obstinately persists in remaining silent in the face of accusation at the police station, a substantial number of jurisdictions take his silence in the face of accusation as an adoptive admission—an admission by silence—the theory being that an innocent man must be expected to cry out his innocence in the face of accusation.¹³² And, virtually everywhere, the body of the accused may be used fairly freely to incriminate him. Although, on a theoretical level, such use of the body is not within the concept of self-incrimination, it remains a significant factor in assessing the total balance, or lack of it, between prosecution and accused. The accused's fingerprints and footprints may be taken;¹³³ his blood and urine may be removed, provided the job is done scientifically;¹³⁴ his handwriting and his voice may be used in most jurisdictions;¹³⁵ he may be required to exhibit him-

authorized to visit jails); MASS. ANN. LAWS ch. 127, § 136 (1957); *Hearings Before Subcommittee No. 2 of the House Judiciary Committee*, 78th Cong., 1st Sess., ser. 12, at 46-47 (1943) (statement of Inspector Callahan of the Police Department of Washington, D.C.); *Hearings Before Special Subcommittee to Study Decisions of the Supreme Court*, House Judiciary Committee, 85th Cong., 2d Sess., ser. 12, pt. I, at 40 (1957) (statement of Chief Murray of the Police Department of Washington, D.C.); NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 148 (1931).

131. See note 37 *supra*. See also Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice*, 46 J. CRIM. L., C. & P.S. 780 (1956).

132. See, e.g., *Commonwealth v. Vallone*, 347 Pa. 419, 421-24, 32 A.2d 889, 890-91 (1943); *People v. Nitti*, 312 Ill. 73, 90-94, 143 N.E. 448, 454-55 (1924); cf. *State v. Kobylarz*, 44 N.J. Super. 250, 256-61, 130 A.2d 80, 84-86 (1957). The jurisdictions which refuse to accept this theory exclude evidence of admission by silence either because it is not probative of guilt, or because it in some measure intrudes upon the privilege against self-incrimination. Collections of cases on the subject are to be found in 4 WIGMORE, EVIDENCE § 1072 (3d ed. 1940); *id.* § 1072 at 46-50 (Supp. 1959); Comment, *The Privilege Against Self-Incrimination: Does it Exist in the Police Stations?*, 5 STAN. L. REV. 459, 473-75 (1953); Note, *Silence as Incrimination in Federal Courts*, 40 MINN. L. REV. 593 (1956); Annot., *Statements in Presence of Accused*, 80 A.L.R. 1235, 1259 (1932), 115 A.L.R. 1510, 1517 (1938).

133. INBAU, SELF-INCRIMINATION ch. 1, 7 (1950) (collecting authorities).

134. The leading cases dealing with the limitations imposed upon such techniques by the due process clause of the fourteenth amendment are *Rochin v. California*, 342 U.S. 165 (1952); *Breithaupt v. Abram*, 352 U.S. 432 (1957). See INBAU, SELF-INCRIMINATION ch. 12 (1950) (collecting cases).

135. See Weintraub, *Voice Identification, Writing Exemplars and the Privilege Against Self-Incrimination*, 10 VAND. L. REV. 485 (1957); INBAU, SELF-INCRIMINATION ch. 9 (1950).

self, in a line-up or otherwise, wearing particular kinds of clothing, though such exhibition may well increase the likelihood that he will be identified as the culprit.¹³⁶

When the grand jury investigation begins, most jurisdictions recognize the immunity of the accused from interrogation only if he has already been named a defendant by arrest, by information, or by earlier indictment. If the prosecutor chooses to defer arrest or formal charge and hales the target of his investigation before the grand jury as a "witness," that target need not, except in a few jurisdictions, be advised that it is he whose conduct is under scrutiny. As a result, he may testify where otherwise he might refrain from doing so. If he should assert complete immunity (for example, a privilege not to appear, or not to be sworn) on the ground that he is the accused *de facto*, most jurisdictions would deny the claim, thereby compelling him to testify or to virtually concede his indictment by invoking his privilege against self-incrimination.¹³⁷

136. The leading federal case is *Holt v. United States*, 218 U.S. 345 (1910). See Note, 13 Md. L. Rev. 31 (1953) (collecting state authorities). For discussion of some of the problems likely to arise in the use of the line-up, see WILLIAMS, *PROOF OF GUILT* 99-116 (1958); LEVIN, *EVIDENCE AND THE BEHAVIORAL SCIENCES* ch. III, § B, at 401 (mimeo. on file Yale Law Library 1956).

137. There seems to be fairly general agreement that the *de jure* defendant (one already named as the accused) may not be summoned before the grand jury or, if summoned, that he must be advised of his right not to testify. *United States v. Lawn*, 115 F. Supp. 674, 677 (S.D.N.Y. 1953); *United States v. Miller*, 80 F. Supp. 979, 981 (E.D. Pa. 1948); *Commonwealth v. Bane*, 39 Pa. D & C 664 (1940); *Taylor v. Commonwealth*, 274 Ky. 51, 54-57, 118 S.W.2d 140, 142-43 (1938); *People v. Smith*, 257 Mich. 319, 323-25, 241 N.W. 186, 188 (1932); *Culbreath v. State*, 22 Ala. App. 143, 113 So. 465 (1927); *Boone v. People*, 148 Ill. 440, 448-50, 36 N.E. 99, 101-02 (1894); 8 WIGMORE, *EVIDENCE* § 2268 at 393 (3d ed. 1940); Annot., *Self-Incrimination Before Grand Jury*, 38 A.L.R. 2d 225, 292-93 (1954). The latter cases simply analogize the grand jury proceeding to the trial itself and accord the accused the same immunity from being called as a witness that he enjoys at trial. There is some authority for the proposition that if a *de jure* defendant's testimony before the grand jury is "voluntary," no objection can be founded on it. In these cases, the courts look for analogies from the law of confessions to determine whether the accused testified "freely" and hold, as a consequence, that failure to warn an accused of his rights is only one among many circumstances to consider in determining "voluntariness." Annot., 38 A.L.R.2d 225, 293-94 (1954). Compare the cases holding "voluntary" the statements of accused persons before magistrates, in reliance upon the "confession" analogy. *Powers v. United States*, 223 U.S. 303, 313-14 (1912); *Wilson v. United States*, 162 U.S. 613, 623-24 (1896). Where the person called before the grand jury as a witness is alleged subsequently to have been the target of the grand jury inquiry, a *de facto* defendant, the case law divides in similar fashion. Some courts hold that if the "witness" was really a *de facto* defendant, though not yet formally designated as such, then he may not be called at all before the grand jury. Others insist that if he is called, he must be advised of his right to remain silent. Disregard of these rules, in such jurisdictions, will cause the ensuing indictment to be quashed or the evidence to be excluded. *People v. Seaman*, 174 Misc. 792, 795, 21 N.Y.S.2d 917, 920 (Sup. Ct. Orange County 1940); *People v. Luckman*, 164 Misc. 230, 233, 297 N.Y. Supp. 616, 618 (Sup. Ct. Kings County 1937), *aff'd in part and rev'd in part on other matters*, 254 App. Div. 694, 3 N.Y.S.2d 864 (1938); *People v. Rauch*, 140 Misc. 691, 251 N.Y. Supp. 454 (N.Y.C. County Ct. 1931); *People v. Bermel*, 71 Misc. 356, 356-59, 128 N.Y. Supp. 524, 525-26 (Sup. Ct. Queens

Not only is the accused himself subject to considerable use by police and prosecution before trial, but every witness, his as well as the prosecution's, may be subjected to similar interrogation before trial. This may be done formally before a grand jury, which affords a full-fledged deposition procedure for the prosecution without the embarrassing presence of defendant or his counsel.¹³⁸ Or it may be done informally at the police station, where the specter of being held as a material witness—or of being charged with one of many vaguely defined crimes as a means of detaining for questioning—offers a considerable inducement for cooperation.¹³⁹ As if all this were not enough, exten-

County 1911); *People v. Gillette*, 126 App. Div. 665, 111 N.Y.S. 133 (1903); *Jenkins v. State*, 65 Ga. App. 16, 23-24, 14 S.E.2d 594, 599 (1941); *State v. Rixon*, 180 Minn. 573, 231 N.W. 217 (1930); *State v. Gardiner*, 88 Minn. 130, 136-40, 92 N.W. 529, 532-33 (1902); *State v. Caperton*, 276 Mo. 314, 319-21, 207 S.W. 795, 796 (1918); *State v. Naughton*, 221 Mo. 398, 420-21, 120 S.W. 53, 58 (1909). The majority view, in state and federal courts, holds that the de facto defendant summoned before the grand jury is to be treated no differently from a "mere witness." He can get relief, usually the exclusion from evidence of any admissions he may have made, only if he can show his testimony was not "freely given, all things considered." In short, a rule is applied comparable to that used in the confession cases. *United States v. Klein*, 247 F.2d 908, 921 (2d Cir. 1957); *Mulloney v. United States*, 79 F.2d 566, 579-80 (1st Cir. 1935), *cert. denied*, 296 U.S. 658 (1936); *O'Connell v. United States*, 40 F.2d 201, 205 (2d Cir. 1930) (stating that the New York view, *supra*, "has not prevailed generally"); *Thompson v. United States*, 10 F.2d 781, 784 (7th Cir. 1926), *cert. denied*, 270 U.S. 654 (1926); *United States v. Kimball*, 117 Fed. 156, 163 (C.C.S.D.N.Y. 1902); *cf. United States v. Bell*, 81 Fed. 830 (C.C.W.D. Tenn. 1897); *United States v. Scully*, 225 F.2d 113, 115-16 (2d Cir.), *cert. denied*, 350 U.S. 897 (1955). *Contra*, *United States v. Edgerton*, 80 Fed. 374 (D. Mont. 1897). Federal cases inclining in the direction of according the de facto defendant the same protection as one formally charged are *Powell v. United States*, 226 F.2d 269, 274 (D.C. Cir. 1955); *Maffie v. United States*, 209 F.2d 225, 228-29 (1st Cir. 1954); *Marcello v. United States*, 196 F.2d 437, 438 (5th Cir. 1952). See also Judge Frank's dissent in the *Scully* case, *supra* at 117; Note, *Self Incrimination By Federal Grand Jury Witnesses: Uniform Protection Advocated*, 67 YALE L.J. 1271 (1958).

138. See generally *Blair v. United States*, 250 U.S. 273, 279-81 (1919); *Hale v. Henkel*, 201 U.S. 43, 65 (1906); *Dession & Cohen, The Inquisitorial Functions of Grand Juries*, 41 YALE L.J. 687 (1932); *Lewin, The Conduct of Grand Jury Proceedings in Antitrust Cases*, 7 LAW & CONTEMP. PROB. 112, 127-29 (1940); ALI, CODE OF CRIMINAL PROCEDURE §§ 133, 135 & commentary at 490-98 (1931). As to the very limited availability of the grand jury minutes to the defendant, see note 116 *supra*. With the defendant or his counsel absent and with witnesses having no standing to challenge the jurisdiction of the grand jury, *Blair v. United States*, *supra* at 282, there is very little formal control of the grand jury process. As to the limited role of the judge, see note 67 *supra*.

139. FED. R. CRIM. P. 46(b), is a typical "material witness" provision. It provides for bail to assure the presence of the witness at trial and for incarceration of the witness if he should be unable to raise bail. For collection of statutes to the same effect, see ALI, CODE OF CRIMINAL PROCEDURE §§ 56-58 & commentary at 316-27 (1931). See also Comment, *Material Witnesses and "Involuntary" Confessions*, 17 U. CHI. L. REV. 706, 710-15 (1950). The origin of such statutes is discussed in *Crosby v. Potts*, 8 Ga. App. 463, 69 S.E. 582 (1910). On the use of vaguely-defined crimes, see Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. CHI. L. REV. 345, 369-70 (1936); Note, 59 YALE L.J. 1351 (1950).

sive legislative and administrative subpoena power exists to assist the government in investigating virtually every major field of regulatory activity.¹⁴⁰ These too may serve as discovery and trial preparation devices available to the government and unavailable to the defense.

Fairly clearly, pretrial discovery by the prosecution is far-reaching. And it cannot in any sense be said to be matched by what is available to the defendant or by what he can keep from the prosecution—even when his “immunity” from self-incrimination is thrown into the scales. While the possibility that the defendant may produce a hitherto undisclosed witness or theory of defense is always present, the opportunity for surprise is rendered practically illusory by the government’s broad investigatory powers and by the requirement in many states that the defenses of alibi and insanity must be specially pleaded. The sum of the matter is that the defendant is not an effective participant in the pretrial criminal process. It is to the trial alone that he must look for justice. Yet the imbalance of the pretrial period may prevent him from making the utmost of the critical trial date. And the trial, in turn, has been refashioned so that it is increasingly unlikely that it will compensate for the imbalance before trial.

Implications for Reform

If a procedural system is to be fair and just, it must give each of the participants to a dispute the opportunity to sustain his position. It must not create conditions which add to any essential inequality of position between the parties but rather must assure that such inequality will be minimized as much as human ingenuity can do so. In the case of enforcement of the criminal law, it seems quite clear that our existing institutional arrangements, as construed by the courts, aggravate the tendencies toward inequality between state and accused. How can a halt be called to these tendencies?

Several tiers of solutions are necessary—some within the scope of this article and some without. Among the latter are the various measures now being taken to make the indigent accused “equal before the law”—such as providing him with counsel and trial transcripts¹⁴¹—and those which should be taken, such as making public investigative resources available to the accused.

Most immediately relevant, however, is the creation of a free deposition and discovery procedure. For this would afford the accused the ability to draw upon all that the prosecution has gathered, compensating in part for all that

140. See generally DAVIS, ADMINISTRATIVE LAW ch. 3 (1951); Handler, *The Constitutionality of Investigations by the Federal Trade Commission*, 28 COLUM. L. REV. 708, 905, 925-28 (1928).

141. See *Griffin v. Illinois*, 351 U.S. 12 (1956); *Betts v. Brady*, 316 U.S. 455 (1942); *Johnson v. Zerbst*, 304 U.S. 458 (1938); Comment, *The Effect of Griffin v. Illinois on the States' Administration of the Criminal Law*, 25 U. CHI. L. REV. 161 (1957); Mars, *Connecticut Public Defenders*, 33 CONN. B.J. 297 (1959); Willcox & Bloustein, *Account of a Field Study in a Rural Area of the Representation of Indigents Accused of Crime*, 59 COLUM. L. REV. 551 (1959).

the prosecution has learned from the accused and his witnesses. Every one of the many excellent arguments which carried the day for pretrial discovery in civil cases is equally applicable on the criminal side. If the trial is to be the occasion at which well prepared adversaries test each other's evidence and legal contentions in the best tradition of the adversary system, there can be no substitute for a deposition, discovery, and pretrial procedure. Whether this is accomplished through an expansion of the preliminary hearing, following the English model,¹⁴² or through incorporation of the discovery provisions of the Federal Rules of Civil Procedure, as in Professor Donnelly's proposed Puerto Rican Penal Code,¹⁴³ is less important than that the job be done. If a choice is to be made, however, it should probably be for the Donnelly proposal since it draws upon a body of rules with which our courts are thoroughly familiar.

The argument customarily advanced in opposition to such a reform is that advice to the accused as to the details of the case against him will be an invitation to him to fabricate evidence, to suborn others to do so, or to intimidate the witnesses against him.¹⁴⁴ Such a view implies that the presumption of innocence is inapplicable before trial. Indeed, its operational assumption is that all persons are guilty; since they expect to be convicted "for what they did," they can be expected to take any measures necessary to prevent conviction. This view builds a procedural system upon the assumption that virtually all are guilty when some twenty-three per cent to thirty-six per cent of persons who actually stand trial are acquitted. Moreover, it treats existing laws against lying, bribing, and intimidating witnesses as ineffective to deter persons charged with crime. In place of such assumedly ineffective criminal sanctions, it attaches a crippling procedural handicap to all defendants.

142. See note 112 *supra*.

143. Donnelly, Rules of Criminal Procedure for the Commonwealth of Puerto Rico, Rules 20, 21 (Preliminary Draft, April, 1958).

144. See, e.g., Chief Justice Vanderbilt's statement in *State v. Tune*, 13 N.J. 203, 218-19, 98 A.2d 881, 888 (1953):

In criminal proceedings long experience has taught the courts that often discovery will lead not to honest fact-finding, but on the contrary to perjury and the suppression of evidence. Thus the criminal who is aware of the whole case against him will often procure perjured testimony in order to set up a false defense. . . . Another result of full discovery would be that the criminal defendant who is informed of the names of all the State's witnesses may take steps to bribe or frighten them into giving perjured testimony or into absenting themselves so that they are unavailable to testify. Moreover many witnesses, if they know that the defendant will have knowledge of their names prior to trial, will be reluctant to come forward with information during the investigation of the crime. . . . All these dangers are more inherent in criminal proceedings where the defendant has much more at stake, often his own life, than in civil proceedings.

Accord, *State v. Shourd*, 224 La. 955, 71 So. 2d 340 (1954); *Rosier v. People*, 126 Colo. 82, 92, 247 P.2d 448, 453 (1952); *State ex rel. Lemon v. Supreme Court*, 245 N.Y. 24, 156 N.E. 84 (1927); Annot., 52 ALR 207 (1927). For a contrasting view by Chief Justice Weintraub, who succeeded Chief Justice Vanderbilt, see *State v. Johnson*, 28 N.J. 133, 145 A.2d 313 (1958). See also 8 ALI, PROCEEDINGS 133-34, 136 (1930).

Since there is good reason to believe that the amount of perjury in civil cases is considerable,¹⁴⁵ it seems questionable at best to allow full discovery in civil cases and deny it in criminal cases. It could, of course, be said that the severity of criminal sanctions is so much greater than civil ones that the accused is more likely to tamper with the process than is the party to a civil case, or that the criminal "class" includes more persons disposed to violence than does the civil litigant class. But a moment's reflection indicates how suspect such hypotheses are. Even if we assume the accused to be more motivated or more disposed by personality to engage in such conduct, he, unlike his civil analogue, is already marked by the state as a criminal and hence is more likely to be under scrutiny. Moreover, the very real likelihood that charges of such misconduct against criminal defendants will be believed makes it all the more obvious that they must behave with the utmost circumspection.

But perhaps the most significant reason of all is the fact that the range of civil and criminal substantive law is too broad to permit the generalization that one involved in civil litigation is far less likely to suborn perjury or intimidate witnesses. It is difficult to believe that the defendant to charges of income tax evasion, false advertising, mail fraud, et cetera, will regularly tamper with justice on the criminal side of the court but that he will not do so when defending against the same or comparable charges on the civil side. Or that the petty thief accused of shoplifting will lie or intimidate but that the same person suing for an injury from an automobile collision will behave properly. Far more likely, "bad" people will do bad things on both sides of the court; the kind of people involved in litigation, and the stakes at issue, are central to the intimidation-bribery-perjury nexus, not their involvement on any one side of the court. It must be conceded, of course, that, at the margins, the pressure of a serious criminal charge may cause a given individual to engage in conduct which he would not consider if he were faced with a less serious civil charge, and that the personality types brought within certain criminal categories may present a significantly greater threat to the process. But since generalizations are necessary if systems of procedure are to be built, it seems fairly obvious that in most instances, the only approach to disclosure consonant with equality of opportunity and with the presumption of innocence is that used on the civil side of the court. It places its faith in the freest possible discovery as an aid to truth and as a means of searching out falsehood. But most important, it leaves to a more selective process than a blanket distinction between civil and criminal cases the development of techniques for coping with the special problems which may arise in some criminal cases.

145. See McClintock, *What Happens to Perjurors*, 24 MINN. L. REV. 727 (1940); Hibschan, "You Do Solemnly Swear!", 24 J. CRIM. L., C. & P.S. 901 (1934). Indeed, the introduction of pretrial discovery in civil cases was met with the outcry that it would facilitate perjury. Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 867 (1933); Speck, *The Use of Discovery in United States District Courts*, 60 YALE L.J. 1132, 1154 (1951).

The Protective Order

A number of problems will undoubtedly arise in the creation of such a system. Most important is the fear, well founded in certain limited classes of cases, that the defendant is dangerous and poses a real threat to the prosecution's witnesses. The almost identical problem is posed whenever a defendant who knows the identity of the complaining witness is released on bail pending trial; or when he has seen several of the prosecution's witnesses at a preliminary hearing; or when the nature of events leading up to the charge of crime informs him to the utmost about the nature of the case against him; or when, after a full trial, he is released on bail pending appeal. The law of bail stands four-square across the path to the easy assumption that he who is charged with crime is indiscriminately dangerous.¹⁴⁶ It refuses to deny to all their liberty and their right to assist in preparing their defense because there are a few who may interfere with the process while it is at work. Even where the ban on excessive bail is manipulated to keep in prison those perceived as dangerous to public or process, the justification ordinarily reflects an attempt to cope with the incredibly complex problems of predicting the behavior of the accused while on bail.

It is likely, however, despite all that has been said, that there will arise cases in which free discovery by the defendant may be too dangerous. In such cases, it may be desirable to borrow from the Federal Rules of Civil Procedure the concept of the "protective order."¹⁴⁷ This would authorize a trial court upon a proper showing to seal off information or identity of witnesses. It would do explicitly what is now done covertly at the bail stage. And in time it would undoubtedly lead to a more selective and discriminating case law than any we now have.

146. Cases dealing with bail (1) before trial are: *Stack v. Boyle*, 342 U.S. 1 (1951); *People ex rel. Sammons v. Snow*, 340 Ill. 464, 173 N.E. 8 (1930); (2) Pending appeal: *D'Aquino v. United States*, 180 F.2d 271 (9th Cir. 1950). For accounts of bail practice and the manner in which it often deviates from the ideal, see Comment, 102 U. PA. L. REV. 1031 (1954); Comment, 106 U. PA. L. REV. 693 (1958).

147. FED. R. CIV. P. 30(b), which is applicable to depositions, interrogatories, and discovery of documents, provides:

[U]pon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place . . . , or that it may be taken only on written interrogatories, or that certain matters shall be inquired into, or that the scope of examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment or oppression.

See 4 MOORE, FEDERAL PRACTICE ¶¶ 30.04-.15, 33.27, 34.10 (2d ed. 1950).

Special problems will surely follow in the wake of the "protective order." Where its effect is merely to seal off the identity of documents or of material which will eventually be disclosed at trial, the only interference with the defendant is that he will have to defer until trial the preparation of defensive matter responsive to, or discoverable from, such previously undisclosed material. Allowance of limited continuances may, of course, be necessary to enable the defendant to make use of such material.

Where, on the other hand, the effect of the protective order is to deny defendant access to material which the government is not likely to introduce at trial—for example, materials helpful to the defense—the prosecution's contentions will undoubtedly resemble those now regularly urged to support a claim of "government privilege." Disclosure will either make known the identity of an informer who would preferably remain unidentified; or it will involve "secrets" of some kind or other; or it will intrude upon the "work-product" of the government attorney; or it will interfere with the administration of justice in some undefined way. Here, the range of solutions developed in the case law generally for "government privilege" would seem adequate.¹⁴⁸ If the

148. An absolute privilege seems to be accorded to state and military secrets both in civil cases, *Totten v. United States*, 92 U.S. 105, 107 (1875); *Pollen v. Ford Instrument Co.*, 26 F. Supp. 583, 585 (E.D.N.Y. 1939); cf. *United States v. Reynolds*, 345 U.S. 1, 11 (1953), and in criminal prosecutions, *United States v. Haugen*, 58 F. Supp. 436, 438 (E.D. Wash. 1944). While the governmental "informer privilege" has often been successfully invoked in civil suits, *United States v. Kohler Co.*, 9 F.R.D. 289, 290 (E.D. Pa. 1949); *United States v. Deere & Co.*, 9 F.R.D. 523, 525-27 (D. Minn. 1949); *Mitchell v. Roma*, 265 F.2d 633 (3d Cir. 1959), and at one time was effectively used to thwart discovery in criminal cases, *Scher v. United States*, 305 U.S. 251, 254 (1938); *Shore v. United States*, 49 F.2d 519, 522-23 (D.C. Cir. 1931); *McInes v. United States*, 62 F.2d 180 (9th Cir. 1932), the modern view is that disclosure of the informant's name must be made when "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause . . .," *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957). Many other lesser "privileges" are often invoked by the government: the "housekeeping privilege" based on 5 U.S.C. § 22 (1958), the "work product" of the attorney privilege, and various specific statutory privileges. Since the policy favoring nondisclosure is relatively weak, such claims have been rather unsuccessful, even in civil suits. See, e.g., housekeeping privilege: *Bank Line, Ltd. v. United States*, 76 F. Supp. 801 (S.D.N.Y. 1948); *United States v. Certain Parcels of Land*, 15 F.R.D. 224 (S.D. Cal. 1954); *O'Neill v. United States*, 79 F. Supp. 827, 829-30 (E.D. Pa. 1948); attorney work product: *Henz v. United States*, 9 F.R.D. 291, 294-95 (N.D. Cal. 1949); statutory privileges: *Bowles v. Ackerman*, 4 F.R.D. 260, 262 (S.D.N.Y. 1945). In criminal cases, where the accused ordinarily has much more at stake, a series of decisions by the Court of Appeals for the Second Circuit articulated the doctrine that the government waives otherwise valid privileges when it institutes a prosecution, *United States v. Andolschek*, 142 F.2d 503, 506 (2d Cir. 1944); *United States v. Krulewitch*, 145 F.2d 76, 78 (2d Cir. 1944); *United States v. Beekman*, 155 F.2d 580, 584 (2d Cir. 1946). The opinion of the Supreme Court in *Jencks v. United States*, 353 U.S. 657 (1957), appears to make such a rule uniform in all circuits. But cf. *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959). See generally 4 MOORE, *FEDERAL PRACTICE* § 26.25 (2d ed. 1950); *Berger & Krash, Government Immunity from Discovery*, 59 YALE L.J. 1451 (1950); 8 WIGMORE, *EVIDENCE* §§ 2367-79 (3d ed. 1940).

court were persuaded that the matter should be privileged, and that nondisclosure would not seriously injure the defendant, then no price need be paid by the government.¹⁴⁹ Where there is both a valid claim of privilege and injury to the defendant, the present case law makes the government pay a price—either of dismissing the case or of having an issue taken as decided against it.¹⁵⁰ Where the claim of privilege is held to be invalid, disclosure could be compelled under penalty of contempt.¹⁵¹

Discovery by the Defendant—Right or Privilege

If full discovery were adopted, it would perhaps be open to the prosecution to claim that it would not have as much access to the defendant himself as he would have to all the prosecution's witnesses. This would, of course, be true—subject to all of the qualifications on the extent of that inaccessibility.¹⁵² Three responses may be made to this line of argument—none of which consigns all defendants to outer darkness, as does the present approach.

The first, and probably the most desirable, would allow the defendant his immunity—as a mark of the maturity of our state and the consummate respect it pays to the dignity of the individual, both for his own sake and for the benefit of a society seeking to impress upon its police and prosecutors the high obligation to proceed against a citizen only when they have independent evidence of his crime. History teaches that too ready availability of the accused as the source of the evidence against him inevitably tempts the state to intrude too much. And the inherent inequality in investigative resources, as between state and accused, suggests also that the defendant does not get so much on the total scale when his limited immunity is left him.

149. See, e.g., *United States v. Reynolds*, 345 U.S. 1, 11 (1953); *United States v. Sun Oil Co.*, 10 F.R.D. 448, 450-51 (E.D. Pa. 1950). The range of situations in which nondisclosure of privileged matter will "not seriously injure" the criminal defendant is narrow. *Roviaro v. United States*, 353 U.S. at 60-61; *Jencks v. United States*, 353 U.S. at 669. However, the government may still escape "paying the price" through application of the harmless error doctrine. *Rosenberg v. United States*, 360 U.S. 367, 370-71 (1959); *United States v. DeNormand*, 149 F.2d 622, 626 (2d Cir. 1945).

150. *Roviaro v. United States*, 353 U.S. at 60-61; *Jencks v. United States*, 353 U.S. at 672; *United States v. Andolschek*, 142 F.2d at 506; *United States v. Beckman*, 155 F.2d at 584; *O'Neill v. United States*, 79 F. Supp. at 830-31. Where the government is not a party to the suit, however, the courts have uniformly upheld the claim of privilege and refused to order production regardless of the need of the moving party. *Boske v. Comingore*, 177 U.S. 459 (1900) (state moving for tax returns in hands of Treasury Department in aid of criminal prosecution); *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951) (relator on habeas corpus claimed that F.B.I. files would reveal that he had been convicted fourteen years previously on perjured testimony).

151. Generally, courts have dismissed the prosecution when the government's claim of privilege has been denied in criminal cases. However, the court possesses the contempt power in case of any refusal to comply with a subpoena order, e.g., *FED. R. CRIM. P. 17(g)*, and either the court or the accused can, in the interests of justice, block a request by the prosecution to have the case dismissed, e.g., *FED. R. CRIM. P. 48(a)*. See also *United States v. Hall*, 153 F. Supp. 661 (W.D. Ky. 1957).

152. See discussion in text accompanying notes 119-37 *supra*.

The second response would demand of the accused who wishes to participate in a balanced and intelligent procedural system that he pay a price for such participation: that he waive his special status as an accused, though not his status as witness, in return for full rights of discovery. He would still have the privilege of the witness to refuse to answer particular incriminating questions. But the questions could be put to him at depositions or at trial. And his refusal to answer, or to take the stand, could be made the subject of comment.

Yet a third response remains. As a condition of enjoying full rights of discovery, the accused could be required to waive all immunity from self-incrimination regarding the crime charged, at the time he enters his plea of not guilty. He would then become as much subject to deposition, discovery and testimony at trial as is any witness in a civil case. The choice would be his to make—to participate in either a civil or criminal type procedural system. In all three approaches, the remedy of the protective order would remain to deal with the exceptionally threatening situation.

About all that can reasonably be said against the second or third suggestions is that the mere existence of the option may make for invidious comparison between those defendants who elect the civil-type procedure and those who insist upon their privilege or immunity. The argument is reminiscent of another day when some resisted the restoration of competency to defendants. Then, too, it was urged that if any defendant were permitted to take the stand, it would create an adverse effect upon those defendants who did not choose to do so. The second and third suggestions seem to call for less in the way of invidious comparison. And in both cases, there is too much to be gained by defendants as a class to warrant denying them the opportunity to get the fairest and most efficient trial our procedural reformers have been able to develop.

CONCLUSION

The “procedural revolution” of the twentieth century followed inevitably from the legal realists’ attack upon the procedural formalism of the prior century. Uncritical reverence for the forms of another day was supplanted by a more discriminating and instrumental view of procedure as an integral part of the substantive law. It became clear that the effectiveness of a court’s statement of “the law” is a function of many variables—chief among them the manner in which relevant institutions channel to them the materials for decision, the forms of words in which legal criteria are stated, and the vigor with which those criteria are worked out at each stage by all those concerned with the process. In the field of civil procedure, the heritage left by the legal realists was a happy one—flexibility, concern for the substantive ends to be served by a procedural system, discriminating efficiency, and maximal opportunity to all to make use of the legal process to obtain the information necessary for resolving the dispute between the parties.

But when those who did so much to shape the procedural revolution on the civil side turned their attention to criminal procedure, albeit as writers of case

law not of codes, the results were unfortunate. The modifications fashioned by them on the basis of allegedly rigorous analysis and in the interest of flexibility and efficiency have all worked to the very serious disadvantage of the defendant. This has occurred not because the modifications are intrinsically undesirable but rather because they have been fragmentary in nature and were introduced without any real appreciation of the requirements of the total procedural system.

If the flexibility of pleading and proof introduced by the procedural reformers at the trial stage were matched by a compensatory zeal for improving the pretrial disclosure devices, or if the pretrial screens could be expected to leave for trial only those who are guilty, it would be difficult to avoid joining the "modernizers," though there would still remain the question why the state could not afford to try the obviously guilty by the strictest possible standards of proof; or whether it is not as important that the process be "fair" as that the guilty be brought to book. Unfortunately, however, the relationships among the parts remain unnoticed in entirely too much of the case law. Judicial supervision of the quantum of proof necessary to convict is being relaxed at the very time when pretrial standards of proof are being removed from meaningful judicially enforced standards. And pleading is being loosened at the very time that judicial attitudes towards pretrial discovery and bills of particulars remain hard.

However much he can be said to benefit from the widely publicized decisions in certain areas of constitutional law, the hypothetical "accused" can find little to please him in current developments in the criminal trial process. Those developments reflect entirely too little concern about the inherent inequality of litigating position between the expanding state and even the most resourceful individual, much less the vast majority of resourceless ones. And even more fundamentally, they reflect subtle erosion of the accusatorial system, relieving police and prosecutor in many instances of the pressures necessary to maintain their actions at the optimum level of responsibility.

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