St. John's Law Review

Volume 45, March 1971, Number 3 Article 1

Improving New York's New Criminal Procedure Law

Frederick J. Ludwig

ST. JOHN'S LAW REVIEW

VOLUME 45 MARCH 1971 NUMBER 3

IMPROVING NEW YORK'S NEW CRIMINAL PROCEDURE LAW

FREDERICK J. LUDWIG*

Law is a means to an end. Ordinarily, the measure of any procedural rule is how well it attains the ends of the substantive law it is designed to implement. In a general sense, any one of the more than 400 separate sections contained in the new Criminal Procedure Law[1] of New York (CPL) is good or bad to the extent that the provision serves or disserves the ends of the substantive Penal Law[2] of the state. The primary end of the substantive Penal Law is to advance the common good by preventing crime. Its provisions propose to give fair warning in advance by drawing the line between lawful and criminal conduct and pointing out the consequences of overstepping that line. When its written text is administered, the criminal law affects human behavior only by the manner in which it impinges upon each person accused of crime. This influence makes itself felt by (1) subjecting actual offenders to unpleasant treatment in the hope (often in vain) that its memory will intimidate them from offending again; (2) treating actual offenders so that potential ones will be dissuaded by that example; (3) restraining those dangerously likely to commit crimes; and (4) rehabilitating corrigible offenders.

CRITERIA FOR PROCEDURAL RULES

The test of "means-end" between procedural rules and the substantive law that they implement may suffice to evaluate procedural rules in civil and administrative law. Additional scales of value must be invoked for criminal procedure. This is so because success or failure in criminal law administration largely depends on the state of mind of

* Chief Assistant District Attorney, Queens County, New York. A.B., College of City of New York, 1939; M.S. in Ed., id., 1942; LL.B., Columbia University, 1945 [*Juris Doctor*, 1969].

1 Law of May 20, 1970, chs. 996, 997, [1970] N.Y. Laws 2147, N.Y. CPL (McKinney 1970) (effective Sept. 1, 1971) [hereinafter N.Y. CPL].

2 N.Y. PENAL LAW (McKinney 1967).

actual and potential offenders — the entire community — in striving to attain an atmosphere of law and order. A criminal law system that achieves maximum deterrent efficacy operates to induce people to maintain their own self-restraint and refrain from lawless conduct. But the same deterrent effect on potential offenders might be achieved if a hundred murders were disposed of by convicting a hundred innocent defendants. The baronet's cousin in Dickens's novel, who, perplexed by the failure of the police to discover the murderer of the baronet's solicitor, said "Far better hang wrong fellow than no fellow," expressed the danger of any criterion of a rule of criminal procedure that is limited solely to preventing crime — the end of the substantive law of crime. The first test of any rule of procedure in administering the law of crime is that it operates directly to *acquit the innocent and convict the guilty.*[3]

Second, a worthwhile rule of criminal procedure must be *certain* in its application. It must be designed and implemented to apply to all persons who commit crime, and not on occasions to a few. It has taken many centuries of brutal experience to demonstrate that certainty of punishment is more effective in preventing crime than severity. During the reign of Henry VIII, 72,000 persons were executed for robbery and theft alone. This was an average of 2,000 per year in a population considerably less than three million.[4] Even as late as 1819 in England, the death penalty was available for no fewer than 220 offenses.[5] Proposed reforms met with vigorous opposition. When in 1814 a man was executed for cutting down a cherry tree, the judge observed that anyone who would maliciously cut down a tree would kill a man.[6] When it was proposed to abolish the death penalty for stealing five shillings from a dwelling house, the Lord Chancellor and the Chancellor of the Exchequer expressed profound regret. Even Sir Robert Peel considered this "a most dangerous experiment." And Lord Ellenborough, Chief Justice of the King's Bench, warned: "If we suffer this Bill to pass, we shall not know where we stand — we shall not know whether we are upon our heads or our feet."[7] It was emphasized that severity of punishment was the single most important threat to the potential offender. Yet even at public executions, at a time when picking pockets

3 Rules that exclude trustworthy evidence of guilt on the basis of procedural due process (see Rochin v. California, 342 U.S. 165 (1952)), or unreasonable search and seizure (see Mapp v. Ohio, 367 U.S. 643 (1961)), must find justification on grounds other than acquittal of the innocent and conviction of the guilty.

4 REPORT OF SELECT COMM. ON CAPITAL PUNISHMENT vii (H.M. Stationery Office 1930).

5 *Id.*

6 *Id.* xii.

7 *Id.*

was punishable by death, pickpockets plied their trade among the crowd gazing upward at the hangman's noose, "for they accounted executions their best harvest." The argument of Sir Samuel Romilly in the House of Commons that certainty, and not severity, of punishment was the important ingredient in deterrence, finally succeeded in abolition of brutal punishment for petty crime, only because the establishment of a police force in London in 1829 made that certainty a concrete reality.[8]

Third, without sacrificing either its primary purpose of acquitting the innocent and convicting the guilty or the certainty of its application, a good procedural rule must be capable of *celerity* in practice. The huge investment of community resources in court, correction, police, probation and prosecution is based upon the faith that subjecting actual offenders to some sort of compulsory treatment will deter would-be offenders. In this manner, prosecution should prevent crime in the long run. The first article of this faith is that there be a reasonable length of time between the arrest of an alleged offender and the disposition of his case. When the time between arrest and disposition becomes tiresome months and years, deterrence of potential offenders is nullified. Prevention of crime ceases to be an outcome of prosecution. Crime rates continue to spiral, even though assistant district attorneys appear and report that they are ready in court rooms every day.

Finally, a good procedural rule must have the *appearance* as well as the reality of being good. "The first requirement of a sound body of law is that it should correspond with the actual feelings and demands of the community, whether right or wrong."[9] Trial by jury, now required in all criminal causes involving possible maximum penalties exceeding six months,[10] did not spring full-grown, like the Boticellian Aphrodite, from the Magna Carta's guarantee to the noblemen of the "judgment of his peers" in a trial at the King's suit in the House of Lords. For the less favored multitude, the institution had to win its spurs in sharp competition with trials by ordeal and oath, and was to assume its current shape only after centuries of development. Reflection upon alternate methods of resolving disputed issues of fact indicates why trial by jury emerged as most popular. Ordeal by fire involved the accused's taking in hand a piece of red-hot iron, or his walking barefoot and blindfolded over nine red-hot ploughshares laid lengthwise at unequal distances. If the party escaped unhurt, he was adjudged innocent; but if it happened otherwise, "as without collusion it usually

8 *Id.*
9 O.W. HOLMES, THE COMMON LAW 41 (1881).
10 Baldwin v. New York, 399 U.S. 66 (1970).

did," he was then condemned as guilty.[11] In water-ordeal, the defendant was required to plunge his bare arm elbow-deep in boiling water without being scalded to establish his innocence. Alternatively, the accused was tossed into a pond of cold water, and acquittal, a questionable victory indeed, could be attained only by sinking.[12] In the bilateral ordeal by battle, which survived abolition until 1819, the accused escapsed conviction by avoiding decapitation in day-long judicial combat with double-edged Frankish war axes.[13] In the thirteenth and fourteenth century city of London, a defendant accused of homicide might purge himself by swearing six times, each oath backed by six oath-helpers so that, in all, thirty-seven persons swore. Such wager of law at Westiminster was early debased by the emergence of a union of compurgators who swore for their living.[14] When, at last, the accused was given the election of putting himself upon the country, the jury, as neighborhood witnesses of the crime, continued for hundreds of years to be the source of proof as much as the arbiters of such proof. One by one with the passing centuries, the ancient ordeals by fire, by water and by battle, and trial by compurgation have been abandoned. In the course of centuries, they have ceased to command the confidence of the community as sound methods of resolving disputed issues of fact.

SOURCE OF STATE PROCEDURAL RULES

The new Criminal Procedure Law by no means embraces all of the statutory rules governing criminal procedure in New York.[15] Many significant provisions are contained in non-statutory rules formulated by various judicial bodies.[16] The most fundamental are those derived

11 4 BLACKSTONE, COMMENTARIES *337. *But cf.* 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 599 (2d ed. 1899): "Such evidence as we have seems to show that the ordeal of hot iron was so arranged as to give the accused a considerable chance of escape."

12 *Id.*

13 *See* 3 BLACKSTONE, COMMENTARIES *337-41; 4 *id.* *340-42.

14 *See* 3 *id.* *343.

15 *See, e.g.*, the rule of the law of evidence requiring corroboration, dealt with in N.Y. CPL §§ 60.20(3) (unsworn evidence of child less than twelve), 60.22 (accomplice), 60.50 (confession of defendant); *see also* § 70.10(1). A similar rule of corroboration also appears in a half-dozen instances in the penal law. N.Y. PENAL LAW §§ 115.51 (for criminal facilitation), 130.15 (for rape, sodomy, sexual misconduct and sexual abuse), 165.65(1) (criminal possession of stolen property), 210.50 (perjury and related offenses), 230.35 (promoting prostitution), 255.30 (adultery and incest). Other state statutes contain various provisions of criminal procedure, *e.g.*, Agriculture & Markets Law, CPLR, Civil Rights Law, Correction Law, Executive Law, General Construction Law, General Municipal Law, Judiciary Law, Labor Law, N.Y.C. Criminal Court Act, District Court Act, Uniform Justice Court Act, and Vehicle & Traffic Law.

16 *See, e.g.*, N. Y. COURT RULES (McKinney 1970): Court of Appeals § 500.8 (papers in criminal matters); Appellate Division, First Dep't §§ 600.8 (appeals in criminal cases), 603.11, 606.5 (assigned counsel in criminal cases); Supreme Court, New York and Bronx

from the Constitution of the United States. These are beyond the pale of state reformulation — by statute or judicial action — and can be modified only by amendment to the federal constitution or reinterpretation by the Supreme Court.

Only nine provisions of the original text of the constitution adopted in 1789 dealt directly with criminal law administration. Three provisions concerned treason, two of them substantive rules defining treason and providing for its punishment, and one procedural relating to the quantum of proof for conviction.[17] Three more provisions dealt with suspension of the writ of habeas corpus[18] and prohibitions on legislative passage of bills of attainder and ex post facto laws.[19] All of these half-dozen provisions concerned the central government and not the states, and have remained the exclusive province of federal court adjudication. An additional three provisions involved the states: two concerning prohibitions on bills of attainder and ex post facto laws, also forbidden to Congress,[20] and one relating to interstate rendition.[21]

The first session of the first Congress in 1789 proposed twelve amendments to the people of the states, and ten of these were ratified in 1791. This was in fulfillment of the understanding upon which a number of the original thirteen state conventions ratified the original document in 1788, particularly Massachusetts, New York, Pennsylvania and Virginia. The Bill of Rights which these amendments comprise enumerates no fewer than a score of separately identifiable guarantees. Sixteen, or 80 percent of these, have significance in criminal law administration.[22] The remaining three apparently do not.[23]

As a matter of explicit language, only the first amendment refers to the governmental body being restricted, *viz.*, Congress. The remaining amendments in the Bill of Rights are silent on the sovereignty sub-

Counties §§ 661.1-661.6 (criminal actions and proceedings); Appellate Division, Second Dep't §§ 671.1-671.8 (duties of counsel in criminal actions, coram nobis and habeas corpus); Supreme Court, Kings County §§ 751.1-751.81 (criminal actions and proceedings); Supreme Court, Richmond County §§ 755.20-755.27 (criminal actions and proceedings); Supreme Court, Queens County §§ 796.1-796.8 (criminal actions and proceedings); Criminal Court of the City of New York §§ 2950.1-2950.17 (rules); Family Court §§ 2506.1-2506.7 (juvenile delinquents).

17 U.S. CONST. art. III, § 3.

18 *Id.* art. I, § 9, cl. 2.

19 *Id.* art. I, § 9, cl. 3.

20 *Id.* art. I, § 10.

21 *Id.* art. IV, § 2, cl. 2.

22 *See* Tables I, II & III *infra.*

23 These are the third amendment's restriction on quartering soldiers, the seventh amendment's right to trial by jury in civil suits where the value in controversy exceeds twenty dollars and, finally, the tenth amendment "truism" that undelegated powers are reserved to the states or people.

ject to limitation. Thus, a municipal restriction making criminal the holding of funeral services in Catholic churches was early held to be outside the ambit of the first amendment.[24] But previously in *Barron v. Mayor of Baltimore,* [25] it was settled by judicial construction that the first eight amendments were directed only at the federal government. The plaintiff claimed that the defendants had, in contravention of the fifth amendment, taken his property for public use without just compensation. Chief Justice Marshall, in denying the applicability of the amendment, said that

> [the] Fifth Amendment must be understood as restraining the power of the general government, not as applicable to the states .... In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government — not against those of the local governments .... These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.[26]

For the first eighty years, the sixteen provisions contained in the Bill of Rights — all affecting criminal law administration — were of no concern in state or local criminal proceedings. The sovereignty against which these guarantees applied was exclusively the federal government. However, in 1868, the fourteenth amendment was adopted. The first and last of its five sections have the most direct and current significance for state criminal law administration. Section 1 denies any state power to

> [m]ake or enforce any law which shall abridge the privileges or immunities of citizens of the United States [defined as persons born or naturalized in the United States, and subject to the jurisdiction thereof]; deprive any person of life, liberty, or property, without due process of law; [and]
> deny to any person within its jurisdiction the equal protection of the laws.

Section 5 provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Except for the clause prohibiting denial to any person of the equal protection of the laws,[27] the remaining provisions in the first section of the fourteenth amendment had no significance for state criminal law

---

[24] Pemoli v. Municipality No. 1 of New Orleans, 44 U.S. (3 How.) 589 (1845).
[25] 32 U.S. (7 Pet.) 243 (1833).
[26] *Id.* at 247, 250.
[27] *See, e.g.,* Rogers v. Alabama, 192 U.S. 226 (1904); Carter v. Texas, 177 U.S. 442

administration for the first fifty-five years of its existence.[28] In 1923, in the landmark decision of *Meyer v. Nebraska*,[29] the Supreme Court for the first time in the more than half-century existence of the fourteenth amendment, invoked its due process clause to reverse a state criminal conviction. In doing so, the Court made applicable to the states the freedom of opinion guarantees contained in the first amendment for the first time in the 132 year history of that amendment.[30] In the thirties, five first-impression decisions made additional Bill of Rights provisions applicable to state criminal proceedings. In the forties, there were three more such decisions, in the fifties only one, with the decade record of seven in the sixties. Table I lists these cases; Table II considers two Bill of Rights provisions still held not applicable to the states; and Table III considers four other provisions possibly in the embryonic stage of applicability.

This review of the impact of the Bill of Rights on state criminal proceedings does not subsume the equal or greater impact of application of Supreme Court standards to state prosecutions in the name of the due process clause in the fourteenth amendment considered purely in a procedural sense, *i.e.*, adequate notice, fair trial, impartial tribunal.[31] Nor are significant extensions of provisions of the Bill of Rights that have been made applicable to the states considered.[32] The entry of

(1900); Bush v. Kentucky, 107 U.S. 110 (1883); Neal v. Delaware, 103 U.S. 370 (1880); *Ex parte* Virginia, 100 U.S. 339 (1879); Strauder v. West Virginia, 100 U.S. 303 (1879).

[28] Several Bill of Rights provisions invoked under the due process and privileges and immunities clauses in criminal cases were held inapplicable to the states during this fifty-year period. *See* Twining v. New Jersey, 211 U.S. 78 (1908) (privilege against self-incrimination); Maxwell v. Dow, 176 U.S. 581 (1900) (trial by jury); *In re* Kemmler, 136 U.S. 436 (1890) (cruel and inhuman punishment); Presser v. Illinois, 116 U.S. 252 (1886) (freedom of assembly); Hurtado v. California, 110 U.S. 516 (1884) (right to indictment by grand jury); United States v. Cruikshank, 92 U.S. 542 (1875) (freedom of assembly).

[29] 262 U.S. 390 (1923); *see also* Bartels v. Iowa, 262 U.S. 404 (1923), decided the same day.

[30] Only a year before the *Meyer* decision, the Court said that "Neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about 'freedom of speech' or the 'liberty of silence.'" Prudential Ins. Co. v. Cheek, 259 U.S. 530, 543 (1922).

[31] *E.g.*, Roberts v. Russell, 392 U.S. 293 (1968) (*Bruton* rule requiring separate trials of co-defendants when one confesses applied to states); Gilbert v. California, 388 U.S. 263 (1967) (fair in-court and pre-trial line up identifications); Young v. Ragen, 337 U.S. 235 (1949) (necessity of state post-trial corrective judicial process to vindicate federal rights); Lanzetta v. New Jersey, 306 U.S. 451 (1939) (vagueness of statute); Brown v. Mississippi, 297 U.S. 278 (1936) (conviction based upon evidence consisting of coerced confession); Mooney v. Holohan, 294 U.S. 103 (1935) (suppression by prosecution at trial of exculpatory evidence); Tumey v. Ohio, 273 U.S. 510 (1927) (trial before judge without pecuniary interest in outcome); Moore v. Dempsey, 261 U.S. 86 (1923) (requiring trial free from mob domination); Allgeyer v. Louisiana, 165 U.S. 578 (1897) (due process limiting state legislative jurisdiction).

[32] *E.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (extension of fifth amendment self-

TABLE I
INITIAL APPLICATION OF GUARANTEES IN BILL OF RIGHTS TO STATE CRIMINAL PROCEEDINGS

U.S. Const. Amendment	Guarantee	Initially Held Applicable
I	No law respecting an establishment of religion	Fowler v. Rhode Island, 345 U.S. 67 (1953)
	Prohibiting free exercise of religion	Schneider v. State, 308 U.S. 147 (1939); Cantwell v. Connecticut, 310 U.S. 296 (1940)
	Abridging the freedom of speech, or of the press	Meyer v. Nebraska, 262 U.S. 390 (1923); Stromberg v. California, 283 U.S. 359 (1931); Near v. Minnesota, 283 U.S. 697 (1931)
	Peaceably to assemble, and to petition the Government	Cox v. New Hampshire, 312 U.S. 569 (1941); Hague v. C.I.O., 307 U.S. 496 (1939)
IV	Against unreasonable searches and seizures	Wolf v. Colorado, 338 U.S. 25 (1949); Mapp v. Ohio, 367 U.S. 643 (1961)
V	Subject for the same offense to be twice put in jeopardy of life or limb	Benton v. Maryland, 395 U.S. 784 (1969)
	Compelled in any criminal case to be a witness against himself	Malloy v. Hogan, 378 U.S. 1 (1964)
	Nor be deprived of life, liberty, or property, without due process of law	XIV Amendment (so restricting any state)
VI	Speedy trial	Klopfer v. North Carolina, 386 U.S. 213 (1967)
	Public trial	*In re* Oliver, 333 U.S. 257 (1948)
	Jury of state and district wherein the crime was committed	Duncan v. Louisiana, 391 U.S. 145 (1968)
	To be confronted with the witnesses against him	Pointer v. Texas, 380 U.S. 400 (1965)
	To have the assistance of counsel for his defense	Powell v. Alabama, 287 U.S. 45 (1932)
IX	Enumeration of certain rights not to be construed to deny or disparage others retained by the people	Griswold v. Connecticut, 381 U.S. 479 (1965)

TABLE II
GUARANTEES HELD NOT APPLICABLE TO STATES

U.S. Const. Amendment	Guarantee	Held Not Applicable
II	To keep and bear arms	Presser v. Illinois, 116 U.S. 252 (1886)
V	Hold to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury	Hurtado v. California, 110 U.S. 516 (1884)

TABLE III
GUARANTEES NOT SQUARELY HELD APPLICABLE TO STATES

U.S. Const. Amendment	Guarantee	Present Status
VI	To have compulsory process for obtaining witnesses in his favor	Power to review state denial assumed (but not held) in 2d, 5th and 10th Circuits
VIII	Excessive bail shall not be required	Power to review state court denial or grant of high bail assumed (but not held) on habeas corpus for incarcerated defendants in the 2d, 4th, 5th and 8th Circuits
	No excessive fines to be imposed	Power assumed (but not held) to interfere with XIV Amendment due process; Waters-Pierce Oil Co. v. Texas, 212 U.S. 86 (1909)
	Nor cruel and unusual punishments inflicted	Assumed (but not held): Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947); Robinson v. California, 370 U.S. 660 (1962) See also *In re* Kemmler, 136 U.S. 436 (1890); Rochin v. California, 342 U.S. 165 (1952)

the Constitution of the United States into state and local criminal law administration during the past forty-eight years has certainly circumscribed the power of any state to act through its legislature in prescribing rules of criminal procedure. These decisions — based on the Constitution — are the *Supreme Law.* They cannot be modified in any manner by any state legislative body. Any change requires either constitutional amendment[33] or the overruling of a prior holding — either implicitly or explicitly — by the Supreme Court. One consequence of attempting to restate these rules of the Court in a legislative code enacted by a state is to require further state action before any modification made by the Court can validly take effect in such state.[34]

Until recently it had generally been assumed that constitutional rules of criminal procedure expounded by the Supreme Court cut one way in favor of the defendant and his rights so as to function as minimum standards for the states. In this view, states were free to adopt additional protections for the accused, even in areas within the Bill

incrimination and sixth amendment right to counsel provisions to require affirmative warnings for police custody interrogation).

33 *E.g.*, Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895), *overruled*, U.S. CONST. amend. XVI; Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), *overruled*, U.S. CONST. amend. XI.

34 More than half of the state legislatures (twenty-eight) meet regularly only every second year to consider matters such as criminal procedure. COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES — 1970-1971, 66-67 (1970).

of Rights and fourteenth amendment due process. But, in *California v. Green*,[35] the Court made clear that its pronouncements are a double-edged sword that protect the prosecution as well as the accused. In that case, a state statute authorized admissibility at a hearing of evidence of a prior inconsistent statement by a witness even if such evidence was hearsay. The highest state court held the statute violated a defendant's sixth amendment right to confrontation. The Supreme Court reversed, vacated the judgment and remanded the case.

MAJOR CHANGES IN NEW LAW

Like Caesar's Gaul, all of the new Criminal Procedure Law is divided into three Parts: Part One — *General Provisions* — subdivided into four *Titles*, A through D; Part Two — *The Principal Proceedings* — containing six *Titles*, H through M; Part Three — *Special Proceedings and Miscellaneous Procedures* — consisting of subordinate Titles P through U.[36] The *Titles* are further subdivided into *Articles*. These are designated by numerals spaced by tens so that Part One contains Articles 1, 10, 20, 30, 40, 50, 60 and 70;[37] Part Two contains Articles 100-470;[38] and Part Three contains Articles 500-730. Each Article is subdivided into *Sections*. The order in which these provisions will be reviewed is the chronological one in which a criminal case proceeds, and not the order employed in the Criminal Procedure Law.[39]

JURISDICTION AND VENUE

The CPL undertakes a restatement of the case law on state criminal jurisdiction. Its codified provisions are brand new and not comparable to anything in the old Code which was silent on the subject.[40] Existing case law concerns itself with (a) the basis of jurisdiction, and (b) the situs of the crime. A third area — venue — was covered in the old Code.

Basis of Jurisdiction

Suppose *D*, a Frenchman, murders *X*, an Englishman, in Brooklyn. May *D*'s case lawfully be disposed of in the courts of (1) the State of New York? (2) France? (3) England? (4) Mexico?

Territoriality, the basic Anglo-American theory of jurisdiction

---

35 399 U.S. 149 (1970).

36 There are no Titles E, F, G, N, O, X, Y, or Z.

37 There are no Articles 80-100.

38 There are no Articles 480-490.

39 *See, e.g.*, F. LUDWIG, CASES ON CRIMINAL PROCEDURE (1951).

40 N.Y. CODE CRIM. PROC. (McKinney 1958) [hereinafter N.Y. CCP].

that makes place of commission determinative of jurisdiction clearly indicates "(1)" as the proper forum.[41]

Nationality, or the Roman theory derived from *pater familias* and based on the concept of criminal justice as discipline of the tribe or clan, makes "(2)" the answer for the considerable number of nations with systems of law derived from Rome. These countries readily punish foreigners committing crimes within their borders in order to maintain the "peace of the King"—the basis of common-law criminal jurisdiction —but they do so incidentally and secondarily to the basic motif of consanguineal good behavior. Just as civil-law nations recognize territoriality as a supplementary basis, common-law countries also recognize nationality or citizenship as a basis of jurisdiction, provided it is based upon a statute.[42] State citizenship has been recognized as a basis of criminal jurisdiction, provided it is claimed by state statute.[43]

A third basis, jurisdiction of the *injured forum*, would make "(3)" correct. When a Frenchman who forged German securities in Switzerland was punished in Germany, the exercise of jurisdiction was accepted as a matter of course outside the United States and British Commonwealth. Under this theory, jurisdiction is determined by the injury caused by the offense. State criminal jurisdiction may be exercised on this basis provided it is claimed by statute and the injury may be established as a result of the offense committed outside a state's

41 Extraterritorial jurisdiction is also part of the common-law theory of territoriality. Originally, the person of the sovereign while abroad was deemed to be at home for purposes of criminal jurisdiction. The fiction has been extended to the sovereign's ambassadors and soldiers, and vessels and airplanes under its flag. *See* United States v. Bowman, 260 U.S. 94 (1922).

42 *E.g.*, 18 U.S.C. § 2381 (1964) (providing punishment for treason committed abroad by American nationals); *see* Blackmer v. United States, 284 U.S. 421 (1932) (contempt of federal court by American national abroad under statute); Regina v. Azzopardi, 174 Eng. Rep. 776 (1843) (under statute authorizing trial of subject in England for homicide committed on land outside the United Kingdom "whether without the King's dominions or not," native of Malta found guilty of homicide in Smyrna, "without" the King's dominions).

43 The American Law Institute, while recognizing nationality as a basis of jurisdiction for the federal government as a "nation recognized as such by the law of nations" provided such basis is claimed by statute, rejects individual state citizenship for this purpose. RESTATEMENT OF CONFLICT OF LAWS §§ 425, 426 (1934). In Skiriotes v. Florida, 313 U.S. 69 (1941), the Court affirmed a conviction under a state statute making criminal the use of diving suits to take commercial sponges in the Gulf of Mexico off the Florida coast in a case in which the forbidden apparatus was used beyond the three-mile limit of the international boundaries of the United States. Mexico had no statute on the question. The Court said that "[i]f the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with an act of Congress." *Id.* at 77. For validity of "absent voters" statute punishing conduct committed outside the state by its citizens, see State *ex rel.* Chandler v. Main, 16 Wis. 398 (1863).

borders.[44] Thus, a state may provide by statute for trial and punishment of homicide if the victim dies within its borders even though the fatal blow was rendered outside its borders and the killer had nothing to do with causing the victim to be within them at the time of death.

Finally, under a fourth basis — the *cosmopolitan* theory of jurisdiction, any nation or state has power to punish any crime committed anywhere by anyone. This theory could make "(4)" a correct answer, or, indeed any nation from Afghanistan to Zambia. It has met with limited acceptance in Italy, and has been used elsewhere in cases of piracy beyond the injured forum theory.

The CPL accepts two of these four bases of jurisdiction, *i.e.*, territoriality and injured forum, and omits any statutory claim to citizenship as a basis,[45] or any reference to the cosmopolitan theory. Under the injured forum theory, statutory claim to jurisdiction is made when the "result of the offense" is also an element and occurs within the state.[46] A presumption is added that in a homicide the victim died within the state if his body is found here.[47] Even if the result is not an element of the offense, when conduct constituting the offense occurs wholly outside the state, claim is still made to jurisdiction if the "particular effect" of the conduct has a materially harmful impact on government or community welfare in this state, or defrauds persons here.[48] In such non-element particular effect situations, jurisdiction is limited to cases in which a statute defining the offense is designed to prevent the particular effect and the defendant intended that effect,[49] but the conduct need not be made criminal in the place of commission.[50] Inchoate crimes aimed at the state, such as attempt committed else-

---

44 RESTATEMENT OF CONFLICT OF LAWS § 428, comment *b* (1934); *see* Hanks v. State, 13 Tex. App. 289 (1882) (Texas may punish a nonresident who, outside the state, forges a transfer of a Texas land certificate).

45 *Cf.* N.Y. CCP § 133: "A person who leaves this state, with intent to elude any law thereof against duelling or prize-fighting, or challenges thereto, or to do any act forbidden by such a law, or, who being a resident of this state, does an act out of it, which would be punishable as a violation of such a law, may be indicted and tried in any county of this state."

46 N.Y. CPL §§ 20.10(3), 20.20(2)(a).

47 *Id.* § 20.20(2)(a); *cf.* Law of Mar. 12, 1909, ch. 88, § 1933, [1909] N.Y. Laws 132 (repealed 1967) [hereinafter *Old N.Y. Penal Law*]: "A person who commits an act without this state which affects persons or property within this state, or the public health, morals, or decency of this state, and which, if committed within this state, would be a crime, is punishable as if the act were committed within this state."

48 N.Y. CPL § 20.10(4); *cf. Old N.Y. Penal Law* § 1930(5): "A person who, being out of the state and with intent to cause within it a result contrary to the laws of this state does an act which in its natural and usual course results in an act or effect contrary to its laws."

49 N.Y. CPL § 20.20(2)(b).

50 *Id.* § 20.30(2).

where[51] and conspiracy provided an overt act in furtherance of the conspiracy occurred within the state,[52] are made subject to the jurisdiction of New York. In addition, omission to perform a duty imposed by the laws of this state is punishable even if the offender is outside its borders.[53]

Situs of the crime

For the basis of territoriality, when conduct constituting an offense occurs outside the state, determining place of commission is crucial. *D*, standing in New Jersey, shoots across the river and kills *X* in New York. May *D* lawfully be tried in New Jersey, New York, or either state? Suppose, further, that *X* upon being wounded was taken to a hospital in Connecticut where he died. At common law, the rule might have developed that any of the states in which elements of the offense occurred would have jurisdiction. But for some reason, a single state was insisted upon: in the absence of statute, the state in which the fatal force impinged upon the body of the victim, or New York, in the supposed case.[54]

If in the supposed case, *D* had missed, the common-law rule, by a fiction that the shooter constructively follows his bullet, would make *D* triable for the attempt only in the state into which he fired.[55] Only in the case of larceny, was the common-law insistence on a single state relaxed so that the thief who stole chattels in one state and brought them to another could be tried in either state.[56]

The CPL subjects offenses consummated elsewhere to jurisdiction of the New York courts if inchoate conduct occurred within the state sufficient to establish an element of the offense, an attempt to commit the offense, or conspiracy or solicitation to commit it.[57] In such cases, the place of consummation must make the conduct criminal.[58] Under the old Code, it had been held that the state lacked jurisdiction "unless the act within this state is so related to the crime that, if nothing more had followed, it would amount to an attempt."[59] The CPL has over-

---

[51] *Id.* § 20.20(2)(c).
[52] *Id.* § 20.20(2)(d).
[53] *Id.* § 20.20(3).
[54] State v. Hall, 114 N.C. 909, 19 S.E. 602 (1894) (facts same as in supposed case); *see also* People v. Botkin, 132 Cal. 231, 64 P. 286 (1901) (*D* mailed poisoned chocolates from California to *X* in Delaware); RESTATEMENT OF CONFLICT OF LAWS § 428, comment *a* (1934).
[55] Simpson v. State, 92 Ga. 41, 17 S.E. 984 (1893).
[56] State v. Bennett, 14 Iowa 479 (1863).
[57] N.Y. CPL § 20.20(1).
[58] *Id.* § 20.30(1).
[59] People v. Werblow, 241 N.Y. 55, 61, 148 N.E. 786, 789 (1925).

ruled this case by the addition of an element of the offense, consipracy and solicitation.

Finally, in connection with the territorial perimeter of a state bounded by the sea, the common-law rule prescribed a limit of one marine league — three and one-half miles or a cannon shot.[60] The old Code modified this perimeter to "a line two nautical miles distant from the shore at high water mark."[61] The CPL drops this claim, adopts as "its boundaries" those "prescribed in the state law" which may now mean three and one-half miles.[62]

Venue

Jurisdiction means the *power* of a sovereign, in this case a state, to act in a criminal proceeding, whether through its executive branch, *e.g.*, by demand or refusal of interstate rendition or international extradition, its legislature, *e.g.*, by enacting a statute purporting to govern conduct that occurs inside or outside its boundaries, or its judiciary, *e.g.*, by entering judgment purely for or against a defendant. *Venue* relates to judicial power distributed among courts within a state.

The power of a state to act in a federal union, connoted by state jurisdiction, is subject to federal constitutional limitations of due process considered in a territorial-jurisdictional sense. Venue — a purely intrastate and local judicial factor — is not so limited. For some unstated reason, jurisdiction is used by the CPL synonymously to designate both the three-branch totality of state power and the local judicial exercise of power within a state.[63]

The CPL restates for venue (called "*jurisdiction* of counties") virtually identical claims made for state jurisdiction.[64] There are two minor modifications. One would shrink county venue vis-à-vis state jurisdiction by omission of criminal solicitation as an event occurring within a county sufficient to try.[65] The other expands venue compared with jurisdiction by conferring it outright in homicide cases upon the finding in a county of a body or its part, rather than merely creating a presumption that death occurred where such finding was made within the state.[66]

Practically all of the old Code provisions on venue for offenses

---

[60] Cunard S.S. Co. v. Mellon, 262 U.S. 100, 122 (1923).

[61] N.Y. CCP § 11-a. A nautical mile is one-sixtieth of a degree at the equator, or 6,080 feet.

[62] N.Y. CPL § 20.40(4)(i).

[63] *See id.* art. 20.

[64] *Compare id.* § 20.20(1), (2), (3) *with id.* § 20.40(1), (2), (3).

[65] *Compare id.* § 20.20(1)(c) *with id.* § 20.40(1)(b).

[66] *Compare id.* § 20.20(2)(a) *with id.* § 20.40(2)(b).

committed on boundaries, vessels and common carriers, bridges and tunnels and waters contiguous to New York City,[67] are continued in the CPL.[68] Expanded venue provisions are made for child abandonment,[69] bigamy,[70] and crimes committed in private vehicles.[71] The CPL does not explicitly contain provisions of former statutes that conferred both jurisdiction and venue to punish for larceny a theft committed outside the state when the thief brings the stolen goods into the state,[72] or to punish for abduction or kidnapping the out-of-state defendant who sends his victim into the state.[73]

Other Preliminary Considerations

Time Limitations

Since the King could do no wrong, it was impossible at common law that delay in pressing any claim of the Crown, civil or criminal, could be raised by a defendant, even if all his witnesses might have died, disappeared or forgotten the occurrence. In 1863, there was a prosecution in England for larceny of a leaf from a parish registry that happened sixty years before.[74] Such a state of affairs obviously leads to abuse and prejudice. To remedy the situation, time limitations upon criminal prosecutions were initiated. These boundaries are of two sorts: those governing intervals between commission of the crime and commencement of the prosecution; and those regulating the time gap between commencement and final disposition. The first relates to state statutes of limitation; the second to speedy trial, a federally imposed constitutional requirement in state proceedings.

The CPL in a single section[75] incorporates, with virtually no change, the provisions on time limitations within which a criminal action must be commenced contained in the old Code: Class *A* felony, at any time; any other felony, within five years; misdemeanor, within two years; petty offense, within one year; larceny involving violation of fiduciary duty, within one year of discovery or when discovery should have been made.[76] The tolling provisions of the old Code are also continued; if the defendant is either outside the state or his whereabouts

67 *Compare* N.Y. CCP § 135 *with* N.Y. CPL § 20.40(4)(c).
68 *Compare* N.Y. CCP §§ 134-a —137 *with* N.Y. CPL § 20.40(4)(c), (d), (e).
69 N.Y. CPL § 20.40(4)(a).
70 *Id.* § 20.40(4)(b).
71 *Id.* § 20.40(4)(g).
72 *Old N.Y. Penal Law* §§ 1301, 1930(2).
73 *Id.* § 1930(4).
74 A. V. Clements, Criminal Law & Procedure 710 (1952).
75 N.Y. CPL § 30.10.
76 N.Y. CCP §§ 141, 141-a, 142.

are unknown the period is extended by a maximum of five years.[77] Similarly, a prosecution that is timely commenced is not defeated by dismissal of complaint or indictment beyond the period of limitation.[78] A new provision, relating to misconduct in office, sets the period at five years after termination of service.[79]

Three troublesome questions repeatedly arose under the old Code and judge-made or common law with respect to time limitations, and only one has been resolved by the CPL:

(1) When does the action commence? The CPL resolves this question, albeit in two widely separated and varying sections defining the term, by fixing the time either upon the filing of an indictment in a superior court, or filing an accusatory instrument in the lower criminal court.[80] The old Code required both the filing of a complaint and the issuance of a warrant of arrest if an indictment was not filed.[81] The usual wording of the statute, "All actions for . . . shall be commenced" within a specified time, has been interpreted to require more than merely filing a complaint with a magistrate and the issuance by him of a warrant in order to commence the action.[82]

(2) Suppose an action has been commenced for murder (no time limitation) six years after the death of the victim. The jury returns a verdict of guilty of manslaughter, first degree (five year limitation). May the defendant lawfully be punished under this verdict? Manslaughter is a lesser included crime on a charge of murder and ordinarily such conviction on the greater charge is valid. But, for purposes of time limitation, the general rule is that if it is too late to prosecute for manslaughter, it is too late to convict of manslaughter under any form of indictment or information.[83] The highest court of the state, divided four-to-three, took exception to this rule under the old Code almost seventy years ago.[84] The CPL is silent on this critical question.

(3) The basic question on time limitation is whether the issue is a jurisdictional one that may be raised at any time, or merely a procedural bar or affirmative defense which is waived if not raised prior to verdict. For example, suppose that an action has been commenced for

---

77 *Compare* N.Y. CPL § 30.10(4)(a) *with* N.Y. CCP § 143.

78 *Compare* N.Y. CPL § 30.10(4)(b) *with* N.Y. CCP § 144-a.

79 N.Y. CPL § 30.10(3)(a).

80 *Id.* §§ 1.20(16)(a), 100.05.

81 N.Y. CCP § 144.

82 Dubbs v. Lehman, 100 Fla. 799, 130 So. 36 (1930); Jarrett v. State, 49 Okla. Crim. 162, 292 P. 888 (1930).

83 *See* Annot., 3 A.L.R. 1331 (1919).

84 People v. Austin, 170 N.Y. 585, 63 N.E. 1120 (1902), *aff'g* 63 App. Div. 383, 71 N.Y.S. 601 (2d Dep't 1901).

manslaughter seven years after the death of the victim and a conviction is obtained for that crime in some degree. The defendant had been out of the jurisdiction for at least two years between the death of the victim and commencement of the action. The question of time limitation is raised by defendant for the first time in a collateral attack by coram nobis. If the court sustains the writ, may the defendant be tried again? If the limitation is jurisdictional, the answer is "no," as it happens to be in many states.[85] The CPL is again silent on this important question.

Former Jeopardy

In *Palko v. Connecticut*,[86] the defendant had been indicted for first degree murder, convicted after jury trial of murder in the second degree and sentenced to life imprisonment. The state appealed under a statute authorizing such appeal "upon all questions of law," and won a new trial. Defendant on retrial was convicted of murder in the first degree and sentenced to death. On appeal, the Supreme Court affirmed, holding that only when jeopardy subjected a defendant to " a hardship so acute and shocking that our polity will not endure it" did due process in the fourteenth amendment apply.[87] Thirty-two years later — after the Revision Commission had adopted the former jeopardy provisions in their present form — the Court announced, *"Palko v. Connecticut* is overruled."[88]

Authoritative standards on what constitutes former jeopardy must now be formulated for state proceedings by the Supreme Court and not by state legislation or state court pronouncements. The CPL provisions must accordingly be examined in the light of federal standards. The CPL flatly restates the state constitutional prohibition that a person may not be twice prosecuted for the same offense.[89] Separate prosecution for offenses based upon the same transaction are also barred with six exceptions.[90] One of these exceptions is when each offense involves "loss or other consequence to a different victim."[91] In *Ashe v. Swenson*,[92] Ashe was acquitted after trial by jury of the robbery of Donald Knight, one of six victims held-up while engaged in a poker game.

85 *Compare* People v. McGee, 1 Cal. 2d 611, 36 P.2d 378 (1934) *with* People v. Austin, 170 N.Y. 585, 63 N.E. 1120 (1902).

86 302 U.S. 319 (1937).

87 *Id.* at 328.

88 Benton v. Maryland, 395 U.S. 784, 794 (1969).

89 N.Y. CPL § 40.20(1). *Compare* N.Y. CONST. art. I, § 6 ("subject to be put *in jeopardy twice for the same offense*") *with* U.S. CONST. amend. V ("subject for the same offense to be *twice put in jeopardy of life or limb*").

90 N.Y. CPL § 40.20(2).

91 *Id.* § 40.20(2)(e).

92 397 U.S. 436 (1970).

Ashe was one of four alleged robbers arrested. He was then tried for the robbery of another victim, Roberts, and convicted. The Supreme Court reversed this conviction, in a seven-to-one determination. The opinion of the Court found the doctrine of collateral estoppel part of the fifth amendment made applicable to the states by the fourteenth, and held that the first acquittal was an implicit finding by the jury that Ashe not only did not rob Knight, but also that he was not one of the band of robbers at all. Three justices adopting the "same transaction" test would have barred the conviction even if he had participated in robbing the second victim. A single dissent by the Chief Justice applied the "same evidence" test — apparently adopted by the CPL — which was not met because evidence of a different victim was required in each trial.

If criminal proceedings are nullified by a subsequent court order, there is no bar to further prosecution if the court "authorizes the people to obtain a new accusatory instrument *charging the same offense.*"[93] In *Price v. Georgia,*[94] the Supreme Court unanimously condemned this procedure for recharging. Price, on indictment for murder, was convicted of voluntary manslaughter. His conviction was reversed by the state appellate court because of an erroneous jury instruction. Price was again placed on trial for murder under the original indictment. The jury in the second trial, like the first, found defendant guilty of voluntary manslaughter. The Supreme Court, considering the contention that the defendant suffered no greater punishment on the second conviction concluded: "We must reject this contention. The Double Jeopardy clause . . . is cast in terms of the risk or hazard of conviction, not of the ultimate legal consequences of the verdict. . . . There is a significant difference to the accused whether he is being tried for murder or manslaughter."[95]

The decisions of the Supreme Court announced contemporaneously with enactment of the CPL have cast a long constitutional penumbra over some of its provisions. The CPL defines a previous prosecution as one in which the charge has been filed anywhere and "[p]roceeds to

---

93 N.Y. CPL § 40.30(4). The other five exceptions for separate trials of offenses based on the same transaction are: offenses having "substantially different elements"; where each offense contains an element not an element of the other *and* each is "designed to prevent very different kinds of harm or evil"; where one offense is possession and the other use, other than the sale of contraband; where one offense results in injury and the other homicide when death results after prosecution for the first offense; and where the first prosecution is terminated in another jurisdiction for insufficient proof of an element not requisite for proof of the offense in this state.

94 398 U.S. 323 (1970).

95 *Id.* at 331 & n.10.

a trial stage and a witness is sworn."[96] But in a new provision, the CPL authorizes appeal by the prosecution upon a trial order of dismissal at "the conclusion of the people's case or at the conclusion of all the evidence."[97] In *Kepner v. United States*,[98] a lawyer in Manila was charged with embezzlement of the funds of a client. He was tried and acquitted. Upon appeal by the Government authorized by statute, the Phillipine high court reversed the judgment for error. Kepner was retried, found guilty, and sentenced to imprisonment. The Supreme Court held that Kepner was placed in jeopardy a second time contrary to the fifth amendment which applied directly to the Phillipines. Justice Holmes, in dissent with two others, observed: "[I]t seems to me that logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause."[99] After citing this case, Justice Cardozo in *Palko*, holding that due process did not incorporate and make applicable to the states the double jeopardy provision in the fifth amendment, said: "Right-minded men, as we learn from those opinions, could reasonably, even if mistakenly, believe that a second trial was lawful in prosecutions subject to the fifth amendment, if it was all in the same case."[100]

However cogent the logic of Justice Holmes, it was not the opinion of the Court. However authoritative the holding of Justice Cardozo, it has been overruled. The CPL, in following this logic and authority, has again set sail on a sea of constitutional doubt.

Commencement of Prosecution

Criminal actions may be commenced only by filing an appropriate accusatory instrument in court.[101] Such instruments include indictments filed in a superior court (supreme or county) that must include at least one charge of the grade of felony or misdemeanor. They also include the following five instruments that are filed in a local criminal court:

(1) *Information*, verified by complainant, for misdemeanors only,

[96] N.Y. CPL § 40.30(1). The same definition results if a plea of guilty is entered. Excepted are cases in which the court lacks jurisdiction, when the prosecution has been procured by the defendant, without the prosecutor's knowledge, in order to avoid prosecution for a greater offense, or when the proceedings are nullified by court order that authorizes or directs a new charge or trial. *Id.* § 40.30(2), (3), (4).

[97] *Id.* § 290.10.

[98] 195 U.S. 100 (1904).

[99] *Id.* at 134 (dissenting opinion).

[100] 302 U.S. at 323.

[101] N.Y. CPL art. 100.

serves both to commence action and as a basis for its prosecution;

(2) *Misdemeanor Complaint,* same as information except that defendant's consent is necessary if it is to serve as basis for prosecution;

(3) *Felony Complaint,* same as misdemeanor complaint, except that it charges only felonies;

(4) *Prosecutor's information,* a new instrument containing a nonverified charge for misdemeanors filed by the district attorney, serving both to commence action and a basis for its prosecution;

(5) *Simplified traffic information,* a new instrument, same as prosecutor's information except it relates only to traffic infractions and misdemeanors and is filed by a police officer.

Defendant's appearance upon filing an accustatory instrument may be compelled by the local criminal court by issuance and execution of a warrant of arrest or summons, formerly known as a court summons. Prior to such filing, defendant's appearance may be compelled by an arrest without a warrant or by an appearance ticket, formerly known as a police summons.[102] A warrant of arrest may be issued upon filing of any accusatory instrument, except a traffic information. Its issuance is entirely in the discretion of the court and a summons may be substituted.[103]

Major change is made in the law of arrest without a warrant and its incidental consequences, such as station-house bail and issuance of in-lieu-of-arrest appearance tickets. At common law, the validity of an arrest depended upon whether (a) the arresting person was a peace officer or private person; (b) the offense was a felony or a misdemeanor; (c) the offense was committed in the officer's presence; and (d) the nature of the reasonable or probable cause for the arrest. The last requirement is the heart of the demand of the fourth amendment with respect to "seizure of . . . persons." Reasonable cause for arrest also affects the validity of search and seizure of evidence without a search warrant, again a matter of final determination as a federal question by the Supreme Court.

The major innovations effected by the CPL are these: (a) Elimination of the requirement of commission of misdemeanors in their presence for valid arrests by police officers and peace officers acting pursuant

102 *Id.* art. 110.
103 *Id.* arts. 120 & 130.

to their special duties. This is a salubrious provision because at the time of summary arrest determination of whether the crime committed is of the grade of Class *E* felony or Class *A* misdemeanor is frequently difficult to make, *e.g.*, whether the value of an item stolen is more or less than $250. (b) For non-police peace officers, curtailment of their powers of arrest when not acting pursuant to their special duties. (c) For both police and non-police peace officers, introduction of the factor of geographical area of employment to affect power to arrest. (d) For non-felony arrests, determination in what county such arrests may lawfully be made.[104] How these new factors operate to affect the validity of arrests is set forth below.

What happens between arrest and arraignment of a prisoner currently is called "The Custodial Merry-Go-Round."[105] Despite existing statutory commands that a prisoner upon arrest be taken to the nearest court in session, "without unnecessary delay"[106] or "immediately,"[107] for decades contrary administrative police regulations have required that he be taken "to the station house of the precinct of arrest for search and record."[108] For example, in New York City, if printing and photographing is necessary,[109] the prisoner must be taken to either the

---

104 *Id.* art. 140; *see* Table IV *infra.*

105 *See* Ludwig, *Stopping the Custodial Merry-go-Round,* 31 QUEENS BAR BULL. 7 (1968).

106 N.Y. CCP § 165.

107 N.Y.C. ADMIN. CODE § 435-12.0 (1963).

108 N.Y.C. POLICE DEP'T, RULES AND PROCEDURES ch. 9, ¶ 5.0 (1970).

109 The CPL requires fingerprinting for all felonies and those misdemeanors defined in the Penal Law. N.Y. CPL § 160.10(1)(c) also requires fingerprinting for non-penal law misdemeanors that would constitute a felony if the defendant had a previous conviction. There are five such "outside" misdemeanors: N.Y. VEH. & TRAF. L. §§ 380 (use of vehicle to transport dangerous chemicals — two prior convictions, *same* crime), 1192 (driving while intoxicated — one prior conviction, *same* crime) (McKinney 1960); N.Y. ALCO. BEV. CONTROL L. §§ 152 (sale of illicit alcohol — one prior conviction, *same* crime, or under § 154), 154 (using premises for illicit alcohol — one prior conviction, *same* crime, or under § 152) (McKinney 1946); N.Y. ELECTION L. art. 16 (§§ 420-462) (election franchise violations — one prior conviction under *same* article) (McKinney 1964). In addition, in the case of a single violation, *i.e.*, loitering for the purpose of deviate sexual behavior, N.Y. PENAL LAW § 240.35(3) (McKinney 1967), fingerprinting is required. N.Y. CPL § 160.10(1)(d).

N.Y. CCP § 552 requires fingerprinting and photographing for all felonies, "outside" misdemeanors and the loitering violation, as in the CPL, but sharply delimits the requirement for other misdemeanors to thirteen in all, principally petty criminal conduct indicative of repetitive or more dangerous behavior, *e.g.*, possession of weapons, burglar's tools and narcotics.

Misdemeanor arrests in 1970 (up 21.1 percent over 1969) amounted to 94,024 and misdemeanor summons (up 1.5 percent over 1969) amounted to 147,019 in the City of New York, or a total of 241,043 misdemeanor cases. The felony arrests in 1970 (up 26.3 percent over 1969) amounted to 94,024. It is fair to assume that the extension of the requirement of fingerprinting and photographing to *all* misdemeanors (arrest and appearance tickets) will result in the taking and forwarding of at least one-quarter million more in the City of New York alone, commencing September 1, 1971. Unlike procedure under the

Offense	Police Officer	Peace Officer acting pursuant to special duties	Peace Officer not acting pursuant to special duties	Private Citizen
Felony	(1) Reasonable cause to believe arrestee committed same (2) Whether in presence or otherwise (3) Anywhere in state regardless of county of commission (4) Close pursuit inside and outside state	Same as police officer	(a) Within geographical area of employment: (1) Reasonable cause to believe arrestee committed same (2) whether in presence or otherwise (b) Outside geographical area of employment: (1) Reasonable cause to believe arrestee committed crime (2) In his presence (3) Arrest made promptly	(1) Arrestee has in fact committed same (2) Whether in presence or otherwise (3) Anywhere in state
Misdemeanor	Same as for felony	Same as police officer	(a) Within geographical area of employment: (1) Arrestee has in fact committed same (2) In his presence (b) Outside geographical area of employment: Same as private citizen	(1) Arrestee has in fact committed same (2) In his presence (3) Only in county of commission
Petty Offense (violation, traffic infraction)	(1) Reasonable cause to believe arrestee committed same (2) In his presence (3) Within geographical area of his employment (4) May arrest in adjoining county (5) Close pursuit inside state	Same as police officer	Same as for misdemeanor	Same as for misdemeanor

SOURCE: N.Y. CPL §§ 140.05, 140.10, 140.15, 140.25, 140.30, 140.35.

east end of Brooklyn or the south end of Manhattan for "mugging," simply because the nation's largest police department possesses only two cameras for this purpose. The consequences are a lengthy inter-precinct custodial merry-go-round, sometimes involving more than sixty miles of travel by the prisoner and at least two police officers through heavy city traffic.

The CPL partially alleviates this avalanching impasse within the City of New York in non-felony cases in three ways:

(1) *Appearance ticket.* After arrest, the arresting officer may release his prisoner from custody and serve him with an appearance ticket, but is not required to do so if the prisoner is under the influence of alcohol or other drugs.[110] An appearance ticket may under such circumstances be issued by a non-police public servant in the line of authorized duty[111] and similarly by a police officer, in the case of an arrest by a private person, when unable to arraign the prisoner promptly.[112] If station-house bail cannot be posted by an arrestee, under all of these circumstances, an appearance ticket may also issue.[113]

(2) *Station-house bail.* For all non-felony arrests, the desk officer may fix pre-arraignment bail — $500 maximum for Class *A* misdemeanors, $250 for Class *B*, and $100 for violations and infractions.[114] Fixing bail solely upon consideration of the offense charged is quite improper. The test ought to be the probability that defendant will appear, and this probability is ascertained by the gravity of the offense charged, but, in addition, many other factors, such as those bearing on roots in the community.[115]

(3) *Discharge by arresting police officer.* Under the old Code, only the court could discharge a prisoner once an arrest was made. The CPL authorizes the arresting police officer to release his prisoner if he is satisfied after further investigation that there is not reasonable cause to believe the arrestee committed the offense.[116] While prompt rectification is desirable, clearly such provision requires careful implementation by police procedures, such as approval of a superior officer, to assure that justice has the appearance of justice.

---

old Code, these must be individually processed (forwarded and return of record) through the New York State Identification and Intelligence System in Albany rather than through the Bureau of Criminal Identification of the police in Manhattan.

110 N.Y. CPL §§ 140.20(2)(a), 150.20(1), (2).

111 *Id.* § 140.40(2).

112 *Id.*

113 *Id.* §§ 140.20(2)(b), 140.40(2).

114 *Id.* §§ 140.20(2)(b), (3), 140.27(3), 140.40(2), 150.30(2).

115 *See* Ludwig, *Bail*, in HANDBOOK ON BAIL, COMPLAINTS, ARRAIGNMENT 104 (Office of the Queens Dist. Att'y 1969).

116 N.Y. CPL § 140.20(4).

COURT FIXED BAIL

Does any defendant have a *right* to bail? On the constitutional level, both state and federal provisions contain prohibitions against *excessive* bail, but not guarantees of bail.[117] Most state constitutions contain guarantees of bail in all but capital cases. The historic Judiciary Act of 1789[118] — considered as fundamental as the Constitution itself that took effect during the same year, contains the same guarantee. Under current provisions in New York, bail in all cases in whatever court is discretionary and not mandatory. No explicit decision of the Supreme Court has thus far made the prohibition with respect to excessive bail contained in the eighth amendment applicable to the states.[119]

Any right to bail in New York is purely statutory. Under the old Code, in non-felony cases pre-conviction bail was mandatory[120] and post-conviction bail discretionary.[121] In felony cases, pre-conviction bail was discretionary.[122] The CPL continues these provisions.[123] Generally accepted case law criteria for the exercise of discretion are set forth to establish the central question in pre-conviction bail. "The kind and degree of control or restriction that is necessary to secure his court attendance when required."[124] For post-conviction bail, a criterion in addition to likelihood of court appearance, is set up: "[t]hat the appeal is palpably without merit alone justifies, but does not require, denial."[125]

In addition to restatement of criteria, the CPL makes more flexible the kind of security to assure court appearance by introducing two intermediate devices between outright release on recognizance and a bail bond, *viz.*, a partially secured surety or appearance bond and an unsecured similar instrument.[126]

PROCEEDINGS PRELIMINARY TO TRIAL

The identical felony case may still be processed in two separate criminal court systems — local and superior. Defendants in misdemeanor cases within the City of New York, but not outside, are still

117 N.Y. CONST. art. I, § 5; U.S. CONST. amend. VIII.
118 Act of Sept. 4, 1789, 1 Stat. 73.
119 *See* Table III *supra*.
120 N.Y. CCP § 553(1).
121 *Id.* § 555(2).
122 *Id.* §§ 552, 553(2).
123 N.Y. CPL §§ 510.30(1), 530.20, 530.50.
124 *Id.* § 510.30(2)(a). The seven criteria have been enumerated in People *ex rel.* Gonzales v. Warden, 21 N.Y.2d 18, 233 N.E.2d 265, 286 N.Y.S.2d 240 (1967), *cert. denied*, 390 U.S. 971 (1968), and in FED. R. CRIM. P. 46(c).
125 N.Y. CPL § 510.30(2)(b).
126 *Id.* §§ 500.10(18), (19), 520.10(1)(e), (f), (g), (h).

entitled to preliminary hearings in the lower criminal court just as in felony cases.[127] Motion practice and the grounds for such motions restate present case law and are virtually identical both in the local criminal court for petty offenses, misdemeanors and felonies, and in the superior court for indictments.[128]

While the power of the grand jury to inquire into any crime is confidently asserted under the old Code,[129] the practice uniformly has been to proceed by indictment only if at least one count amounted to a felony, unless a superior court certifies presentation of a pending misdemeanor case to the grand jury.[130] Under the CPL, an indictment need contain no count charging a felony and may charge petty offenses so long as a single count charges a misdemeanor.[131] The expanded option to proceed by indictment in non-felonious offenses is useful in those misdemeanor cases in which either minimum exposure of complainants or rapid procedure is necessary and desirable at the accusatory state, *e.g.*, undercover agents in narcotic cases, victims of blackmail threats (aggravated harassment) and sex offenses, and witnesses whose departure from the jurisdiction is imminent. The grand jury continues its power of inquiry into conduct of public servants, whether criminal or not.[132] It may act by indictment, direction to file information, dismissal of charge or submission of report.[133]

Significant change is made in the form of indictment. At the close of the 18th century, all felonies except petty larceny and mayhem were subject to capital punishment at common law. During the decade ending 1818, 7,074 were sentenced to death. Of the 808 actually executed, 645, or 80 percent were for offenses other than murder.[134] Every judicial effort was made to nullify the imposition of the extreme penalty. The common-law indictment was the principal procedural device to achieve humanitarian restraint. Misspelling the defendant's name, or omitting his title "Esq." was fatal. The same was the case for failure to use technical words, such as home-made Latin "Burglariter" in setting out the crime. One hundred yards of parchment was required for the indictment for treason in *O'Connell's case*.[135]

The old Code in 1881 eliminated these devices of nullification. In

---

127 *Id.* § 170.75.
128 *Cf. id.* §§ 170.30, 180.10-180.80, 210.20.
129 N.Y. CCP § 252.
130 *Id.* § 57; *cf.* N.Y. CPL § 170.25.
131 N.Y. CPL § 200.10.
132 *Id.* § 190.55(2)(c).
133 *Id.* § 190.60.
134 REPORT OF SELECT COMM. ON CAPITAL PUNISHMENT, *supra* note 4, at viii.
135 3 St. Tr. (n.s.) 1 (1844).

1929, the pendulum swung as far as conceivable from common-law pleading when Caleb Baumes[136] capped his crusade against crime by placing a form indictment of just eighteen words and the defendant's name in the Code and having it declared sufficient by the legislature.[137] Coupled with the mandate of a bill of particulars to be supplied by the district attorney, the short form indictment has been upheld against attack that the district attorney, and not the grand jury, is really making the accusation when he supplied time, place, circumstances and identity of victim in the bill.[138]

The CPL adopts a neutral course between the abbreviated "notice" pleading and the over technical "fact" accusation of the common law. It requires that the indictment both name the offense and the acts constituting it, as under the old Code.[139] The CPL, unlike the old Code, also requires allegation that the offense was committed in a designated county and at some designated time or period of time.[140] The CPL restates case law under the old Code as expansively as possible on joinder of offenses and consolidation of indictments.[141]

The remaining significant change in accusatory proceedings are provisions that fortify the indictment against quashing by the court. At the close of the last fiscal year, one county within the City of New York had 31.4 percent of its 372 indictments dismissed before trial.[142] Current procedure under the old Code, requires that the grand jury receive none but legal evidence[143] and the quantum of evidence to indict amounts to that necessary to convict, if uncontradicted, *viz.*, proof beyond a reasonable doubt.[144] There is a statutory prescription that the determination of sufficiency of evidence be "in *their* judgment"[145] and a case law requirement that the defendant present prima facie proof of

---

136 Assemblyman, 1909-1913; Senator, 1919-1930.

137 N.Y. CCP § 295-d: "The grand jury of the county of Albany, by this indictment accuse Richard Roe of the following crime: Murder."

138 People v. Bogdanoff, 254 N.Y. 16, 171 N.E. 890 (1930).

139 *Compare* N.Y. CPL § 200.50, *with* N.Y. CCP §§ 275, 276.

140 *Compare* N.Y. CPL § 200.59(5), (6), *with* N.Y. CCP §§ 280, 284; *see also* People v. Hetenyi, 277 App. Div. 310, 98 N.Y.S.2d 990 (4th Dep't), *aff'd*, 301 N.Y. 757, 98 N.E. 819 (1950); People v. Guiley, 222 N.Y. 548, 118 N.E. 1072 (1917).

141 *Compare* N.Y. CPL §§ 200.20, 200.40, *with* N.Y. CCP § 279; *see also* People v. Bussey, 297 N.Y. 627, 75 N.E.2d 742 (1947) (two murders committed on successive Saturdays, indictments consolidated); People v. Virga, 259 App. Div. 706, 18 N.Y.S.2d 1022 (1st Dep't), *aff'd*, 285 N.Y. 725, 34 N.E.2d 895 (1941) (two kidnappings, one in April and the other in July); People v. Luciano, 277 N.Y. 348, 14 N.E.2d 433 (1938) (sixty-two separate crimes of compulsory prostitution).

142 REPORT OF THE ADMINISTRATIVE BOARD OF THE JUDICIAL CONFERENCE OF THE STATE OF NEW YORK, A 65 (1970).

143 N.Y. CCP § 256.

144 *Id.* § 251.

145 *Id.*

insufficient evidence in order to have the grand jury minutes inspected and the indictment set aside.[146] In practice, the reviewing judge frequently assumes veto power over the findings of fact by a grand jury, and substitutes his judgment for theirs. Motions to inspect minutes and set aside indictments are granted on mimeographed notices and affidavits, and even on oral applications.

The federal and state constitutions contain virtually identical provisions concerning indictment by a grand jury. But the federal district court, mindful that it is a creature of Congress and the grand jury a body created by the Constitution, accords an indictment an overwhelming presumption that it is based upon competent evidence. A heavy burden is placed on a defendant to overcome this presumption. The burden has been made even heavier by recent decisions. In *United States v. Costello*,[147] defendant was convicted of tax fraud after trial at which the prosecution called 144 witnesses and introduced 368 exhibits. The grand jury had heard only three witnesses, each without firsthand knowledge. The Supreme Court unanimously held that an indictment is sufficient even though based entirely upon hearsay evidence.

> Neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act. . . . If indictments were open to challenge on the ground that there was inadequate or incomplete evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury.[148]

The CPL takes a step, albeit not a giant one, in the direction of federal procedure on challenge to an indictment for insufficiency of evidence. First, the quantum of proof necessary to indict has been reduced from the standard of proof necessary to convict, if uncontradicted, to "reasonable cause to believe" defendant committed the offense.[149] This is the identical standard for an arrest without a warrant. In *People v. Nitzberg*,[150] the Court reversed a conviction of murder because the evidence before the grand jury, not the evidence at trial, failed to meet the standard of sufficiency to convict. The CPL overrules

146 *Id.* § 313; *see also In re* Montgomery, 126 App. Div. 72, 110 N.Y.S. 793 (1st Dep't 1908); People v. Steinhardt, 47 Misc. 252, 93 N.Y.S. 1026 (Sup. Ct. N.Y. County 1905).

147 350 U.S. 359 (1956).

148 *Id.* at 362; *see also* United States v. Blue, 384 U.S. 251 (1966); Lawn v. United States, 355 U.S. 339 (1958)—unconstitutionally seized or tainted evidence before grand jury is not a basis to abate prosecution and require a new indictment.

149 N.Y. CPL § 190.65(1)(b).

150 289 N.Y. 523, 47 N.E.2d 37 (1943).

Nitzberg and moves in the direction of *Costello*: the validity of a denial of a motion to inspect and dismiss an indictment is not reviewable upon an appeal from an ensuing judgment of conviction.[151]

Second, the requirement that the evidence before the grand jury be "legally sufficient"[152] has been relaxed so as to make competent certain hearsay evidence in the form of a certified report by a public servant or agency, or a person employed by them, concerning examinations, comparisons and tests of a scientific or professional nature.[153]

Finally, the CPL is explicit that challenges to indictments on grounds of insufficiency of evidence must be in writing and "must contain sworn allegations of fact supporting such claim."[154] If appellate courts insist that this provision is not directory but fundamental for dismissal of an indictment, then the current number of dismissals will be substantially reduced.

Discovery

The most significant innovation in the CPL is the codification of rules of discovery borrowed almost verbatim from the Federal Rules of Criminal Procedure which were drastically revised in 1966. Some exchanges between adversaries were required under the old Code, and these are continued in the CPL: a bill of particulars supplementing the indictment and concerning the nature and character of the charge, but not containing evidentiary matter, to be supplied by the prosecutor;[155] notice by defendant of intent to rely on defense of mental disease and defect;[156] and the bill of particulars required to be furnished by defendant upon demand by the prosecutor concerning alibi.[157] In addition, to a limited degree, the power of "courts of criminal jurisdiction to compel the discovery of documents in furtherance of justice" was acknowledged, "but concededly there were only the beginnings or at least the glimmerings of such a doctrine."[158]

For sixteen years, debate raged over the adoption of the revised 1966 federal rule. Opponents argued that discovery in criminal cases

---

151 N.Y. CPL § 210.30(6).

152 *Id.* § 190.65(1)(a).

153 *Id.* § 190.30(2).

154 *Id.* § 210.30(2).

155 *Compare* N.Y. CCP §§ 295-g, 295-h, 295-i *with* N.Y. CPL § 200.90.

156 *Compare* N.Y. CCP § 336 *with* N.Y. CPL § 250.10.

157 *Compare* N.Y. CCP § 295-*l with* N.Y. CPL § 250.20. In Williams v. Florida, 399 U.S. 78 (1970), a divided Court sustained a state alibi-notice statute that specifically required reciprocal notice by the prosecution naming the witnesses to be used in rebuttal of the defense. The Court explicitly left open what the result would be under a non-reciprocal statute, such as that in the CPL. *Id.* at 82 n.11.

158 People *ex rel.* Lemon v. Supreme Court, 245 N.Y. 24, 27, 156 N.E. 84, 86 (1927).

would encourage perjury, intimidation of prosecution witnesses and, unlike civil litigation, unequally favor defendants because their privilege against self-incrimination would be a shield against comparable disclosure to the prosecution. Proponents urged that the higher stakes in criminal cases (infamy of conviction, loss of liberty), compared with monetary loss in civil litigation, required at least as much discovery, and probably more, in criminal matters as that under existing rules of civil procedure that permitted virtually unlimited discovery. Other countries, such as England and Canada, and other systems, such as military courts, had found disclosure successful.

Whatever the merits, the proponents have prevailed, and, moreover, are likely to prevail still further. During the last term, the Supreme Court said that "[t]he adversary system of trial is hardly an end to itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played."[159] As a matter of due process in the fourteenth amendment, the Court held, in *Mooney v. Holohan*,[160] a conviction void because the evidence, favorable to the defense, was suppressed by the prosecution. *Brady v. Maryland*[161] expanded *Mooney*: "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."[162]

In 1946, rule 16 of the Federal Rules of Criminal Procedure, was first adopted and, in effect, provided the defendant with access only to material that would otherwise have been available to him but for its impounding by the Government. The drastic revision of 1966, adopted by the CPL, makes much more evidence available, and federal decisions prior to revision have virtually no current effect. Under the comparable provisions of the revised rule 16 and article 240 of the CPL, discovery by defendant is divided into three classes: (1) Automatic, mandatory, unconditional discovery upon motion by defendant for (a) his testimony before the indicting grand jury, and (b) a written or recorded statement (other than an intercepted communication under authorized eavesdropping) made to law enforcement personnel or their agents; (2) Discretionary discovery by defendant concerning physical or mental examinations, or scientific tests or experiments, subject to condition of granting a prosecution motion for discovery of property of the same

159 Williams v. Florida, 399 U.S. at 82.
160 294 U.S. 103 (1935).
161 373 U.S. 83 (1963).
162 *Id.* at 87.

kind provided there is a showing that the property sought by the prosecution is (a) not exempt, *i.e.*, memoranda, work papers, witness' statements taken by defense, (b) material to prosecution preparation, and (c) reasonable; and (3) Discretionary discovery by defendant of other property, (a) subject to condition of prosecutorial discovery, limited above, (b) not exempt, (c) specifically designated, (d) a showing of materiality to defense, and (e) a showing of reasonableness.[163] Provision is made for subsequent orders of protection and *in camera* opposition by the prosecution which shall be sealed and made part of the record on appeal.[164] An order of disclosure imposes a continuing duty and noncompliance is subject to a variety of sanctions.[165]

Further liberalization of criminal discovery is clearly indicated. While discovery under the CPL falls short of that permitted under federal rule 16, some states currently exceed the federal requirements.[166] The American Bar Association's Project on Standards for Criminal Justice has recommended "more permissive discovery practices for criminal cases than is provided by applicable law in any jurisdiction in the United States."[167]

Pre-Trial Motions

Reference has been made to the motion to dismiss an indictment for insufficiency of evidence before the grand jury.[168] This is one of nine motions addressed to the indictment or information that now must be made prior to plea. Moreover, these motions cannot be made piecemeal: the challenges must issue in a single omnibus attack.[169] Under the old Code, the defendant was first arraigned, furnished a copy of the indictment, entered a plea to it and then a time was set within which to make motions.[170] Former jeopardy was a plea that raised an issue for the trier of fact,[171] instead of the more rational disposition under the CPL as a question of law by motion before plea. The archaic demurrer required a motion to withdraw a plea of not guilty before it could be interposed under the old Code. If the demurrer was overruled, a second plea to the indictment was required.[172] The CPL, with its single manda-

163 N.Y. CPL § 240.20.
164 *Id.* § 240.20(5).
165 *Id.* § 240.40.
166 *See* Langrock, *Vermont's Experiment in Criminal Discovery*, 53 A.B.A.J. 732 (1967); Louisell, *Criminal Discovery*, 49 Calif. L. Rev. 56 (1961).
167 ABA, Discovery and Procedure Before Trial 1 (Tent. Draft 1969).
168 *See* notes 149-51 and accompanying text *supra*.
169 N.Y. CPL § 210.20.
170 N.Y. CCP § 332.
171 *Id.*
172 *Id.* § 312.

tory motion in umbrella form before pleading, has shortcircuited disposition of challenges to the indictment.

Concerning motions to suppress evidence to be offered at trial by the prosecution, made after plea and before trial, the CPL expands existing statutory motions[173] by adding two new classes: (1) potential testimony on identification of the accused that would be inadmissible because of a previous identification improperly made by the witness;[174] and (2) the "fruit of the poisonous tree,"[175] *i.e.*, tangible evidence obtained as a consequence of unlawful search and seizure, eavesdropping or involuntary confession.[176] Like the challenges made to the indictment, the five addressed to potential evidence must be made in a single omnibus motion before trial.[177] In the case of potential testimony concerning confessions and identification, notice of intention by the prosecution to offer this evidence must be served upon the defendant to enable him seasonably to move to suppress before trial.[178] Failure to give notice is sanctioned by exclusion of the evidence, unless, of course, defendant moved to suppress without notice and the motion was denied.[179] Troublesome questions of conflict-of-laws on those motions under current provisions of the old Code are avoided, *e.g.*, whether a party is collaterally estopped by an adverse decision on suppression in the local criminal court from relitigating the matter in the superior court after indictment. Those are solved by requiring that all such motions in felony cases be made in the superior court whether pending in that court or the local criminal court, and that in all non-felony cases, the motion be made in the local criminal court. The superior court shall transfer undetermined pending motions in cases reduced from felonies to the local criminal court.[180] On hearing all such motions, the CPL restates existing case law and makes hearsay evidence admissible.[181]

TRIAL

The most controversial provision on the formation of a jury is the mandate that voir dire be conducted directly by counsel rather than by the court: "The court *must* permit both parties, commencing with the

173 *Id.* §§ 813-a-813-e (tangible property obtained by unlawful search and seizure), 813-j-813-m (eavesdropping evidence unlawfully obtained).

174 N.Y. CPL § 710.20(5); *see also* Gilbert v. California, 388 U.S. 263 (1967).

175 Wong Sun v. United States, 371 U.S. 471 (1963).

176 N.Y. CPL § 710.20(4).

177 *Id.* § 710.40.

178 *Id.* § 710.30.

179 *Id.* § 710.30(3).

180 *Id.* § 710.50.

181 *Compare id.* § 710.60(4), *with* People v. Coffey, 12 N.Y.2d 443, 191 N.E.2d 263, 240 N.Y.S.2d 721 (1963), *cert. denied*, 376 U.S. 916 (1964).

People, to examine the prospective jurors, individually or collectively, regarding their qualifications to serve as jurors in the action."[182] This restates practice under the old Code.[183] Recently, the Administrative Board of the Judicial Conference adopted a rule implementing the old Code that mandates that the judge presiding (1) initiate voir dire by identifying parties and counsel and outlining the case; and (2) put to prospective jurors questions on their qualifications. Discretionary with the judge is permitting the parties to examine jurors on their qualifications.[184] The federal rule simply places the question whether counsel or court conduct the examination of prospective jurors in the discretion of the court.[185] A survey of eighty-seven judicial districts in the federal court system shows that in criminal cases the examination is conducted by the court in fifty-three, by both court and counsel in twenty-two, and by counsel alone in only twelve.[186] Exclusion of counsel from direct examination of prospective jurors has frequently been upheld as not an abuse of discretion and no denial of the right to trial by a fair and impartial jury guaranteed by the sixth amendment.[187] Critics of judge-conducted examinations complain that efficiency and elimination of delay ought not be made paramount to the communicative and persuasive process that questioning by counsel initiates.[188] Whatever the balance, the CPL and the newest rule of the Administrative Board are on a collision course and one or the other must give way to amendment before the effective date of the CPL.

The CPL contains a new mandatory provision for preliminary instruction by the court on jury demeanor during trial, including specifically a prohibition against viewing the scene of the offense.[189] Beyond the mandatory preliminary instructions, nothing is changed in the order of trial prescribed by the old Code: the prosecutor must open, and the defense has the option to decline opening statement; evidence in chief to support the indictment is then presented by the prosecution; evidence supporting the defense is next offered; respec-

---

182 N.Y. CPL § 270.15(1).

183 N.Y. CCP § 369: "[T]he defendant must be informed by the court or under its direction, that if he intend to challenge an individual juror, he must do so when the juror appears." *Id.* § 370. "A challenge to an individual juror may be taken either by the people or by the defendant."

184 22 N.Y.C.R.R. 20.13 (adopted Dec. 17, 1970, effective Jan. 1, 1971).

185 FED. R. CRIM. P. 24.

186 *The Jury System in the Federal Courts*, 26 F.R.D. 409, 466 (1960).

187 Rodgers v. United States, 402 F.2d 830 (9th Cir. 1968); Ungerleider v. United States, 5 F.2d 604 (4th Cir. 1925), *cert. denied*, 169 U.S. 574 (1926).

188 *See* Youtt, *Voir Dire Has Its Proper Uses*, 57 A.B.A.J. 38 (1971).

189 N.Y. CPL § 270.40; *see also* People v. Crimmins, 26 N.Y.2d 319, 258 N.E.2d 708, 310 N.Y.S.2d 300 (1970).

tively, the parties may offer rebutting evidence, but the court, for good reason or in furtherance of justice, may permit additional evidence upon their original case; on conclusion of the evidence, unless the case is submitted to the jury on either side or both sides, without argument, the defense commences and the prosecution concludes the argument to the jury; finally, the court must charge the jury.[190] In its charge to the jury, the court must apply the law to the facts and "need not marshal or refer to the evidence to any greater extent than is necessary for such explanation."[191] Similarly, all other provisions of the CPL concerning evidence, standards of proof, trial without jury, and verdict, substantially restate statutory provisions of the old Code and the case law interpreting these provisions.

The pre-sentence conference that creates a forum to resolve controversies over information gathered by presentence investigators alleviates a long standing abuse.[192] All but a handful of the offenses defined by the Penal Law contain only maximum penalties and no minimum. Vast discretion is vested in the judge in sentencing, ranging from unconditional discharge to a maximum of twenty-five years. Yet this discretion heretofore has been exercised on the basis of an *ex parte* report that might contain material easily qualified, explained or controverted, if only defense counsel could be made aware of such material.

Post-judgment motions, like those addressed to the indictment and made for suppression of evidence, must be made in omnibus form, and include those made under the old Code and based upon case law as well as those created by statute.[193] A motion to set aside sentence not previously provided for in the old Code but allowed under case law, is explicitly set forth.[194]

Appeal is not a matter of right under due process; it is purely statutory. Until *Lyons v. Goldstein*,[195] there was no way by which a defendant could question a judgment of conviction after the time to appeal had expired. This was so even though the court may have lacked jurisdiction, or the conviction had been obtained on perjured testimony

---

190 *Compare* N.Y. CCP § 388 *with* N.Y. CPL § 260.30.

191 N.Y. CPL § 300.10(2); *cf.* People v. Montesanto, 236 N.Y. 396, 407, 140 N.E. 932, 936 (1923).

192 N.Y. CPL § 400.10; *see also id.* § 390.40 (defendant's pre-sentence memorandum).

193 *Compare id.* § 440.10 *with* N.Y. CCP §§ 467, 468, 469 (arrest of judgment: lack of jurisdiction, insanity); *see also* N.Y. CCP § 465 (new trial: felony trial, defendant absent; jury receives evidence out of court; jury separated after retiring; verdict by lot; erroneous instruction to jury; verdict against evidence; newly discovered evidence) N.Y. CPLR art. 70 (McKinney 1963) (habeas corpus); Lyons v. Goldstein, 290 N.Y. 19, 47 N.E.2d 425 (1943) (writ of error coram nobis).

194 N.Y. CPL § 440.20, 440.40.

195 290 N.Y. 19, 47 N.E.2d 425 (1943).

and was thus a fraud upon the court, or the defendant's constitutional rights had been violated. To remedy this, the Court of Appeals held in the *Goldstein* case that there was inherent power in the trial court to entertain a motion to vacate a judgment of conviction, in the nature of the common-law writ of error coram nobis. Later, the legislature permitted appeals from orders denying motions to vacate judgments.[196]

The major innovation on appeal is the authorization of the prosecutor to appeal from a trial order of dismissal, a matter of serious constitutional proportion.[197] Failure to file a notice of appeal within thirty days, once a fatal, jurisdictional omission, is now subject to a palliative application so long as it is made within one year of the judgment.[198]

PROGRAM FOR IMPROVEMENT

Ten major modifications are necessary if the CPL is to serve in superior fashion the ends of a worthwhile statute governing procedure in the administration of criminal law, *viz.*, acquitting the innocent and convicting the guilty, certainty of application, celerity of disposition, and the appearance as well as reality of a just rule.

Celerity of Disposition

Without sacrificing a just or certain disposition or its appearance, several amendments suggest themselves to eliminate the current most crying need in criminal law administration, the elimination of delay:

1. Geographic discrimination in requiring preliminary hearings and three-judge benches, should be abolished

Under current practice in the City of New York, for offenses of the grade of misdemeanor (other than gambling and crime under the Multiple Dwelling Law), a preliminary hearing, identical to that required in felony cases, was mandated upon request of defendant.[199] No such requirement existed for local criminal courts within the fifty-seven counties outside the city. In similar cases, a three-judge court for trial was mandatory upon request in the case of local criminal courts inside New York City, but not for those outside the city.[200] At first blush, any rational basis for this geographic distinction would normally operate in the reverse: The volume of misdemeanor cases is so great within the

196 N.Y. CCP § 517, *overruling* People v. Gersewitz, 294 N.Y. 163, 61 N.E.2d 427 (1945).
197 N.Y. CPL § 450.20; *see also* notes 94-100 and accompanying text *supra*.
198 N.Y. CPL § 460.30.
199 N.Y.C. CRIM. CT. ACT § 40 (McKinney 1963).
200 *Id.*

city compared to that outside, that one would reasonably anticipate a more expeditious and abbreviated procedure as a matter of necessity within the city.

The justification advanced for the intra-extra municipal difference in procedure has been that six-man jury trials were provided for the disposition of misdemeanor cases outside the city, but not within it.[201] These provisions for the geographic distinction in according preliminary hearings and three-judge trials in misdemeanors have been continued by the CPL.[202]

The CPL was approved by the Governor on May 20, 1970, to take effect on September 1st of the following year. On June 29, 1970, the Supreme Court held in *Baldwin v. New York*,[203] with specific reference to this state, that possible penalties of six months or more imprisonment made mandatory, under the federal Constitution, trial by jury. The bulk of misdemeanors defined by the Penal Law are of the grade Class *A*, punishable by a maximum of a year's imprisonment. With respect to these, trial by jury is now mandatory under the federal Constitution, whether within or outside the City of New York. The old rationale for requiring preliminary hearings within the city, but not outside, was that state law required jury trials outside. The basis of this distinction has now been obliterated in the case of Class *A* misdemeanors. Similarly, the three-judge requirement within the city, but not outside, has lost even the vestige of a rational basis for Class *A* misdemeanors under *Baldwin*. As to the relatively fewer Class *B* misdemeanors, punishable by a maximum of only one-third of the penalty provided for Class *A*, no sane reason can be advanced for a felony-type preliminary hearing. The discovery advantage to defendants supposedly assured by the preliminary hearing, is amply supplied by the brand new, federal type discovery article in the CPL.[204] It would be equally absurd to continue the requirement of a three-judge panel for the four-month maximum

201 N.Y. CONST. art. VI, § 18; N.Y. UNIFORM JUSTICE CT. ACT § 2011 (McKinney 1963); N.Y. UNIFORM DIST. CT. ACT § 2011 (McKinney 1963); N.Y. UNIFORM CITY CT. ACT § 2011 (McKinney 1963). The old Code contained no explicit provision on preliminary hearings or three-judge panels for misdemeanor cases in the City of New York. Both requirements were part of the New York City Criminal Court Act at a time when local criminal court jurisdiction was vested in a Magistrates Court and Court of Special Sessions. The preliminary hearing constituted the extent (absent waiver by defendant) of the Magistrates Court's jurisdiction in misdemeanor cases, *i.e.*, to conduct a hearing to determine whether the case should be held for trial in the three-judge Court of Special Sessions. When both courts were consolidated in 1962 for disposition of cases of misdemeanor and lower grade, the requirement of preliminary hearing became vestigial but, like the vermiform appendix in the human anatomy, continued to survive to the frequent discomfort of many.

202 N.Y. CPL §§ 170.75, 340.40(1), (2), (3).

203 399 U.S. 66 (1970).

204 *See* pp. 414-16 *supra*.

punishable Class *B* misdemeanor. Such trial is no longer available in Class *A* misdemeanor cases, punishable by a maximum of one year, when jury trial is waived. It has never been available in the case of violations, either within or without the city. It has never been available outside the city for Class *B* misdemeanors. The case for continuing the three-judge tribunal for Class *B* misdemeanors within the city has, from any view, been totally eroded by the march of events since the date of enactment of the CPL.

Based upon arrests and summonses for misdemeanors in the City of New York in the number of 241,043 during 1970 (an increase of 6.6 percent over 1969),[205] it is fair to assume that the elimination of preliminary hearings and three-judge panels will affect at least one-quarter million cases annually beginning September 1, 1971. If this number be multiplied by the eight times each case appears on calendars in the Criminal Court of the City of New York, some idea of shrinking delay may be realized by this single amendment.

2. Youthful offender cases should be processed as other criminal cases until verdict or plea of guilty. At that time, upon a single pre-sentence investigation, the court should determine whether judgment of conviction, or adjudication as youthful offender with records sealed, ought to be entered and treatment prescribed. Either a verdict or plea of guilty to a Class A felony, or verdict or plea of guilty to any felony when the offender has previously been convicted of a felony or adjudicated a youthful offender on conduct amounting to a felony, should be disposed of by entry of judgment of conviction

The bulk of major aggressive crime is committed by males in the young-adult stage of life. The salutary purpose of the Youthful Offender Law, enacted in 1942, was to divert a young person, who had committed a crime between his sixteenth and nineteenth birthday, from a subsequent criminal career, and to accomplish this by substituting for the stigma of criminal conviction an "adjudication" as "youthful offender."[206] Excluded mandatorily by statute from eligibility for the prescribed procedure and treatment, were youths in the defined age group who were charged with what now amounts to a Class *A* felony, or charged with any felony or misdemeanor who had "previously been convicted of a felony."[207] Administration of the Youthful Offender Law for a generation has made extremely rare any youth in the defined

205 *See* note 109 *supra.*

206 N.Y. CCP §§ 913-e-913-r; *see* Ludwig, *Considerations Basic to Reform of Juvenile Offender Laws*, 29 ST. JOHN'S L. REV. 226 (1955).

207 N.Y. CCP § 913-e.

age group who — regardless of the crime charged — has "previously been convicted of a felony." Prior to his sixteenth birthday, any crime committed would amount to only juvenile delinquency. During the brief three years of eligibility for "YO," any first felony committed, except the Class *A* variety, would have resulted in all probability in youthful offender adjudication. Under the old Code, most applications for YO procedure and treatment were in fact discretionary with the court.

A substantial defect of "certainty" results. One judge will deny YO for any crime of violence, regardless of background of the defendant. Another will grant such treatment, even for a defendant with convictions of misdemeanors or prior adjudications as a youthful offender for conduct amounting to a felony. Outside well-populated areas, a judge — bereft of investigatory probation facilities — must deny YO, regardless of his sympathies, even in misdemeanor cases.[208]

The major defect of the old Code is the mandated multiplex investigatory procedure by probation and other personnel that contributes to virtually interminable delay in the disposition of YO cases. First, there is a "recommendation" for the investigation itself to determine eligibility. This may be made by the grand jury, district attorney, or the court. If the recommendation is made by the district attorney, an investigation is actually made by his office in order that he recommend that an investigation for eligibility be made by the court. If approved by the court, a "second" investigation is made by probation personnel. If thereafter, YO is disapproved by the court, these two investigations will have been made in vain. If the court approves YO, and the youthful respondent is found guilty, still a *third* investigation, one to determine treatment, must be ordered by the court.

Under the old Code, the multiple investigations of eligibility prior to determination of guilt had been defended on the grounds that a different procedure was required for YO's vis à vis adult offenders. This is no longer the case. Youthful offenders subject to six months or more of complusory treatment — a class that embraces all YO's — are entitled to trial by jury on federal constitutional grounds.[209] Any attempt to bargain the stigma-less adjudication as youthful offender in exchange for waiver of this jury trial has been rejected by the state's highest court.[210]

---

208 *See, e.g.*, Zivin v. Nassau County District Court, 19 Misc. 2d 21, 23, 186 N.Y.S.2d 110, 113 (Sup. Ct. Nassau County 1959).

209 Baldwin v. New York, 399 U.S. 66 (1970).

210 People v. A.C., 27 N.Y.2d 79, 261 N.E.2d 620, 313 N.Y.S.2d 695 (1970).

The universal practice is to commingle the prescribed trial *in camera* before a judge with the processing of cases involving older offenders in open court. Under these circumstances, it seems clear that a new simplified procedure should be adopted. The central feature should be a single investigation by probation after determination of guilt to determine (1) whether or not the defendant should be convicted or adjudicated a youthful offender; and (2) the sort of treatment to be prescribed. The CPL falls far short of this goal.[211]

3. To prevent dilatory tactics, definitive time limitations should be prescribed for the making of the omnibus motions addressed to the indictment or information, made to suppress evidence, or to vacate judgment or set aside sentence

Some limitations are fixed by the CPL on motions. Those addressed to indictment or information "should be made prior to entry of a plea of guilty or commencement of trial," but "the court, in the interest of justice and for good cause shown, may, in its discretion, entertain and dispose of the motion on the merits *at any time before sentence.*"[212] The motions to suppress evidence "must be made with reasonable diligence prior to trial" but "may be made for the first time during trial" under certain circumstances.[213] The motion to set aside a verdict contains no reference to any time limitations.[214] The post-judgment motions may be made, "[a]t *any* time after the entry of a judgment."[215]

These limitations and non-limitations contained in the CPL are conducive to drawn-out motion practice and delay of ultimate disposition. There is no cogent reason why definitive limitations, such as ten or twenty days ought not to be spelled out in the CPL as it is in the CPLR. The current cunctatory system of criminal law administration must either be speeded up or the whole system given up.

4. Hearsay evidence in the form of medical examiners reports, should be made both competent and admissible before the grand jury

Reference has been made to the "albeit giant step" of the CPL towards federal practice under virtually identical wording of state and federal constitutional mandates of indictment by grand jury. The CPL has liberalized the restrictions of the old Code on hearsay reports concerning examinations, comparisons and tests of a scientific or profes-

211 N.Y. CPL art. 720.
212 *Id.* § 210.20(2) (emphasis added).
213 *Id.* § 710.40(1), (2).
214 *Id.* § 330.30, 330.40.
215 *Id.* § 440.10(1).

sional nature.[216] The language, on its face, would apparently embrace the reports of physicians, chemists, physicists and biologists employed by the Medical Examiner in the City of New York. However, there is some legislative history indicating that this is not the case. Because of the current huge number of homicides and the massive roadblock to indictments caused by the personal unavailability of physicians, chemists, physicists, biologists and other scientists participating in the autopsy of the victim, nothing can be lost by making explicit that the official reports of these officials be made competent before the grand jury.

5. Three different expediting devices for felony cases, viz., (a) *unitary preliminary processing in a single court of superior jurisdiction;* (b) *alternative accusation by information instead of indictment, and* (c) *requirement of permission to appeal — all necessitating state constitutional amendment — ought to be explored*

In the current crisis caused by the clogging of judicial machinery designed to process serious criminal cases, more drastic reforms than those authorized by the draftsmen of the CPL ought to be considered: (a) The feasibility of having the superior criminal court handle all felony cases from their inception. Whether or not this necessitates the consolidation of the Criminal Term of the Supreme Court within the City of New York with the Criminal Court, as proposed by the dean of New York prosecutors,[217] the procedure is embraced by the federal district courts. From the viewpoint of judicial administration, the plan is sound. The felony jurisdiction of the Criminal Court is subject to a city-wide Supreme Court Justice who administers the system, under the guidance and approval of the presiding Justices of the Appellate Divisions of two separate judicial departments, one of them embracing the problems of seven counties outside the City of New York as well; (b) The alternative procedure of information by the prosecutor, instead of indictment by grand jury, is permissible in federal and many state courts under the virtually identical wording of the right to indictment by grand jury contained in the state Constitution, so long as the defendant waives indictment. A decision by the state's highest court holds that waiver is insufficient and a constitutional amendment is necessary to make this procedure valid;[218] (c) Automatic appeal, as a matter of right, while in no way hampering a speedy disposition in the trial court, certainly contributes to delay in disposition of criminal matters. For

216 *See* notes 152-53 and accompanying text *supra.*
217 N.Y.L.J., Feb. 22, 1971, at 1, col. 5 (remarks of Mr. Hogan).
218 People *ex rel.* Wachowicz v. Martin, 293 N.Y. 361, 57 N.E.2d 53 (1944).

the sake of saving our own state from embarrassment, we choose a comparable jurisdiction, California, in which cases as serious as murder are subject to retrial as many as five times over a period of ten years.[219] Collateral attacks on a judgment of conviction by writs of error coram nobis may, by statute, without constitutional amendment, be made appealable only upon permission of an appellate court judge. It should be noted that not only is the right to appeal not one under the due process clause of the federal Constitution — but also that the entire appellate jurisdiction of the Supreme Court of the United States, enacted by Congress, depends upon the discretion of four of the nine Justices to make review possible. Certain provisions of the state Constitution freezing existing jurisdiction to review makes extension of the doctrine of permissible review a matter of constitutional amendment. One huge advantage of requiring appellate court permission for review would enable those courts to concentrate on meritorious appeals, instead of mandatorily scattering their attention to all sorts of pencil-written petitions from the penitentiary, 97 percent of which are palpably without merit.

6. A statute, definitive in terms of months and specifying circumstances under which it may be tolled, should measure the period of permissible pendency of a criminal action

"After a criminal action is commenced, the defendant is entitled to a speedy trial,"[220] is the sole rule on delay contained in the CPL. The few specific time standards are concerned solely with jail cases: (a) In the absence of defendant's consent to prosecution under a misdemeanor complaint or compelling circumstances, five days is the limit of confinement without filing an information;[221] (b) Under the same conditions, seventy-two hours is the limit of confinement under a felony complaint in the absence of hearing or indictment;[222] (c) Under similar conditions, forty-five days is the limit for a criminal court to hold a defendant in custody pending grand jury action.[223]

219 People v. Terry, 70 A.C. 427 (1969) (1960 murder, fifth trial pending in 1969); *see also* People v. Modesto, 66 Cal. 2d 695, 427 P.2d 788, 59 Cal. Rptr. 124 (1969) (multiple murders in 1961, three judgments of conviction affirmed by the state's highest court, hearing pending in federal district court in 1969); *In re* Hillary, 71 A.C. 896 (1969) (1962 murder, third trial pending in 1969); *In re* Seiterle, 71 A.C. 722 (1969) (multiple murders in 1960, fourth trial pending in 1969); People v. Ketchel, 71 A.C. 651 (1969) (1961 murder, fourth trial pending in 1969); *In re* Arguello, 71 A.C. 13 (1969) (1961 murder, fourth trial pending in 1969); *see generally* Fleming, *Court Survival in the Litigation Explosion*, 54 J. AM. JUD. SOC'Y 109, 113 (1970).

220 N.Y. CPL § 30.20; *cf.* N.Y. CCP § 8(1).

221 N.Y. CPL § 170.70.

222 *Id.*

223 *Id.* § 190.80.

The demand for speedy trial in the state courts has recently been made a federal constitutional mandate.[224] To translate that demand into a period between accusation and disposition measured definitively in numbers of either terms of court, months or days is the project of the legislature by statute or the courts by rule. The old Code attempted this measure by terms of court, allowing one term between being "held to answer" and indictment,[225] and another between indictment and trial.[226] In both cases, the sanction was dismissal of the charge, was discretionary with the court and was subject to "good cause shown."

Those states that define speedy trial in terms of days, fix the period from seventy-five days to six months.[227] Some statutes and rules exhaustively enumerate excuses for delay.[228] Most delay is occasioned by defendants who feel they have nothing to gain from trial and everything to expect by delay in exhaustion of victims, complainants and witnesses. A realistic rule would embrace not only a period of time defined by months and a full list of excuses, but also requirements of periodic reports to judicial conferences from judges granting adjournments and sanctions of remand for cunctative defendants.

Convicting the Guilty

Two major obstacles to successful prosecution of organized crime and official corruption in state tribunals are the statutory rule of corroboration of accomplice testimony and the constitutional problem of immunity and self-incrimination before the grand jury.

7. The statutory requirement of corroboration for accomplice testimony should be abolished and a rule requiring cautionary instruction to the jury adopted instead

In 1937, a commission on criminal justice branded the New York statutory "corroborated accomplice" rule a refuge of organized crime and recommended its repeal.[229] Thirty-four years later, in the teeth of an enormous resurgence of organized crime and official corruption, the CPL has not only reaffirmed this rule that sharply departs both from the common law and the practice in the federal courts and most states, but

---

224 Klopfer v. North Carolina, 386 U.S. 213 (1967).

225 N.Y. CCP § 667.

226 *Id.* § 668; *see also id.* §§ 669-a, 669-b.

227 *E.g.*, CAL. PENAL CODE § 1382 (West 1964) (fifteen days from date held to answer to information; sixty days from filing information to trial); PA. STAT. tit. 19, § 781 (1964) (six months from commitment).

228 *E.g.*, VA. CODE ANN. § 19.1-191 (1960); 2D CIR. R. (Jan. 5, 1971).

229 1937 N.Y. LEG. DOC. No. 77.

also has enlarged this barrier to convicting the guilty by expanding the class of witnesses who may be deemed accomplices.[230]

In its ancient form, the common-law rule that prevailed in England and the United States well into the nineteenth century, an accomplice who confessed and named his accessories was deemed an "approver." He was required to abjure the realm and on his failure was hanged on his confession. The departure from the common law contained in the old Code[231] is based on inherent suspicion generally of testimony possibly motivated by self-interest. Under varying circumstances in both civil and criminal cases, a witness may have motives of self-interest in giving testimony. Adversary counsel has full opportunity to explore these motives on cross-examination because they bear on the veracity of the witness, *i.e.*, that he is relating his actual present recollection of past events, and nothing else. Veracity is only one of the ingredients of credibility, and credibility is always a question for the triers of fact.[232] Legislative intervention in the accomplice and other situations,[233] is in the form of a rule of thumb that numbers of witnesses can make up a deficit in credible testimony. If a witness is fully credible in all respects, no corroboration is necessary; if he is not, no number of corroborators can supply the deficiency. This legislative solution to the trial and grand jury issue of witness credibility simply relieves the sitting judge of examining all of the evidence on a motion to dismiss and restrict his inquiry to the artificial question of whether or not there is another witness.

Under the old Code, a witness was an accomplice if he could have been convicted at common law either as principal or accessory before the fact, or when he wrongfully participated in the commission of the crime although he could not have been convicted of its commission.[234] Under the old Code, for purposes of prosecution official corruption and organized crime, both the bribe giver and receiver have been deemed accomplices, thus making indictment and conviction in such cases formidable for the prosecution.[235] For other crimes, the courts have

---

230 N.Y. CPL § 60.22.

231 N.Y. CCP § 399.

232 Other ingredients are, of course, capacity and opportunity to observe, memory and ability to relate. *See* Ludwig, *The Case For Repeal of the Sex Corroboration Requirement in New York*, 36 BROOKLYN L. REV. 378 (1970).

233 *See* note 15 *supra*.

234 People v. Clougher, 246 N.Y. 106, 158 N.E. 38 (1927); People v. Sweeney, 213 N.Y. 37, 106 N.E. 913 (1914); People v. Gondelman, 253 App. Div. 924, 2 N.Y.S.2d 405 (2d Dep't 1938). At common law, a thief was deemed an accomplice if he induced the defendant to become his receiver. State v. Coroles, 74 Utah 94, 277 P. 203 (1929). But by statute in New York, the thief was not deemed an accomplice in such a situation. *Old N.Y. Penal Law* § 1308-a.

235 *See* People v. Mullens, 292 N.Y. 408, 414, 55 N.E.2d 479, 481 (1944).

wrestled with the problem whether the witness should be characterized as accomplice, victim, mere witness or spectator and have come up with considerably conflicting results. The CPL, in continuing the accomplice rule, undertakes an expansive definition by statute of an accomplice for the first time. Under this definition, there is no requirement that the witness be subject to conviction but merely that he possessed the requisite state of mind for commission of the offense and in some way "engaged" in its commission.[236]

The rational rule employed in the federal courts is to make such testimony of an accomplice admissible and leave to the trier of fact the question of witness credibility, together with a cautionary instruction which is "never an absolute necessity" though "deemed usually desirable."[237] A state statute making admissible accomplice testimony and mandating a cautionary instruction — though still a stricter rule than the federal one — would be far more preferable than the present provision of the CPL.

8. Witness immunity before the grand jury

The effect of compelling the testimony before a grand jury of a witness who participated in a criminal transaction has always been a difficult one to assess under the state constitutional privilege against self-incrimination[238] and state statutes conferring immunity.[239] The difficulty has not been diminished by the recent occupation of the field by the federal guarantee in the fifth amendment, subjecting the question to reappraisal in the light of determinations by the Supreme Court.[240]

Our focus here is limited to compelling the testimony (1) of witnesses who are targets of an investigation, actual or prospective defendants or tainted and more or less accomplices in a criminal transaction; (2) before a grand jury, and not a court, civil or criminal, or civil administrative body; and (3) in an investigation not merely of conspiracy, bribery or gambling, but of any crime. Excluded from this focus is, of course, the witness — of whatever status as to involvement — who executes a waiver of immunity; and the witness — of whatever status as to involvement and manner of appearance — who, seeking an immunity bath, blurts out incriminating answers when no incriminating questions are asked.

There has always been two kinds of immunity in state proceedings:

---

236 N.Y. CPL § 60.22(3).
237 United States v. Becker, 62 F.2d 1007, 1009 (2d Cir. 1933).
238 N.Y. CONST. art. 1, § 6.
239 *Old N.Y. Penal Law* § 2447 (now N.Y.CCP § 619-c).
240 Malloy v. Hogan, 378 U.S. 1 (1964).

constitutional under the self-incrimination clause of the state Constitution (and, since 1964, under the fifth amendment of the federal Constitution); and statutory, under which the state legislature confers amnesty for testimony given by the witness, and the only question for the courts is whether the immunity conferred is as broad as any incriminating answer given.

Prior to current proposals of the CPL, there were two eras of case law on the effect of compelling testimony before a grand jury: first, the automatic era when witnesses who appeared under compulsion need not have claimed any privilege or have immunity conferred upon them. They received immunity for incriminating evidence by dint of being subpoenaed. This was the case even though immunity statutes scattered through the Penal Law were operative.[241] Second, the statutory formality era, which began in 1953 with the adoption of a statute that required, before the witness obtain immunity, that he be asked a question, that he refuse to answer, that he claim his privilege, that the grand jury retire, deliberate, return and confer immunity, and that the witness thereafter answer the question. In a subsequent criminal prosecution based upon that answer, immunity to some undefined extent was recognized.[242] The formality was first suggested by the Law Revision Commission in 1942 out of fear that under multitudinous immunity statutes governing purely civil matters, through connivance a minor administrative official might give an immunity bath to a witness who also happened to be a flagitious criminal.[243] The suggestion was picked up by a report of the State Crime Commission a decade later,[244] and with the support of that body, became law.

The trouble with the formality statute was that the courts chose to ignore it in the case of witnesses of the suspect, tainted, target and prospective defendant genre who blatantly testified without refusing to answer and claim privilege, or who refused to answer, or who lied. For this less creditable class of witness, the courts have held (on purely constitutional grounds) that this type of witness should not have been called in the first place; if this type witness gives evidence without claiming privilege, the evidence cannot be used against him; if the penumbral witness lies, he cannot be prosecuted for perjury; and, finally, if he is contumacious and refuses to answer, he cannot be prosecuted for contempt.[245]

On the other hand, under the formality statute, the pedestrian

241 People v. Sharp, 107 N.Y. 427, 445-46, 14 N.E. 319, 336-38 (1887).
242 *Old N.Y. Penal Law* § 2447 (now N.Y. CCP § 619-c).
243 1942 N.Y. LEG. DOC. No. 12, at 17-18.
244 3D REP., N.Y.S. CRIME COMMISSION 15 (1953).
245 People v. Yonkers Contracting Co., 17 N.Y.2d 322, 217 N.E.2d 829, 270 N.Y.S.2d

citizen called as a witness before the grand jury waives his immunity if he does not claim it, and is subject to punishment for perjury or contempt if he lies or refuses to answer. So, far from preventing the immunity bath for flagitious criminals, the formality statute has had the effect of giving him the keys to the city in the grand-jury room, while imposing upon the law-abiding spectator all of the sanctions, if he does not affirmatively assert his privileges and gives incriminating answers, or false ones, or is evasive.

The CPL, in returning to the automatic era and repealing the formalities statute in the grand jury, has eradicated the preferred status of tainted witnesses vis-à-vis ordinary ones. This is entirely salutary and one of the crowning achievements of this new body of law. A lingering quarrel remains solely with respect to the *extent* of immunity automatically granted for incriminating answers. The CPL extends immunity beyond testimony actually given to "any transaction, matter or thing concerning which he gave evidence," — in short, so-called transactional immunity.[246] But the highest court of the state has repeatedly indicated that automatic grants of immunity based upon the Constitution extend only to testimony actually given — testimonial immunity.[247] This means that the testimony given by the witness cannot subsequently be used against him either in a grand jury or at trial, but that he may be accused (albeit by a different grand jury from the one before which he testified) of an offense arising out of the transaction concerning which he gave evidence. In the area of prosecuting organized crime, no reason can sanely be advanced why the legislature should be more charitable in granting immunity than the highest court of the state finds requisite under the demands of the federal and state constitutions in order to compel testimony.

Acquitting the Innocent

Two further considerations, particularly affecting defendants and the certainty and uniformity of disposition of their cases have been seriously overlooked by the CPL.

9. Definitive provisions governing negotiated pleas of guilty must be set forth

Of 12,855 indictments for felony disposed of in the City of New York during the fiscal year ending June 30, 1970, only 559, or 4.3 per-

745 (1966); People v. Laino, 10 N.Y.2d 161, 176 N.E.2d 571, 218 N.Y.S.2d 647 (1961); People v. Steuding, 6 N.Y.2d 214, 160 N.E.2d 468, 189 N.Y.S.2d 166 (1959); People v. DeFeo, 308 N.Y. 595, 127 N.E.2d 592 (1955).

246 N.Y. CPL § 50.10(1).

247 People v. LaBello, 24 N.Y.2d 598, 249 N.E.2d 412, 301 N.Y.S.2d 544 (1969); People v. Laino, 10 N.Y.2d 161, 176 N.E.2d 571, 218 N.Y.S.2d 647 (1961).

cent, were verdict after trial, and 12,296, or 95.7 percent, were by plea of guilty to either felony or misdemeanor, negotiated before or during trial.[248] Clearly, the Perry Mason characterization of a criminal prosecution as a courtroom confrontation between two lawyers in antagonistic roles is a popular misconception. Barely one in ten accused of a major crime in the United States ever reaches court for trial.[249] Yet the CPL dedicates to this paramount method of disposition only a single subdivision of one five-subdivision section in a law containing more than 400 sections.[250] Recently, the Supreme Court, as a matter of due process, has made applicable to state acceptance of guilty pleas virtually the identical rigorous and explicit standards laid down for their acceptance in federal courts.[251] The President's Commission on Law Enforcement devoted five columns in two pages, endorsing the practice and making three recommendations.[252] The American Bar Association's Project on Minimum Standards sets forth fourteen canons regulating this procedure.[253] The total omission of any rules governing the disposition of the overwhelming number of major criminal cases is a glaring hiatus in the CPL.

Moreover, for purposes of disposition by plea, the CPL has adopted the test of "lesser included offenses" used for trial purposes,[254] with an expansion for pleas that frankly is not sufficiently expansive and excludes the traditional hypothetical plea.[255]

10. Provision should be made for transfer from municipal to state facilities of prisoners convicted of felonies and awaiting sentencing

A major cause of the municipal prison riots in October 1970 was overcrowding. A major cause of overcrowding is the significant number of prisoners — more than one-third — whose cases have long since been disposed of by plea of guilty or verdict, but who are awaiting sentence.[256] The principal reason for non-sentence is that the judge is awaiting a pre-sentence report. Although in practice sentences have

248 *See* REPORT, *supra* note 142.

249 *See* Mackell, *Streamlining Procedure for Guilty Pleas*, 4 THE PROSECUTOR 75 (1968).

250 N.Y. CPL § 220.10(5); *cf.* N.Y. CCP § 342-a.

251 McCarthy v. United States, 394 U.S. 459 (1969); Boykin v. Alabama, 395 U.S. 283 (1969); *see* FED. R. CRIM. P. 11.

252 REPORT OF THE PRESIDENTIAL COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 134-37 (1967).

253 ABA, STANDARDS RELATING TO PLEAS OF GUILTY (Approved Draft 1968).

254 N.Y. CPL § 1.20(37).

255 *Id.* § 220.20; *cf.* People v. Moyer, 27 N.Y.2d 252, 265 N.E.2d 535, 317 N.Y.S.2d 9 (1970).

256 *See* Mackell, *Sentencing of Prisoner Without Probation Report Is a Valid Procedure*, N.Y.L.J., Oct. 21, 1970, at 1, col. 3.

almost never been pronounced until such reports had been received, as a matter of law sentencing without receipt of these reports by state courts has been uniformly upheld.[257] The CPL makes the pre-sentence report a sine qua non, and moreover does so — unlike provisions of the old Code — for misdemeanor sentences in excess of ninety days, as well as for any felony conviction.[258] There can be no quarrel with an investigation of an offender's background to determine optimum treatment, nor even a lengthy in-depth study for this purpose. The problem simply is one of situs of the subject while he is bing studied. If he remains— as he now does — in municipal detention facilities, another log-jam of even more horrendous proportions may be expected as soon as the CPL takes effect. If provision is made for his transfer to a more commodious state facility upon his conviction and while awaiting sentence, the common good will be advanced by preventing conditions conducive to unrest, disorder and riot in municipal prisons.

257 United States *ex rel.* Brown v. City of New York, 240 F. Supp. 387 (S.D.N.Y. 1965); United States *ex rel.* Boone v. Fay, 231 F. Supp. 387 (S.D.N.Y. 1964); People *ex rel.* Thompson v. Noble, 231 F. Supp. 188 (S.D.N.Y. 1964).

258 N.Y. CPL § 390.20.