Criminal Justice: Adversary or Inquest; Did Due Process Reform the Wrong System?

Robert Emmett Burns
Prof., DePaul University College of Law

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Criminal Justice: Adversary or Inquest; Did Due Process Reform the Wrong System?

ROBERT EMMETT BURNS*

I raise this question, and I will overstate it to try to evoke a challenging response. I say that the adversary system is not the best system of criminal justice and that there is a better way.**

HON. WARREN E. BURGER
Chief Justice
Supreme Court of the United States

Jurisprudence of fact-finding in the law of crimes and procedure may sometimes appear festooned to the ages of its origins, history or ideology. Even so, in an era of due process "Model Shopping" appropriate procedure, to the bench, jury, commission or sequel room, deserve at least, the concern our forebears gave when in 1791 they added to the Constitution some specific amendments, trial rights and procedures applicable to National Government.

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* Holy Cross (A.B.), Yale (J.D.); NYU (LL.M.); Professor, DePaul University College of Law, Chicago.

** This statement was made in 1968 when Judge Burger then spoke on the United States Court of Appeals at a 1968 Symposium on Criminal Justice. See Report, Center Magazine, published by Fund for the Republic Center for the Study of Democratic Institution (1968) at p. 3.


All models, be they ones of crime control, battle, family or puritan vintage, estimate the relative place of efficiency versus humanity. At extremes might lie the largesse of English Chancery practice, put to service of preliminary leisurely trial, appeal and collateral attack versus the cruder vigilante justice least human, but most efficient.

2. U.S. Const. amend. IV. (Rules of Real Evidence); amend. V. (Miscellaneous Procedures); amend. VI. (Speedy Public Trial by Adversary Jury Rights.

3. Federal Trial Procedures were not always required in State Courts. Chief

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At the passage of the Bill of Rights the king's former Colonies conducted criminal trials according to adversary rules before a jury—a "model" inherited from the 17th Century England.\(^4\) The adversary system developed from old ideas of cause, ritual, ordeal,\(^5\) freedom of contract, and sport theory, which contemplated that truth could best be discovered in the clash of parties, opposing and reacting to each other within the bounds of fairness and relevancy. The party-battle trial when conducted before a number of people such as a jury of peers, was a vast improvement for the colonial society accustomed to witchcraft or,\(^6\) trial by wager, sword and self-evident eternals.

It was not however, the only system to discover truth that prevailed in 17th Century Merry England.

A competing system of fact-finding, popular in European Clerical and English Society, were procedures called "inquests," coming from the

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Justice Marshall had written:

The question thus presented is, we think, of great importance, but not of much difficulty. The constitution was ordained and established by the people of the United States for themselves, for their own government, and for the government of the individual states. Each state established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated. Barron v. Baltimore, 32 U.S. (7 Pet.) 242, 246-47 (1833).

Of the four states, (New Jersey, New York, Georgia and South Carolina) that did not preface their constitution with a separate bill of rights, none secured the right of self-incrimination. See Levy, Origins of the Fifth Amendment, 405-432 (1968) . . . For a history of the privilege, see, 8 Wigmore, Evidence, § 2250 (1940). The Northwest territory did not include the privilege; see, An Act to Provide for the Government of the Territory Northwest of the River Ohio, Act of Aug. 7, 1789, 1 Stat. 50-53.

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Only Post 1890 construction to the phrase "Liberty" and "Due Process" incorporated to State Courts all but perhaps the most "fundamental of 1787 amendments rights:" the Second Amendment Right to Bear Arms. See Warren, The New "Liberty" under the Fourteenth Amendment, 39 Harv. L. Rev. 431 (1925). "The word 'liberty' seemed an especially convenient vehicle into which to pack all sorts of rights." Id., at 439; Frankfurter, Memorandum on Incorporation of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment," 78 Harv. L. Rev. 746.


5. At the time of the growth and development of the adversary model in England there were other "trials" sometimes called "ordeals of truth." There was, for instance, a practice of immersing suspects in cold water to discover the truth on a sink-or-float basis. There was trial by battle. Experience with informal trial proceedings in England animated many a hasty trip to the New World. For a brief history, See, Tracy, supra, note 4, at 1-8.

Inquisition procedure, fact-finding is combined with investigation. A presidential commission, a grand jury, congressional investigations or a coroner's hearing today would be characterized by their inquest procedure. The classic difference between fact finding by adversary trial and fact finding by inquest trial lies in the supposed passivity of the fact-finder in the adversary trial, but his "activism" at inquest justice. Judge, jury, prosecutor and defense tended to be one in combination; at the inquest trial, all appearing pro se, suspect "defendant" or person plain were simply called "Witness." In recognition that both inquest and adversary fact models could prevail in the same century and in the same country, the practice prevailing by the late 18th Century should be illustrated here. The contrast is striking.

Inquiry is a general term applicable to any question—for truth; investigation, a query. For example, and a question are related in connotation but the manner or intensity to a question may provide in the process secondary meaning, "by their bullying tactics, by their having turned needed investigations into regrettable inquisitions . . .

Since American law comes modeled from English practice inquest procedure, there bears re-examination. The many refinements in modern continental trial procedure is beyond the scope of this paper.

Inquest Justice is most often remembered not so much because government was judge and jury, but because inquisitions in Spain and Europe were associated with burning, witches, and expropriating their property . . ." When torture and/or confiscation became from time to time unlawful, the number of witches decreased drastically or disappeared altogether. Currie, Crimes without Criminals, Witchcraft and Its Control in Renaissance Europe, 3 Law and Society Review, 7 at 23-24 (1968).

See Silving, The Oath, 68 Yale L.J. 1329 (1959); Wigmore, A Panorama of the World's Legal Systems (1936); Benthem, in his Rationale of Justice Evidence, Specially Applied to English Practice, had, in 1827, attacked the rules excluding evidence of a party to an action or prosecution. Party incompetency was abolished there in 1898. The party versus witness distinction is to be underscore. At trials conducted under adversary procedures defendant or his spouse could not, at common law, testify at all. The mouth of an accused was closed at the legal adversary proceedings until 1870 (Maine) and 1878 in National Federal Courts (Act of March 16, 1878, 20 Stat. 30). Only adversary trials conducted under adversary rules disqualified person qua party from testimony. ("Nemo debet esse testis in propria cause.")

But we notice that most of the church's religious investigations, the cause of all the trouble, were conducted by means of commissions or inquisitions, not by ordinary trials upon proper presentment; and then the very rule of the canon law itself was continually broken, and persons unsuspected and betrayed, "per famam" were compelled, "seipsum procedure" to become their own accusers." Wigmore, Nemo Tenetur Seipsum Prodere, 5 Harv. L. Rev. 71, at 84 (1891).

When Church became Crown in England it was only to be expected that Common Courts would adopt same or hybrid procedures. Ecclesiastical Courts were especially interested in hearsay and treason.


Ecclesiastical Courts were, of course, inquest in nature, before and after church and state, became Henry VIII.

For a series of Articles on Norman-Saxon English trial development, See J.B.
<table>
<thead>
<tr>
<th><strong>ADVERSARY</strong></th>
<th><strong>INQUEST</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Civil and Criminal Proceedings alike</td>
<td>—Same</td>
</tr>
<tr>
<td>Parties (or later their)</td>
<td>—Fact-finder asked the</td>
</tr>
<tr>
<td>Lawyers asked questions</td>
<td>witness questions</td>
</tr>
<tr>
<td>Accuser-Private Person</td>
<td>—Accuser</td>
</tr>
<tr>
<td>Later (17th Cent.) State, People or Government</td>
<td>Government</td>
</tr>
<tr>
<td>Parties called and sponsored</td>
<td>—Trier called the witness</td>
</tr>
<tr>
<td>their witnesses</td>
<td></td>
</tr>
<tr>
<td>Party Chief Investigator</td>
<td>—Fact-finder, Chief</td>
</tr>
<tr>
<td>Investigator</td>
<td></td>
</tr>
</tbody>
</table>

Thayer, *Older Modes of Trial*, 5 Harv. L. Rev. 45 (1891); *The Jury and Its Development*, 5 Harv. L. Rev. 249, 293, 357 (1891).

12. One is struck by the similarities of the adversary civil jury trial for damages to 1971 criminal trial procedure in rules of examination, credibility and expert testimony. Surely the state was once more than mere party in criminal cases. The people should include victim and defendant. Historical development from adversary to inquest (1066-1640) and thereafter back to party adversary (1640-1688), may explain why criminal cases people are aligned as party in same fashion as private individual per civil party plaintiff. *See, infra*, note 33.

13. Legal defense attorneys are not essential to either adversary logic, or the party system. The private aspect to counsel for party is underscored by the relatively late developmental date in America when in capitol or general felony, indigents (who commit most crimes) became entitled in State proceedings to appointment of counsel by a due process constitution. *See Powell v. Alabama*, 287 U.S. 45 (1932); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

14. Compulsory attendance of witness in civil cases was authorized in 1962 but defendant in inquest-conducted criminal cases did not obtain the right to call witness until the close of the 17th century. *See I. Wigmore, Evidence*, § 4 where he speaks of Proceedings Conducted Ex Parte or by Administrative Tribunals Not Bound by the Common Law; “Rules of Evidence” he says, citing James Bradley Thayer, “do not apply ex stricto jure in any tribunal but a jury court,” *id.*, at 27.

15. In trial by oath helping, battle or compurgation, party, witness helper or accuser were “aligned” as per sponsorship. Under that system the line between a civil action for contract of debt and a criminal proceeding made little difference in trial procedure. In trial by inquest, the parent of the modern “jury” there was no place for “sponsorship” at all, for everyone but inquirer were witnesses. The transition in the 15th, 16th and 17 Centuries from Norman inquest trial by government to adversary trial by a party system albeit cum inquest jury explains how under adversary rules, government or people become parties (thus encumbered by, in their case, the silly rule that since prosecution called a witness they sponsored and could not impeach, etc.) For a historical sketch, *see Ladd, Impeachment of One’s Own Witness, New Developments*, 4 U. Chi. L. Rev. 69 (1936).

16. “As the change from the inquisitional to the adversary system came in criminal cases, we first find . . . that the accused can not impeach his own witness.” *Id.*, at 72.

17. Oath helping, trial by wager and by contest are older than the inquest refinements regarded in their day as innovation to the extent that the jury would consider outside witnesses or recognitors called but sponsored by no one (inquest stage). *See Moschzisker, The Historic Origin of Trial by Jury*, 70 U. Pa. L. Rev. 1 (1921).

18. The meeting of the waters between pre-trial party compulsion and pre-trial inquest compulsion may be dramatized from civil cases at the so-called pre-trial hearing conducted before His Honor anxious for calendar currency, order, settlement and pre-trial disposal. An aggressive pre-trial prodding judge is at odds with party adversary expectations. Pre-trial procedures mollify or dilute adversary freedoms to fact presentation.

In criminal cases much of people's pre-trial investigation centers on out-of-court
<table>
<thead>
<tr>
<th>Confrontation: The Right to Cross-Examination¹⁹</th>
<th>—No special 'right' to cross-examine accusers</th>
</tr>
</thead>
<tbody>
<tr>
<td>A public trial</td>
<td>—Mostly private</td>
</tr>
<tr>
<td>Friends, Jury; Later Judge and Jury—Finder of Fact</td>
<td>—Grand Jury, Judge, Petit Jury, King, Prelate, Commission Probate or Chancellor Fact-Finder</td>
</tr>
<tr>
<td>Bench defendant disqualified to testify for himself.</td>
<td>—All defendants treated like any other witness and encouraged to speak out or else . . . ²⁰ (today contempt)²¹</td>
</tr>
<tr>
<td>Defendant sometimes confessed out of court his guilt</td>
<td>—Witness (defendant) sometimes confessed guilt at the trial proceeding</td>
</tr>
</tbody>
</table>

When the United States Constitution was proposed for ratification by States Legislatures or Conventions, some amendments were proposed

Informal interrogation of probable cause arrestee, or 'focal' suspect, etc. A confession obtained thereby through hearsay could be testified to or admitted at defendant's trial as an admission by party.

19. Wigmore calls cross-examination "the greatest legal engine ever invented for the discovery of truth." ⁵ Wigmore, Evidence, § 1367 at 29. Whether cross-examination is or was co-extensive with "confrontation" of accusers' witness under the Sixth Amendment is a nice point. See the views in California v. Green, 399 U.S. 149 (1971); Comment, Confrontation and the Hearsay Rule, 75 Yale L.J. 1434. A witness might be accuser or plain favorable. It is unquestionable that the Sixth Amendment was intended to preserve an adversary rights package. See Pollitt, The Right of Confrontation: Its History and Modern Dress, 8 J. Pub. Law 381 (1959).

Self-incrimination, in the Fifth Amendment is addressed to "persons" but the Sixth Amendment speaks of accused and accusers. The two modes explain today's doubts whether confrontation is cross-examination.

20. It, of course, remains true today that a witness may be sentenced for contempt of court or chair on failure to testify unless proper invocation to claim of privilege is made. Brown v. U.S., 356 U.S. 148 (1958). After 1688 in England the practice of interrogation accused parties on oath, examination and trial, fell into disuse for as Stephens had put it in his General View of the Common Law of England:

The practice of courts up to the time of the Revolution of 1688 and for some little time after, was that the prisoner should be questioned at his trial; and till the year 1848 the committing magistrates were bound by statute to take his 'examination' a word which naturally suggests questioning and was judicially held to justify it. Many illustrations of this occur in the State Trials, p. 192. After referring to cases he proceeds: 'In the eighteenth century the practice of questioning prisoners at their trial appears to have fallen into their disuse, probably because during that period the theory that a criminal trial was substantially a private litigation, constantly gained ground and was combined with the reduction of the rules of evidence to a systematic form. Hence the principle that a party was an incompetent witness would be supposed to forbid the interrogation of the prisoner.'

Taken from Maury, Validity of Statutes Authorizing the Accused to Testify, 14 Am. L.R. 748 at 755, 756 (1880). It seems almost redundant to point to the privilege to decline self-incrimination as responsive to trial by inquest, where use of the rack and screw on defendant-witness suspect appears.

21. Civil contempt of court, chair, commission or Congress. See Beale, Contempt of Court: Criminal and Civil, 21 Harv. L. Rev. 161 (1908) for contempt case growing out of failure to answer questions before a grand jury inquest where witness had been accorded incrimination immunity; See, In re Giancana, 352 F.2d 921 (7th Cir. 1965) cert. denied, 382 U.S. 959 (1965).
and incorporated in 1791 to prevent misconstruction by the National Government of its powers.\textsuperscript{22} Human rights and procedures applicable to all proceedings under oath conducted by the new government were provided by formal amendment.\textsuperscript{23}

The heart of the Bill of Rights today is the Fifth Amendment.

The Fifth Amendment’s most famous clause is the privilege against self-incrimination. It provides as follows:

No person . . . shall be compelled in any criminal case to be a witness against himself . . . .\textsuperscript{24}

The privilege against self-incrimination has always been controversial, for a first principle at all truth-gathering inquiries is supposed to be (except in totalitarian countries) a concern for truth.\textsuperscript{25}

When an ordinary witness says, “I decline to answer on grounds that my answer will incriminate me,” the fact-finder is denied access to apparently relevant information.

The meaning and scope of evidence, privileges, i.e., who has them, when they are waived, etc., is determined by the “Law of the Forum.” Most criminal forums are today, as then, state and local.

For 170 odd years, the Fifth Amendment was viewed as an evi-

\textsuperscript{22} The Preamble to the Bill of Rights reads as follows:
The Conventions of a number of the states having at the time of their adopting the Constitution, expressed a desire in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses shall be added; And extending the ground of public confidence in the Government, will best insure the beneficient end of its institution.

\textsuperscript{23} Adversary trial by jury was provided for by the Sixth Amendment. It was argued that unless an amendment specifically guaranteed a jury in all civil cases, Federal Courts would be impliedly prohibited from that mode of trial. Hamilton, opposed a civil jury amendment (no doubt mindful that Admiralty, Probate and Chancery operated under Civil and Common inquest or common law often without juries answered:

A power to constitute courts is a power to prescribe the mode of trial; and consequently if nothing was said in the constitution on the subject of juries, the legislature would be at liberty either to adopt that institution or to let it alone. This discretion, in regard to criminal causes is abridged by an express injunction, but it is left at large in relation to civil causes, for the very reason that there is total silence on the subject. The specification of an obligation to try all criminal causes in a particular mode excludes indeed the obligation of employing the same mode in civil causes, but does not abridge the power of the legislature to appoint that mode if it should be thought proper. The pretense, therefore that the national legislature would not be at liberty to submit all the civil causes of federal cognizance to the determination of juries, is a pretense destitute of all foundation. Hamilton v. The Federalist (Blackwell ed. 1948) at 425.

\textsuperscript{24} U.S. Const. amend. V.

\textsuperscript{25} There is no reason why our profession should not begin now to move in this reform. Hallam calls this privilege ‘that generous maxim of English law,’ and weigh in its favor. But this is one of the cases where we must be just before we are generous. Every day, in some court of some city, justice is miscarriage because of this extraordinary maxim (nothing in truth but a misquotation consecrated by age), “nemo tenet seipsum prodere.” Wigmore, supra, note 10 at 88.
dence privilege from a code applicable only in federal courts. In 1964, however, the Fifth Amendment privilege, as the United States Supreme Court would review it, was incorporated to state trial courts by constitutional construction to the phrase, "due process of law":

We hold today that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgement by the states.27

In Malloy v. Hogan, the majority wrote:

The marked shift in the Federal Standard in state cases began when the courts spoke of accused 'free choice' to admit, to deny or to refuse to answer. The shift reflects recognition but the American system of crime is accusatorial not inquisitional and the Fifth Amendment privilege is the essential mainstay.28

Why did the Supreme Court make binding in all courts, on a one-nation basis, a majority's view from time to time on self-incrimination? Was it that a few years before Senator Joseph McCarthy, in the Nineteen Fifties, had abused the rights of witnesses (the Fifth Amendment Communist era).29 Congressional investigations were not supposed to be trials of course at all?29a It must not be forgotten that once incorporation of a "clause" is made, the Supreme Court became exclusive, nonappealable interpreter to appropriate depth extension, penumbras, emanations, or umbrellas in cases under the clause.

One year after Malloy, the Court announced the famous Miranda decision,30 making applicable new self-incrimination silent "rights" at post-custody, but pre-trial police station interrogations:

The principles announced today deal with the protection which

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26. Justice Frankfurter wrote in 1949:

The notion that the 'due process of law' guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution and thereby incorporates them has been rejected by this Court again and again, after impressive consideration. See e.g., Hurtado v. California, 110 U.S. 516; Twining v. New Jersey, 211 U.S. 78; Brown v. Mississippi, 297 U.S. 278; Palko v. Connecticut, 302 U.S. 319. Only the other day the Court reaffirmed this rejection after thorough re-examination of the scope and function of the Due Process Clause of the Fourteenth Amendment, Adamson v. California, 332 U.S. 46. The issue is closed. Wolf v. Colorado, 338 U.S. 25 at 27. That's what he thought. In twenty years every Frankfurter case cited was overruled in the Due Process Revolution, Trial Vintage, infra, note 32. For other Due Process Vintages, see Burns, The Death of E Pluribus Unum, 19 DePaul L.R. 651 (1970).


28. Id., at 7.


29a. One can only speculate on the subtle influence in 1950's trial thinking and reform of the self-incrimination privilege, abused by McCarren, Kefauver, Velde, Jenner or McCarthy committees which regularly conducted open, T.V. hearing Fifth Amendment inquests. At some of these "witch trials" many ordinary witnesses no doubt thought they were "on trial."

must be given to the privileged against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of the freedom of action in any significant way. It is at this point that our adversary proceeding commences, distinguishing itself at the outset from inquisitional systems, recognized in some countries.\footnote{Id., at 577.}

Malloy proceeded on the assumption that the self-incrimination clause was to mainstay adversary rights; \textit{Miranda} applied this logic to police interrogation not conducted under oath. Thus the Supreme Court in this, the Warren era, proceeded to reform or restore by due process rule-making, the entire area of adversary justice.\footnote{Defendant is entitled to confront and cross-examine his accusers, Pointer v. Texas, 380 U.S. 400 (1965), but need not testify himself, and it is unconstitutional to comment on his failure to testify, Griffin v. California, 380 U.S. 609 (1965). Defendant must be convicted by sufficient and untainted legal evidence or proof beyond a reasonable doubt to the satisfaction of all (usually 12) jurors. Johnson v. Florida, 391 U.S. 596 (1968). Defendant, except in petty cases, Dyke v. Tyler Implement Co., 391 U.S. 216 (1968), has a constitutional right to trial by jury, Bloom v. Illinois, 391 U.S. 194 (1968). The right includes right to a speedy trial, Klopfer v. North Carolina, 386 U.S. 213 (1967). Defendant is entitled at all times to be sponsored by Counsel, Moore v. Michigan, 355 U.S. 155 (1957), accorded one-way discovery, Clewis v. Texas, 386 U.S. 707 (1967) (dicta), and counsel on appeal, Anders v. California, 386 U.S. 738 (1967). At all times defendant must be shielded from improper trial publicity, Sheppard v. Maxwell, 384 U.S. 233 (1966), and must be convicted only on untainted evidence, Mapp v. Ohio, 367 U.S. 643 (1961). Real evidence must have been obtained fairly, pursuant to the more than one hundred rules of the Supreme Court in the search and seizure area, See LaFave, \textit{Search and Seizure: The Course of True Law . . . Has Not . . . Run Smooth}, 1966 U. of Ill. L. F. 255. Confessions are admissible but must they comply with Miranda v. Arizona, 384 U.S. 436 (1966). Voluntariness must not be left exclusively to the jury, United States v. Jackson, 390 U.S. 570 (1967). Line up testimony if considered unfair is inadmissible unless counsel for defendant was notified of lineup, United States v. Wade, 388 U.S. 219 (1967). Every violation of a Constitutional decision is deemed grounds for reversal unless the state proposes it to have been harmless beyond a reasonable doubt, Chapman v. California, 386 U.S. 18 (1967). From the Code of Constitutional Procedure enacted for the State Courts by the United States Supreme Court by construction to a phrase, due process of law.}

Indeed, the self-incrimination privilege was the mainstay right not under the adversary system at all but of its opposite, the inquest.\footnote{Stephen, \textit{History of the Crim. Law} 325 quoted in Twining v. N.J., 211 U.S. 78 at 103 (1908). He added: Soon after the Revolution of 1688 the practice of questioning the prisoner died out. \textit{Id.}, at 104.} The accused needed no rights to silence at trial by adversary. His right to testify under an accusatorial but adversary trial system did not
exist at common law. The defendant was not made a competent wit-
ness in criminal adversary proceedings until competency statutes were
passed, the first one in Maine 77 years after the passage of the Fifth
Amendment.34 There never was legal compulsion for defendant to
testify at his own trial conducted under adversary rules.

Now any reformer which mistakes the two different kinds of legal
systems by confusing witness privileges pursuant to inquest procedure
with party rights pursuant to trial might not recognize prevailing reality
and reform the wrong system of justice. Consider the possibility that:

(1) An impractical accusatorial jury trial system had by 1900
died among the states and been replaced by a de facto in-
formal inquisitional model administered by police, defense,
prosecution and judges;

(2) That the Supreme Court reformed what it thought was an ad-
versary system;

(3) With “solutions” which may have caused the very inquest in-
formality that the Court, by reform, sought to correct.
A large order. Let’s try it.

THE SECOND SYSTEM

How could a 12-man jury system developed from rural England,
survive the population logistics of Civil War (1860), the Industrial
Revolution (1870), immigrant millions (1880), or the New Town
of Ninety (1890)?

What does law do in a multi-million metropolitan area when con-
fronted with thousands of felony suspects carrying rights to party
trial by jury? It is called “Negotiated Justice.”

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34. See, 8 Wigmore, Evidence, § 2250 at 296.
35. At the date of the Constitution of 1787, only two cities in the United States had
as many as 25,000 residents. By 1964, when the Supreme Court accelerated state
crime procedure reform, the Town of Loch Haven, Maryland, had that many.
In 1860, the ten largest cities would hardly resemble the 1960 Metropolis of 10 ur-
banized areas containing 25% of the country’s population. 2 Int’l Encyclopedia of the
Social Sciences 469-472 (1968).
36. There was, in 1969-70, 36,619 criminal felony filings in the City of Los
Angeles, a rate of 523 per 100,000 of population—Judicial Council of California
Annual Report of the Administrative Office of the California Courts, at
123 (1971).
37. See D. Newman, Conviction—The Determination of Guilt or Innocence without
Trial (1966); Miller, The Compromise of Criminal Cases, 1 S. Cal. L. Rev. 1 (1927),
Note, Guilty Plea Bargaining: Compromises by Prosecution to Secure Guilty Pleas, 112
U. Pa. L. Rev. 865 (1964); Polstein, How to “Settle” a Criminal Case, 8 Prac. Law.
In 1970, less than 10 percent of felony defendants will receive the jury trial they are promised. Mass crime demands an attrition process administered by police, prosecutor and the courts. The American Bar Association Report on Metropolitan Justice stated:


38. See generally, Dash, *Cracks in the Foundation of Criminal Justice*, 46 Ill. L. Rev. 385 (1951). Dallen Oaks broke down the figures on where went Chicago's reported 1964's 225,000 arrests; The Hurdle Derby vis-a-vis: Transfers, Prelims, Nolle,
The magnitude of guilty pleas to felonies on a national scale, has been estimated to be as high as 95 per cent and as low as 69 per cent.\(^9\)

How do you persuade defendants to plead guilty or confess guilt to an offense in open court when the crush of numbers require it? There are ways. Have you ever wondered, for instance, if the greatest civil rights could co-exist with the world's worst penalties? The rules to plea negotiation are not complicated.

*Multiply prosecutor's trading cards;*\(^40\) *give a little;*\(^41\) *trade or bargain with party or parties in interest,*\(^42\) convince defendant with good

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S.O.L. D.O.L. Bench Jury and Plea are set out in Oaks and Lehman, *The Criminal Process of Cook County and the Indigent Defendant,* 1966 U. Ill. L. F. 584. See, for instance, figures for the National Opinion Research Center; *Six-Stage Study from Victimization to Trial Disposition, for the President's Commission on Law Enforcement.*

**The Challenge of Crime in the Free Society:** 2100 incidents; 50 convictions.


41. The New York Legislative Commission Study 1970 Figures are typical:

<table>
<thead>
<tr>
<th>Indictments Returned:</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Felonies</td>
<td>127,385</td>
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<tr>
<td>Misdemeanors</td>
<td>4,046</td>
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<tr>
<td><strong>Total</strong></td>
<td>131,441</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Convictions</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Minimum number of</td>
<td></td>
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<tr>
<td>felony charges reduced</td>
<td></td>
</tr>
<tr>
<td>to misdemeanor charges</td>
<td>51,480</td>
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<tr>
<td>Misdemeanor convictions</td>
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<tr>
<td>Felony convictions</td>
<td>41,889</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>97,415</td>
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</tbody>
</table>

42. Though one would hesitate to allege that plea negotiation "often occurs in the trial judge's chambers," but see Alschuler, *The Prosecutor's Role in Plea Bargaining,* 36 U. Chi. L. Rev. 50, Footnote 73 at 81 (1968) (the result of a one-year study).

The ABA minimum standards Rule 3.3 boldly proclaims in § (a) that the trial judge should not participate in plea "discussions" followed by § (b) where he can "permit disclosure." Indicate whether he will concur if ... and he may § (c) give the plea agreement due consideration but otherwise he should reach an independent decision.

**ABA Project on Minimum Standards for Criminal Justice:** *Standards Relating to Pleas of Guilty,* (Tent. Draft) (1967).


Most cases are disposed of outside the traditional trial process, either by a
horse sense; and then try and settle all but those cases too popular, persistent or financed.

decision not to charge a suspect with a criminal offense or by a plea of guilty. In many communities between one third and one half of the cases begun by arrest are disposed of by some form of dismissal by police, prosecutor or judge. When a decision is made to prosecute it is estimated that in many courts as many as 90 percent of all convictions are obtained by guilty pleas. Many overburdened courts have come to rely upon these informal procedures to deal with overpowering caseloads, and some cases that are dropped might have been prosecuted had sufficient resources been available. (Supra, note 39 at 132.)

That in Metropolitan areas parties in interest include judges seem indubitable. The author in attendance at successive judicial conferences and seminars noted the countenances of Cook County Illinois trial judges when their colleagues from sparsely populated downstate counties protest that they never get "involved" or participate in plea negotiation. Basically, the problem is this: State-defendant attorneys ought to know before plea what sentence will probably be. The judge has to know what the defendant's record and past is so that he can discharge his legal obligation in order to tailor the sentence to the offender. Advance notice or sentence peeking before pro-forma hearing in aggravation or mitigation (after plea) sounds like involvement. Of course, if the judge changes his mind, fairness requires him to afford the defendant opportunity to withdraw his plea. See People v. Riebe, 40 Ill. Id. 565, 241 N.E.2d 313 (1968).


Observations of the guilty plea process in recorder's court made it unmistakably clear that the high rate of pleas was heavily dependent upon the inducement of charge reduction to get a guilty plea entered . . . . (Supra, note 39 at 132.)


It may well be that the defendant was afraid of receiving a severe sentence, but as we pointed out in People v. Bowman, 40 Ill. 2d 116, 239 N.E.2d 433, this fear resulted from no improper conduct by the authorities, but was the result of the course of conduct which the defendant himself had pursued. The penalty of death was a possibility under the murder indictment, and a lengthy sentence to the penitentiary was a possibility under all three indictments. The fact that defendant's attorney advised him of these possibilities does not support a conclusion that his pleas of guilty were improperly induced. People v. Brown, 41 Ill. 2d 503, 505, 506, 244 N.E.2d 159, 160 (1969).

To hold that the sentence differential between life imprisonment and death is such that a plea of guilty negotiated on this basis is involuntary would, of course, prohibit negotiated pleas in all capital cases. We hold that the policy considerations which permit a negotiated plea in a noncapital case (see People v. Durrah, 33 Ill. 2d 175, 210 N.E.2d 478) are sufficient to permit it in a capital case. People v. Granberry, 45 Ill. 2d 11, 44; 256 N.E.2d 830, 832 (1970)—

44. A hallway about 20 feet long and four feet wide running between two courtrooms is used as a conference quarters by the assistant prosecuting attorneys and the various defense attorneys who line up to talk with him and discuss pleas and sentences during the judge's first docket call or immediately thereafter. The officer in charge of the case would customarily attend these conferences in the hall on the matter of reduction of charge, pleas and sentencing. During this time, the judge is either on the bench or in his chambers. On occasion, a defense counsel would appear with his client before the judge and state that his client was charged with armed robbery and that the assistant prosecuting attorney had stated that this would be acceptable. If the assistant prosecuting attorney happened to be in the room discussing another case, with another defense counsel, the judge would call for him. The judge would learn if this had been "okayed" by the assistant prosecuting attorney. If it had, then the court accepted the plea to the reduced charge. (Law Enforcement (ABA), p. 132; see Oak's study of Illinois Indigents, supra, note 38.)
By 1900, the realities of law enforcement required two systems of criminal justice; one "book law",\(^4\) the other, \emph{and the main one} an informal inquisitional process based largely on the power of a district attorney to make recommendations regarding reduction of or dismissal of a charge.

Suppose rights kept "booklog" currency by guilty pleas "volunteered,"\(^5\) in fear of the dark side of the moon; the threat to prosecute the offender for record offenses brigaded to exquisite sentence possibilities.

The United States Supreme Court of the Fifties viewed, of all things, the "voluntariness" of police station out-of-court confessions, concededly and infrangibly once a crown jewel of real world Evidence at the adversary trial.\(^6\) State criminal verdicts lacked due process when based on admission of a coerced confession.\(^7\) Behind Mutt and Jeff station

\begin{footnotes}
45. Our administration of justice is not decadent. It is simply behind the times . . . .
Bentham tells us that in 1797, out of 550 pending writs of error, 543 were shams or vexatious contrivances for delay. Jarndyce and Jarndyce dragged out its weary course in chancery only half a century ago. We are simply stationary in that period of legal history . . . . [W]ith the passing of the doctrine that politics, too, is a mere game to be played for its own sake, we may look forward confidently to deliverance from the sporting theory of justice . . . . [Excerpts from an address by Roscoe Pound, The Date is 1903, reprinted in 57 A.B.A.J., 348 at 351, 352 (1971).]


47. An out-of-court confession was a party admission admissible even though defendant plead not guilty. The requirement that confession be not coerced but true and voluntary after warnings, etc., is a very late 18th century refinement to adversary trial confession law. Wigmore summarizes the history of the doctrines of confession and says: "The development of the principle of safeguarding the use of confession has been largely due (as may be later noticed) to the spirit of consideration for accused persons, which grew up during the latter half of the 1700's and the first part of the 1800's." 3 Wigmore at 229. It is this period when the trial by adversary rules obtained their greatest currency in England and America.

48. The use of the Constitution to limit the power of states to utilize confessions was first employed in \emph{Brown v. Mississippi}, 297 U.S. 278 (1936).
\end{footnotes}
house processes lie, however, a much more material, but missed inquiry.

Just what trial systems were confessions servicing by the 1950's?

But to answer that question is to pose one: And what, pray tell, be confessions at inquest justice?

The answer is a plea in open court or just what 90 percent of the defendants in America were doing by 1964.

eral Court search in that area prompted Mapp v. Ohio, 367 U.S. 643 (1961). In confession cases, no Fifth Amendment analysis came until 1964. Till then, review in State cases was accomplished by the Fourteenth Amendment procedural due process of fundamental fairness. See Ritz, Twenty-Five Years of State Criminal Confession Cases in the Supreme Court, 19 Wash. & Lee L. Rev. 35 (1962).

49. See Court's opinion in Miranda v. Arizona, 384 U.S. 436 at 452, citing Inbau and Reid. Of course, police, interrogation is to formal adversary justice what judge and magistrate interrogation is under inquest procedure. Query which is more humane, desirable and better for the poor and oppressed who commit crimes? Only academia though has displayed the happy courage in consistency to suggest that may be (as per early authority) police should not question post arrest suspects at all.

For full achievement of Miranda's values, a suspect needs even more than a sympathetic explanation before his interrogation—he needs a sympathetic advocate during the interrogation. Only in this way will most suspects be able to assert a measure of control over the situation, overcome inevitable nervousness, and avoid the impact of perceived (but irrelevant) social rules operating in a situation structured and manipulated by a professional interrogator. Griffiths, A Postscript to the Miranda Project: Interrogation of Draft Protestors, 77 Yale L. J. 300 at 317 (1967).

50. By the end of the Middle Ages, a peer indicted for a felony by indictment procedure under Pleas of the Crown "In Pace Domini Regis," could be tried before either inquest or adversary oriented tribunal. Depending, it was said whether Parliament was in session.

He may be tried before a court in which all his peers sit as judges of both fact and law, presided over by a high steward who is but 'primus inter pares'; on the other hand he may find that a high steward empowered 'ad audiendum et terminandum' is his only judge, while a selected body of his peers summoned 'ut rei veritas melius sciatur' plays the part, not indeed of a jury, for they do not swear, but of a quasi-jury charged to find fact but not to meddle with law.

I Select Pleas in Manorial and Other Seignioral Courts, p. ixvii Matilard, ed. (1888). Distinguish the oath in primitive oath helping from the latter "Oath of cleric origin" administered ex officio; a Supremacy Act in Elizabeth's time vested in the Crown's Commissioners all Ecclesiastical Jurisdiction. Levy, in Origins, p. 95 adds:

She vested in her commissioners 'full power and authority . . . to visit, reform, redress, order, correct and amend in all places within this our realm of England all of such errors, heresies, crimes, abuses, offences, contemptes and enormities spiritual and ecclesiastical' by the most expedient means at their discretion. She specifically empowered them to examine suspects 'upon their corporal oath, for the better trial and opening of the premises.' Although the regular ecclesiastical courts might punish only by ecclesiastical censures which graduated to excommunication, the letters patent creating her Majesty's commissioners for ecclesiastical cases authorized them to punish 'by fine, imprisonment or otherwise.' In the Colonies, the 'oath' was considered a form of torture, hence Rights of Self-Incrimination protect freedom at any and all proceedings conducted under oath.

On the merger of God's Church with King's court, see Levy, Ch. 3, supra, note 11.

At inquest tribunals pleading to the mercy was the climax to magistrate interrogation under oath by the inquest judges sitting as star chamber commissioners. As late as the 17th century, Lord Coke and the 'development of his common law of English rights,' we find the clerk of the court writing:

... Lord Chancellor Ellesmere, after the example of wolsey, was in the habit of taking his seat in the Star Chamber Attended by a number of the no-
In 1650, poor John Udell was dealt with by a Star Chamber inquest for his libelous and criminal spoofs at the prelates of Her Majesty's church. Udell was urged:

Do not stand in it, but confess it and submit yourself to the Queen's mercy before the jury find you guilty.\textsuperscript{51}

And today? An estimated 90 per cent of felony convictions are based on waiver of party trial, by plea.\textsuperscript{52} But if state adversary jury trials were all that infrequent why did police have to conduct pre-trial interrogation to obtain person-party-suspect-defendant confessions at all?

The answer was by 1964 to primarily encourage suspect “not to stand in it”; (a station confession being useful for this purpose) and only barely incidental for use if defendant persisted in demanding the whole of the form, necessitating jury trial by adversary rules where defendant would probably not, because of undoubted prior criminal record, dare to testify about his impeachable self.\textsuperscript{53}

The enormity of the court’s mistake as to prevailing state criminal justice "systems" is underscored by the President’s Commission’s findings about this other system two years later:

The system usually operates in an informal, invisible manner. There is ordinarily no formal recognition that the defendant has been offered an inducement to plead guilty. Although the participants and frequently the judge know that negotiation has taken place, the prosecutor and defendant must ordinarily go through a courtroom ritual in which they deny that the guilty plea is the result of any threat or promise. As a result there is no judicial review of the propriety of the bargain—no check on the amount of pressure put on the defendant to plead guilty. The judge, the public, and sometimes the defendant himself cannot know for certain who got what from whom in exchange for what.\textsuperscript{54}

\textsuperscript{51} Taken from an account in Sutherland, \textit{Crime and Confession}, 79 Harv. L. Rev. 21, 28 (1966).

\textsuperscript{52} The President’s Commission on Law Enforcement and Administration of Justice—The Courts, at 9.


\textsuperscript{54} President’s Commission, supra, note 52 at 9. “Judicial supervision is not an effective control when the system of plea bargaining is built on tacit rather than explicit understandings.” \textit{Id.}, at 12.
Even so, reasonable men could differ whether proper reform should consist of the restored reaffirmation of an adversary system, once before in 1688 'brought back' by Englishmen in contest with a divine right state. Rights apportionment in our Constitution, Hamilton once observed a century after that, was supposed to be different.\(^5\) A king's jury in service of party adversary rules share the system's assumptions, maybe true a time once only.

<table>
<thead>
<tr>
<th>17th CENTURY ASSUMPTION</th>
<th>1971 REALITY</th>
</tr>
</thead>
<tbody>
<tr>
<td>A religious oath to God and perjury sanction guaranteed that most witnesses would reveal only truth.</td>
<td>—The oath is nonreligious or unconstitutional. How often does a perjury indictment occur?</td>
</tr>
<tr>
<td>No rules excluding relevant evidence.</td>
<td>—Hundreds of rules excluding relevant evidence because of the ways it was obtained or presented. These rules often have nothing to do with the probative force to the offered proof.(^6)</td>
</tr>
</tbody>
</table>

55. The relationship between man and state in a society supposed to have been founded on consent seemed different than the premise of rights from a government totalitarian in pretence. Hamilton in the *Federalist*, one hundred years after an English Common Law revolt, wrote:

It has been several times truly remarked that bills of rights are, in their origin, stipulations between kings and their subjects, abridgements of prerogative in favour of privilege, reservations of rights and not surrendered to the prince. Such was MAGNA CHARTA, obtained by the Barons, sword in hand, from King John. Such were the subsequent confirmations of that charter by succeeding Princes. Such was the petition of right assented to by Charles the First, in the beginning of his reign. Such also, was the declaration of right presented by the lords and commons to the Prince of Orange in 1688, and afterwards thrown into the form of an act of parliament, called the bill of rights. It is evident, therefore, that according to their primitive signification, they have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and as they retain everything, they have no need of particular reservations. 'WE THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity do ordain and establish this constitution for the United States of America:' This is a better recognition of popular rights, than volumes of those aphorisms, which make the principal figure in several of our state bills of rights, and which would sound much better in a treatise of ethics, than in a constitution of government.

But a minute detail of particular rights is certainly far less applicable to a constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to one which has the regulation of every species of personal and private concerns. Hamilton, *The Federalist* at 438, 439 [Blackwell ed., 1948].

56. At any rate, *what warrant is there for the federal courts to assume the same supervisory control over state officials as they have assumed over federal officers, even if that control could be effective?* And the exertion of controlling pressures upon the police is admittedly the only justification for any exclusionary rule. [Emphasis added.] *Elkins v. United States*, 364 U.S. 206,
<table>
<thead>
<tr>
<th><strong>No Fifth Amendment</strong></th>
<th><strong>A jury which at first was to know everything (friends, neighbors or oath helpers) later nothing about the case.</strong></th>
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</thead>
<tbody>
<tr>
<td>—Defendant can testify but it is unconstitutional to comment when he does not.(^6)</td>
<td>—A jury of neither friends nor strangers but which reads the paper.</td>
</tr>
<tr>
<td><strong>A system that could be re-formed by, for instance, allowing defendant to testify about his life.</strong></td>
<td>—Almost all defendants who go to trial have a record to &quot;impeach.&quot; <em>The System won't let them testify.</em>(^6)</td>
</tr>
<tr>
<td><strong>A public trial—&quot;what saved the English procedure from degenerating into an inquisitional system.&quot;(^9)</strong></td>
<td>—See the Reardon Report—Query: Is the free press wanted.(^6)</td>
</tr>
<tr>
<td><strong>An assumption that there was either opinion or facts; witnesses could create original event by stating it; witnesses either were liars or told the truth.</strong></td>
<td>—Same, but Freud, psychology and science in conflict.(^6)</td>
</tr>
<tr>
<td><strong>No negotiated guilty pleas or jury waivers encouraged (unless incident to an inquisitional system).</strong></td>
<td>—Waiver based on number of crimes, scarcity of resources serving a <em>de facto</em> inquest real life 'model.'</td>
</tr>
<tr>
<td><strong>An age when capital punishment was considered an improvement to hard labor.</strong></td>
<td>—Two centuries of prison failure—the crime of punishment, related to trial procedure as substance is to form.(^6)</td>
</tr>
</tbody>
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241 (1960) (Frankfurter, J., dissenting).


58. E.g., Impeachment by Prior Inconsistency, Specific Acts of Misconduct (most jurisdictions) Reputation Witness, Prior to Criminal Act. Query: Do most first offenders go to trial at all?


62. Menninger, *The Crime of Punishment* (1968). "Psychiatrists cannot understand why the legal profession continues to lend its support to such a system after the scien-
Ample community resources to provide adversary trial and jury. —No time, manpower, or people for jury trials. 63

A great number of capital offenses. 64 —Promises.

No discovery of opponents’ facts or witnesses. 65 —Defendants’ discovery of people case. 66

Straight witnesses. —Witnesses in many criminal trials are, in fact, accomplices who for trade promise and leniency testify for state. 67

Proceedings initiated by victim. —The worst of both systems. Sometimes victim—mostly a police decision.

—Ambitious political-minded prosecutors who try onerous winners and settle rest with practically no settled 68 guidelines. 69

... The discoveries of Sigmond Freud and other scientists near the turn of the century led to new understandings of human behavior that made a tremendous impact on almost all aspects of human life—all except law.” 70 Id., at 91, 92.

64. There was once in England 162 capital offences reduced to 2 in the nineteenth century. See Dicey, Law and Opinion in England during the Nineteenth Century, 29-30 (1914). The brutal pillory was abolished in 1837 (7 Will IV and 1 Vict. C. 23).

65. The indictment or civil pleadings at common law were to frame issue for trial discovery. Pre-trial discovery is symptomatic of a failing adversary fact-finding system as 'compelled disclosure' is responsive to inquest practices.

66. See, Fletcher, Pretrial Discovery in State Criminal Cases, 12 Stan. L. Rev. 293, 316-19 (1960). What are the implications to “kept” evidence by adversary? Suppose for instance defense must lay a foundation and show that a transcribed statement of a witness was given to police before such a written statement or reports must be disclosed to adversary. See, People v. Golson, 37 Ill. 2d 419 (1967). Would the prospect of discovery lead to more or less transcriptions and written reports kept by police? Query: Do adversary expectations lead to or from internal fact accumulation? Reasonable men could differ.

67. Lord Hale in his “Historia Placitorum Coronae” put it for an earlier age (Henry II-1300) this way:

A confession in order to obtain some other advantage, is either where the prisoner confesseth the felony in order to his clergy, de quo infra, cap. 44, or where he confesseth the offense, and appealeth others thereof, thereby to become an approver, and thereupon to obtain his pardon, if he convict them, and this lets in the whole learning touching approvers and approvement, which I shall here open in the order that Mr. Stamford hath gone before me.” 2 Hale’s Pleas of the Crown, 226 (Small ed. 1847).

68. See, for instance, the careful differences toward plea candor by judges who might ‘participate’ or ‘ratify’ but at least be aware of bargains under F.R.Crim. P. 11, 18 U.S.C.A., Scott v. United States, 419 F.2d 264 (D.C. Cir. 1969).

An era of witchcraft — An era of technology, movies, tapes, voice prints, etc.

The adversary system which the Supreme Court says is required in all courts by the Constitution strains an honest conscious lawyer's credibility. He must at once know all about the client's involvement in the crime, and yet nothing. Disassociation does not come so easy.

Lawyers cannot recommend that an innocent client plead guilty, but the attorney must inform himself of the evidence in order to properly advise his client. Once, however, a decision for trial has been made, lawyer then must fein ignorance: "It is not up to me to decide."

Professor Monroe H. Freedman caused a sensation when he wrote that it is proper for a lawyer under the adversary trial system to put a witness on the stand when he knows the witness will commit perjury. Can you imagine determining the cause of a plane crash by these processes?

The adversary system of truth-finding was concededly unscientific enough. The Supreme Court, however, aggravates the problem by welding to it a host of "cloth rights" enacted not to filter truth but to

70. Do the Canons drafted in 1908 fail to reflect the practical realities of the systems they are designed to serve? For a discussion of Prosecution and Defense Attitudes, see Skolnick, Justice Without Trial, 241 (1966). Griffith attributes to the adversary battle model defined roles which at least in prosecutor's case veils and masks the ambivalence he is supposed to have.

So long as the state's interest is solely 'to put a suspected criminal in jail,' the suspected criminal's corresponding interest, almost necessarily, is simply to stay out of jail. The roles of prosecutor and defense counsel are thereby defined. The competing concerns of efficiency and abuse of power affect the size of the role defense counsel is allowed to play but not the nature of that role. Ideology, 79 Yale L.J. 359, at 383, supra, note 1.

71. See, Baily and Rothblatt, Investigation and Reparation of Criminal Cases (1970). Ch. 1, Section 26—"Tell your client to (a) speak with no one. Section 32. As to your position as his attorney, make it clear that you alone will control the strategy of the defense, decide what witnesses to call and engage in whatever discussions you deem necessary with the prosecutor. Section 33. Warn your client about common police strategems. Section 38. . . . It is necessary for you to avoid any overt reactions to anything your client reveals to you. Section 44.

"§ 134. Should you demand a jury? " . . . You must know both the strengths and weaknesses not only of your own, but also of the prosecution's case. . . . "If you believe that the defense witnesses will be unconvincing and the prosecution's case is powerful, consider the negotiation of a plea. Only do so, however, if you are satisfied of your client's guilt and if your client is willing publicly to admit his guilt in exchange for a plea."

Section 139. "If you decide to put the defendant on the stand, prepare him with special care for his testimony will be scrutinized more carefully than anyone else's."


1. Is it proper to cross-examine for the purpose of discrediting the reliability or credibility of an adverse witness whom you know to be telling the truth?
2. Is it proper to put a witness on the stand when you know he will commit perjury?
deter unfair means or methods used in obtaining evidence by law enforcement agencies. Suppose evidence is admitted which was gathered unfairly, but defendant stands convicted by other different untainted evidence. If the Supreme Court reverses the defendant's conviction, "the criminal is to go free because the constable has blundered." If it affirms conviction, the truth might win out, but the judges have failed to chastise, punish or police offending parties in the only way a court can—by reversing conviction.

No one seems to know at due process state trials just what is constitutional harmful error. Moreover, it is not certain whether the Supreme Court's "remedies" for impropriety in the preparation or conduct of an adversary criminal trial are at all responsible to pre-trial or no-trial informality and abuse that the decisions were supposed to correct. In Miranda, for instance, the Supreme Court saw the cure to police pre-trial third degree in expanded Fifth Amendment silence "rights." In 1927, the Dean of Cornell Law School had written:

3. Is it proper to give your client legal advice when you have reason to believe that the knowledge you give him will tempt him to commit perjury?"

Id. at 1469.

See ABA CANONS OF PROFESSIONAL ETHICS: No. 22, Cander to the Court; No. 15, Fraud; No. 37, Duty to preserve Confidences.


74. In Harrington v. Cal., 395 U.S. 250 (1969), a majority found that the improper admission of two nontestifying co-defendants confessions placing a California robbery defendant at the scene of the crime was harmless beyond a reasonable doubt within meaning of Chapman v. Cal., 386 U.S. 18 (1967), although the minority of Marshall, Brennan and the Chief Justice were sure that the Court overruled the very case it purported to apply. See Coolidge v. N.H., supra note 73.

The discovery of adversary due process rights creates all sorts of problems. Should a newly enacted constitutional right apply to an old conviction obtained before the right discovery?

In Linkletter v. Walker, 381 U.S. 618 (1965), the Court announced that only newly discovered due process rights essential to the integrity of the fact-finding process would become retroactive and apply in state courts to convictions which had become final before the date of the constitutional discovery. Thus, Mapp was not applied retroactively because how police obtain real evidence does not affect whether or not the object proves anything. The famous Gideon case was applied retroactively because a lawyer had by 1962 become essential in state criminal procedures. The fair line-up legislative rules in the Wade and Gilbert cases were not given retroactive effect because of their effect on thousands of prior convictions obtained without them. It is difficult to conceive of anything more essential to the fact-finding process at a criminal trial than the line-up testimony identifying defendant. For the latest 5-to-4 decision on retroactivity, see U.S. v. United States Coin and Currency, 39 L.W. 4415 (U.S., April 5, 1971). It is all very faint.

75. Here is your F.B.I. form:

"YOUR RIGHTS
PLACE ________________________
DATE ________________________
TIME ________________________

Before we ask you any questions, you must understand your rights.
"You have the right to remain silent.
"Anything you say can be used against you in court.
"You have the right to talk to a lawyer for advice before we ask you any ques-
In the opinion of the writer, the privilege against self-incrimination is the fundamental cause of the practice of the third degree.\textsuperscript{76}\n
It is human to mistake effects as causes, but it may be tragic to replant the tree that reaped the thorns.

Is it possible that improper searches, alley trials, coerced confessions, immunity baths, squeal room justice, dropsy rituals, and unequal sentences are effects of a massive failure of the very adversary system that the Supreme Court sees as the cure of it all?

Any system of undifferentiated arrest, indictment, two blind advocates, right kind of evidence, proof beyond doubt to the satisfaction of all twelve and laissez faire appeal may be accompanied by pre-trial abuse or no trial informality not as the court would have it despite the system, but because of it. Perhaps the incremental pre-trial cost of trial rights is what we should be looking at.

In Harper’s Monthly for example, there once appeared an arresting article called “The Great American Game\textsuperscript{77}.”

The difficulty of getting at the facts in the courtroom induces a certain type of mind to seek for this information elsewhere where restraints are not merely less rigid, but are lacking altogether. The

\textsuperscript{72} 72. Irvine, The Third Degree and the Privilege Against Self-Incrimination, 13 Cornell L.Q. 211, at 213 (1927).

\textsuperscript{76} 76. Irvine, The Third Degree and the Privilege Against Self-Incrimination, 13 Cornell L.Q. 211, at 213 (1927).

result is the 'third degree.' Thus, while over tenderness for the accused causes many who are guilty to escape their just punishment, the direct result is to cause many to suffer humiliation and even physical torture of a nature not authorized by law even for the guilty—and some of these sufferers are innocent of any crime. Let us add, parenthetically, that a legal system that encourages law officials to act outside of the law must be held accountable not only for the direct ill consequences of such unlawful conduct, but also for the general lawlessness which thus breeds. [Emphasis added.]

And what happens when the ball is over? The re-arrest figures for those released are even worse. Could it be different? Perhaps a first step, proposed by Mr. Justice Harlan is the repeal of the fifty-state code. Why not! As Mr. Justice Douglas is wont to remind us, "Happily constitutional questions are always open." They are anyway under the Fourteenth Amendment due process clause. Disincor-

78. Id. at 755.
79. PERCENT OF PERSONS REARRESTED WITHIN 30 MONTHS BY TYPE OF RELEASE IN 1963*

<table>
<thead>
<tr>
<th>Type of Release</th>
<th>Percentage</th>
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<tbody>
<tr>
<td>Fine and probation</td>
<td>30%</td>
</tr>
<tr>
<td>Suspended sentence and/or parole</td>
<td>47%</td>
</tr>
<tr>
<td>Parole</td>
<td>57%</td>
</tr>
<tr>
<td>Fine</td>
<td>63%</td>
</tr>
<tr>
<td>Mandatory Release</td>
<td>67%</td>
</tr>
<tr>
<td>Acquittal or Dismissal</td>
<td>83%</td>
</tr>
</tbody>
</table>

80. "It is time, I submit, for this Court to face up to the reality implicit in today's holdings and reconsider the 'incorporation' doctrine before its leveling tendencies further retard development in the field of criminal procedure by stifling flexibility in the States and by discarding the possibility of federal leadership by example." Williams v. Florida, 399 U.S. 78 at 138 (1870) (Harlan, J., dissenting).
82. In Duncan v. Louisiana, 391 U.S. 145 (1968), the Supreme Court declared that Louisiana and every other state in the Union in all criminal cases in which federal courts would award jury trial must award them. A few years earlier in construction to the same constitution, same clause, same state and same issue (jury trials), the Court wrote: "The States so far as this amendment is concerned are left to regulate trials in their own court in their own way." Walker v. Sauvinet, 92 U.S. 90 at 92 (1875). In another due process case, decided after the Civil War: "The States so far as this amendment is concerned are left to regulate trials in their own court in their own way."
poration of the Fourth, Fifth and Sixth Amendments in state courts would leave state justice (when modified by their constitutions) free to enact space-age reform. Wasn't Federalism a safe experiment?

Walker v. Sauvinet, 92 U.S. 90, at 92 (1875). In another due process case, decided after the Civil War. The Supreme Court seemed emphatic:

We might go still further, and say, with undoubted truth, that there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. Missouri v. Lewis, 101 U.S. 22 at 31 (1879).

What a world of difference between the dynamics of fifty possibly different state procedures; (federalism was a safe experiment) and one fifty-state constitutional model which will change only if court personnel are willing to forego 'strict construction.'

In Hurtado v. California, 110 U.S. 516 (1884) it was said that if a proceeding followed usages of England and this country if was due process:

but it by no means follows that nothing else can be due process of law to hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians. 110 U.S. at 528, 529.

Reasonable men could differ on which characteristic would be most like the law of the Medes, the due process of fifty state procedures changeable by their law and legislation of a one-nation due process. Chief Justice Burger (is) apparently unattuned to one nation due process,

I find it somewhat disconcerting that with the constant urging to adjust ourselves to being a pluralistic society—and I accept this in its broad sense—we find constant pressure to conform to some uniform pattern on the theory that the Constitution commands it. (Jury required when confinement of 6 months to 1 year possible). (Baldwin v. New York, 399 U.S. 66 at 77. (1970) Burger, C.J., dissenting).

The whole theory of incorporation stands on the shakiest of 'precedent' as Mr. Justice Douglas conceded in 1962 in Gideon, only a handful of judges until then (10) espoused an incorporated bill of right to the Fourteenth Amendment phrase 'due process of law.' See Frankfurter, Memorandum on "Incorporation" of the Bill of Rights into Due Process Clause of the Fourteenth Amendment, 78 Harv. L. Rev. 746 (1964). One hundred and seventy years after the amendment came Justice's Black and Douglas with a few stands and pebbles of suppositions history; see Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 Stan. L. Rev. 5 (1949), audaciously suggesting in Adamson v. California 332 U.S. 46 (1957) that all along the Fourteenth Amendment included all the adversary federal amendments. "The only legal precedent was the 1890 railroad court which invested substantive due process, discovered that corporations were due process persons, doomed the federal income tax, decided Plessy v. Ferguson and incorporated the first bill of right nor shall private property be taken for a public use without just compensation." U.S. Const. Amendment V. See Burns, The Death of E Pluribus Unum, 19 DePaul L. Rev. 651 (1971). It was the disgrace of this and succeeding private property due process courts which may have led the victim to a "new deal" court on Black-Douglas. (5 to 4) to incorporate a less terrestrial version of due process. At least, Malloy v. Hogan (a 5-to-4 decision) was good enough to concede where incorporation got started.

... The view which has thus far prevailed dates from the decision in 1897 in Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, which held the Due Process Clause requires the States to pay just compensation for private taken for public use. It was on the authority of that decision that the Court said in 1908 in Twining v. New Jersey, supra, that 'it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action because a denial of them would be a denial of due process of law. 378 U.S. at 4, 5.

"Denial of the right to experiment may be fraught with serious consequences to the nation: It is one of the happy incidents of the federal system that a single courageous
In the short term, plea bargaining should be recognized for what it is, a current necessity, not it is submitted, despite, but because, of the rarified adversary trial system. Inquisition procedures prevailing today should become honest and regulated with checks, balances, or filters in lieu of hardened rights. Exclusionary rules which do not deter and are unrelated to proof should be abolished.

Multiple special interest appeals should be curtailed and preliminary hearings reconsidered, jury trials in civil cases should be reconsidered, criminal juries reduced, and selected offenses reclassified, or abolished. Over the longer haul state constitutional amend-

State may, if the citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

... If we would guide by the light of reason, we must let our minds be bold. New State Ice Co. v. Liebman, 285 U.S. 262 ct. 311 (1932) (Brandies J., dissenting).

85. The "United" profession in defense of plea negotiations is set out in Alschuler, The Prosecutor's Role in Plea Negotiations, 36 U. Ch. L. Rev. 50, 51, 52 (1968).


87. See the findings of Dallin Oaks' Exclusionary Rule Study, supra, 56. But see, Coolidge v. U.S., supra note 73, rejecting reconsiderations of the exclusionary rule.


In New York, criminal appeals seeking constitutional release are beginning to paralyze the appellate docket.

The same picture emerges from California. Its 1969 Judicial Council reveals:

Despite the doubling of appellate court judges in the seven year span between 1961 and 1968 and the conscientious efforts of those judges, civil appeals are being unduly delayed because of the volume of criminal appeals and the priority given them. Unless some change is made in criminal appeal procedures there is every reason to believe that the number of appellate judges will have to be doubled again within the next five years.

Most collateral attacks on criminal judgments come from errors in charge, assignment, or trial preliminary. The 1971 California report lists the ten most often assigned grounds for post conviction relief as:

1. Ineffective counsel.
2. Plea of guilty unlawfully induced.
3. Use of a coerced confession.
4. Use of evidence obtained through an unconstitutional search and seizure.
5. Use of evidence obtained through an unlawful arrest.
6. Infringement of the privilege against self-incrimination.
7. Unconstitutional suppression of evidence.
8. Use of perjured testimony.
9. Denial of the right to appeal.
10. Double jeopardy.
11. Unconstitutional selection and impeachment of the jury.

1971 JUDICIAL COUNCIL OF CALIFORNIA REPORT, 53. Forthright pleas and better allocation to appeal doctrine vis-a-vis, estoppel, laches, and res judicata would assist filtration to meritorious appeals.

89. REPORT OF THE SPECIAL JUDICIAL REFORM COMMITTEE SUPERIOR COURT, LOS ANGELES COUNTY, (1971).

90. Id. recommendation, 13.
91. Id. recommendation, 15.
92. Id. recommendation, 11. Marijuana possession classed as misdemeanor.
ment should be enacted to afford genuine two-way fact-trial discovery. This means, you know what about the Fifth Amendment.94

The role of juries (an early inquest ‘reform’) should be reconsidered. Let magistrates or juries question suspects or defendants.95 What would be wrong with video “partials.”96 All offense procedures should begin to be viewed in behavior terms; the rights and place of counsel should come tailored form experiential historicity in subject-object, victim analysis. What is needed are more studies directed to one procedure per offense.97

The courage of real reform98 in post-trial prison and feudal prisons will, it is submitted, come only when, not before, pre-verdict adversary procedures are viewed as part and parcel of the one-same static seventeenth century party system of criminal justice. As Chief Justice Burger puts it, “If that system cannot be satisfactorily explained to enlightened people, perhaps we should re-examine some of its fundamentals.”99

94. “It is necessary to repeal the provision in question to enable the community to protect itself against the evils of trusts and combinations.” Terry, Constitutional Provisions against Forcing Self-Incrimination. 3 Yale L.J. 127, at 129 (1905).
97. “Nothing could be more unfair than a fair trial operating on the assumption that in respect to behavior control all men are created equal.” Menninger, supra, 62, at 92.
98. “§ 134. Should you demand a jury?
   “... You must know both the strengths and weaknesses not only of your own, but also of the prosecution’s case...
   “If you believe that the defense witnesses will be unconvincing and the prosecution’s case is powerful, consider the negotiation of a plea. Only do so, however, if you are satisfied of your client’s guilt and if your client is willing publicly to admit.
99. See the Report of the Judicial Reform Committee, supra n. 89, particularly the exciting range of suggestions in its Appendix III (part (a)) and “additional suggestions,” part (c), suggesting a merger of state and federal court systems (No. 152); etc.