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THE CRIME CRISIS AND PROPOSED
PROCEDURAL REFORM

by Robert A. Kessler*

It is seemingly becoming more and more difficult to gain acceptance for
the proposition that punishment of the guilty is desirable, other things
being equal. One commentator, who attempted in vain to dissuade
this Court from today's holding, thought it necessary to point out that
there is "a strong public interest in convicting the guilty." Indeed the
day may soon come when the ever-cautious law reviews will actu-
ally be forced to offer the timid and uncertain contention, recently sug-
gested satirically, that "crime may be thought socially undesirable, and
its control a 'valid governmental objective' to which the criminal law is
'rationally related.' "1

Today's crime crisis has truly assumed pandemic proportions. While
the quantum of criminal occurrences increases at an alarming rate,2
barely one in nine of the serious crimes reported annually to the police
results in a conviction.3 Although we are told that certainty of swift
punishment is the principal deterrent to crime,4 we foster a system of

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dissenting) (footnotes omitted) (holding that a claim of unconstitu-
tional search and seizure by a federal prisoner is cognizable in a post-conviction proceeding under 28 U.S.C. § 2255).

2. See FBI, UNIFORM CRIME REPORTS FOR THE UNITED STATES 2 (1970) [hereinafter
cited as UNIFORM CRIME REPORTS] wherein the Federal Bureau of Investigation reports
a 176% increase in crime from 1960 to 1970.

3. R. CLARK, CRIME IN AMERICA 117-18 (1970); see UNIFORM CRIME REPORTS,
supra note 2, at 33-36; What the Police Can—and Cannot—Do About Crime, TIME,
July 13, 1970, at 34: "Of all reported major offenses only 12% lead to arrests, only
6% to convictions and 1% to prison."

It must be conceded, however, that the statistics in this regard may often be mislead-
ing. For instance, when a criminal engages in 50 to 100 crimes per year the cumulative
statistical chance that he will escape conviction is significantly lower than should he
commit 1 to 10 crimes per year. On the other hand, many crimes are unreported or the
culprits never arrested. This necessarily emphasizes the major "enforcement" problem
which faces our society. See note 6 infra.

4. H. Packer, THE LIMITS OF THE CRIMINAL SANCTION 287-88 (1968); B. Wootton,
CRIME AND THE CRIMINAL LAW 98-99 (1963); Andenaes, The General Preventive Ef-
fects of Punishment, 114 U. PA. L. REV. 949, 964-65 (1966); Bator, Finality in Criminal
Law and Federal Habeas Corpus for State Prisoners, 76 HARV. L. REV. 441, 452 n.21
Ehrlich, Participation in Illegitimate Activities and the Effectiveness of Law Enforce-
ment, in NAT'L BUREAU OF ECONOMIC RESEARCH, 50TH ANNUAL REPORT 77 (1970)
criminal justice which encourages delay, uncertainty and ultimately more crime. Moreover, while the fundamental difficulty faced by the administration of our system of justice may be best characterized as a "police problem," a dramatic improvement in the detection and apprehension of criminals will be meaningless should the juridical process allow factually guilty arrestees to escape conviction and punishment.

This article is not intended as a panacea for the criminal woes afflicting our society. Nor is its purpose to denounce recent landmark

(results of a statistical survey confirm that the probability and severity of punishment have a significant deterrent effect on all offenses); Williams, Crime, Punishment, Violence and Dissent; A Crisis of Authority, 45 CAL. STATE B.J. 817, 824 (1970). See R. CLARK, CRIME IN AMERICA 119 (1970); see generally CALIFORNIA ASSEMBLY COMMITTEE ON CRIMINAL PROCEDURE, PROGRESS REPORT—DETERRENT EFFECTS OF CRIMINAL SANCTIONS 25 (1968); but see Bazelon, New Gods for Old: "Efficient" Courts in a Democratic Society, 46 N.Y.U.L. REV. 653 (1971).

5. Edward Bennett Williams vividly characterized the plight of the criminal justice system in a speech before the California State Bar Association:

They [criminals] go out in the street to do their mischief on one basic premise—that they won't get caught! And the record shows they're right 80 percent of the time! And they go out on another basic premise. Their downside position is that if by some wild fortuity they're apprehended by the police that they can tinker with the archaic, outmoded, antiquated American criminal justice system for two years before they face the day of reckoning. You think that's a deterrent? You bet it's not! Williams, Crime, Punishment, Violence and Dissent; A Crisis of Authority, 45 CAL. STATE B.J. 817, 822 (1970).

6. This term connotes the dramatic improvement needed in the facilities, manpower, and detection methods and devices available to the federal and state law enforcement agencies. See FORD FOUNDATION, A MORE EFFECTIVE ARM 1 (1970):

The need for reinforcement and change in police work has become more urgent than ever in the last decade because of rising rates of crime, increased resort to violence, and rising tension, in many communities, between disaffected or angry groups and the police.

Prominent police officials and criminal justice experts, with whom we have consulted in the last two years verify our own staff analysis that initiatives for change in the police function are critically needed to improve both police effectiveness and the quality of American justice.

See also THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 91 (1967):

The entire system—courts and corrections as well as the police—is charged with enforcing the law and maintaining order. What is distinctive about the responsibility of the police is that they are charged with performing these functions where all eyes are upon them and where the going is roughest, on the street. Since this is a time of increasing crime, increasing social unrest and increasing public sensitivity to both, it is a time when police work is peculiarly important, complicated, conspicuous, and delicate.

7. For a discussion of factual guilt as compared with legal guilt see text accompanying notes 18-19 infra.

8. Assuredly, there is no panacea for the criminal problems which afflict our society. Indeed, crime seems to be an inevitable concomitant of our American culture. How else is it, for instance, that Tokyo (population of 11.5 million) sustained only 20% the number of murders which occurred in New York City (population of 7 million) in 1970? Or that Tokyo sustained only 474 robberies as compared with 74,102 in New...
decisions of the United States Supreme Court. Rather, this article will propose five changes in the rules of criminal procedure which, if effectively utilized, would allow our system of justice to operate more expeditiously in today's crime infested society. It is submitted that the rules criticized herein have so shifted the balance between society's need for protection against crime, and the interests of those persons suspected and accused of crime, that the latter now unduly prevail upon the scales of justice. A fresh examination of these rules will reveal that they no longer aid in the achievement of the paramount goals of criminal law and criminal procedure. Further, strict adherence to some of these rules has served only to debilitate the deterrent effect of the law and to unleash upon society persons who, though adjudged legally innocent, were perhaps factually guilty.

It has been stated that the primary purpose of the criminal law is the

9 York? Los Angeles Times, Dec. 3, 1971, pt. 1-A, at 2, col. 1. It has been stated that in order to eliminate the occurrence of crime per se in our society, the very fountainheads of crime would have to be abrogated: poverty, drugs, racism, unemployment, sickness, alcoholism, avarice and hatred. R. CLARK, CRIME IN AMERICA 17 (1970). However, the simple enumeration of these causes evinces the almost quixotic task involved in their eradication. The Japanese society is assuredly afflicted with these causal factors; nevertheless, crime there appears to be a minor occurrence. Perhaps this disparity supports the subjectivists' view that crime is caused by elements within the criminal himself (see note 16 infra) and that the Occidental is inherently more criminally prone than his Oriental cousin. As such, the Hobbesian theory concerning the inherent vices of human nature would necessarily be limited to the Western culture. Nevertheless, it is the author's opinion that crime, being a firmly established "vice" within the Western culture and man, will continue to increase proportionately, if not geometrically, with the population increase. This view seems adequately bolstered by the current statistics concerning crime. See note 2 supra.

10 E.g., Miranda v. Arizona, 384 U.S. 436 (1966) (statements of a defendant in custodial interrogation inadmissible if the defendant not warned of his right to remain silent, that statements may be used against him, of his right to counsel, and, if indigent, of his right to appointed counsel); Malloy v. Hogan, 378 U.S. 1 (1964) (Fifth Amendment privilege against self-incrimination held applicable to the states); Escobedo v. Illinois, 378 U.S. 478 (1964) (Sixth Amendment right to counsel during jailhouse interrogation held applicable to the states); Gideon v. Wainwright, 372 U.S. 335 (1963) (indigent defendant charged with felony has right to be represented by court-appointed counsel).

11 The proposals are: (1) eliminate the exclusionary rule (see text accompanying notes 32-59 infra); (2) allow prior-convictions as direct evidence during the case-in-chief (see text accompanying notes 60-90 infra); (3) abolish trial by jury as a matter of right (see text accompanying notes 91-144 infra); (4) change the standard of proof to preponderance of the evidence (see text accompanying notes 145-177 infra); and (5) modify the appellate process and limit the scope of federal habeas corpus (see text accompanying notes 178-244 infra).

11 While many persons arrested and charged may well be innocent, there are numerous inadequacies in the present system of justice which too easily allow a guilty arrestee to go free. For a discussion of various circumstances, other than innocence,
prevention of crime,\textsuperscript{12} while the primary purpose of criminal procedure is the assurance of a just disposition of the dispute before the court.\textsuperscript{13} However, since a criminal proceeding may be adjudicatively disposed of in only two manners—by acquittal or by conviction\textsuperscript{14}—it follows more particularly that the purpose of criminal procedure is the assurance of a \textit{just} conviction or a \textit{just} acquittal. Since what is “just” in this respect may only be determined by the prevailing societal standard concerning the essence of Justice itself,\textsuperscript{15} our society, afflicted as it is with an alarming incidence of crime, would assuredly accept the conviction of the guilty\textsuperscript{16} and the acquittal of the innocent as representing truly just dis-

which warrant dismissals or acquittals see R. CLARK, CRIME IN AMERICA 118-19 (1970). It has recently been intimated that of the many persons arrested for crimes, the greater percentage have actually been instrumental in their commission. \textit{See} Cole, \textit{Criminal Justice as an Exchange System}, 3 Rutg. Camden L.J. 18, 31 (1971). Further, the FBI statistics on recidivism and rearrest tend to create some doubt concerning the innocent nature of many of those freed by acquittal or dismissal:

Of those persons who were acquitted or had their cases dismissed in 1965, 85 percent were rearrested for new offenses. Of those released on probation 56 percent repeated, \textit{on} parole 61 percent \textit{repeated}, and \textit{on} mandatory release after serving prison time 75 percent \textit{repeated}. \textit{Uniform Crime Reports, supra} note 2, at 39.


13. Goldstein, \textit{The State and the Accused: Balance of Advantage in Criminal Procedure}, 69 YALE L.J. 1149 (1960). Instructive of the purposes for which the Federal Rules of Criminal Procedure were designed is Rule 2:

\textit{... to provide for the just determination of every criminal proceeding ... [t]o secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay. FED. R. CRIM. P. 2.}

14. Although a plea of nolo contendere or a mistrial may dispose of a criminal proceeding, a just disposition requires a finding of either guilt or innocence. This is what juries are charged to determine. \textit{E.g., E. Devitt \& C. Blackman, Federal Jury Practice and Instructions §§ 17.01-.21 (2d ed. 1970).}

15. \textit{See} Breitel, \textit{Criminal Law and Equal Justice}, 1966 Utah L. Rev. 1. For an excellent analysis of the various, and often contradictory, definitions of Justice which have been pronounced through the centuries by noted philosophers see H. Kelson, \textit{What Is Justice?} (1960).

16. In order to effectively deter those with a propensity for crime, their conviction must be certain and punishment must follow swiftly therefrom. Note 4 \textit{supra.}

Rehabilitation within the prison system itself, while not literally a deterrent to crime, may be an effective curative device which could significantly reduce the crime rate. Such rehabilitation is needed in order to halt the alarming amount of recidivism and to close once and for all the revolving door process of crime, arrest, imprisonment, rearrest and reimprisonment. However, the despicable conditions existent in our present penal system seem to be fostering crime rather than preventing it:

\textit{Beatings, deaths and suicides are frequent [in the prison system]. Rape and homosexual cultures involve most of the inmates by choice or force. ... They [prisons] are breeding places of crime, violence and despair. R. Clarke, Crime in America 213-14 (1970).}

The current rash of prison riots is an obvious result of the intolerable conditions under which many prisoners are forced to survive. Though a great percentage of recidivism might be eliminated through more stringent parole standards, it is axiomatic
positions. Additionally, should the conviction of the guilty be certain and the correlative punishment be swift, the criminal procedure would further the purpose of the criminal law.17

The continuing task of criminal procedure has been to make the determination of guilt or innocence as accurate as possible. Since it was early recognized that a system of human design and application could never be perfect, it was deemed preferable to have the system err on the side of leniency and thereby allow some of the guilty to escape rather than punish any innocent person.18 What necessarily evolved was a bifurcation of the concepts of guilt and innocence into what may be termed legal guilt and legal innocence, and factual guilt and factual innocence.

The concept of legal guilt in the United States today constitutes more than a mere determination that the accused has engaged in that mere isolation from society, in addition to its being totally inhumane and impractical, could never “cure” an individual’s propensity to crime. It should therefore be incumbent upon society, once it has captured a suspect and determined his guilt, to attempt to rehabilitate the criminal in order that he may re-enter society as a more useful member thereof. While most penologists agree that rehabilitation may be an important means to reduce the high recidivism rates (see American Correctional Ass’n, Manual of Correctional Standards (1966)), few prisoners receive any curative treatment. 117 Cong. Rec. S416 (daily ed. Jan. 28, 1971) (remarks of Senator Mondale). Senator Mondale noted that of approximately 3000 jails, 85 percent had no educational or recreational facilities, 50 percent had no medical facilities, and 25 percent had no visiting facilities. Id.

Of course, rehabilitation is a tenable concept only if crime is subjectively viewed, i.e., if it is caused through abnormalities or aberrations existing primarily within the criminal himself. If the objectivist approach should be taken—that offenders are really normal beings who have been exposed to external criminogenic forces—then only the elimination of the external sources of crime such as poverty, drugs, et al. (note 8 supra) could appreciably affect the rate of crime. D. Taft & R. England, Criminology 66-67 (4th ed. 1964).

There is an additional theory concerning the causes of criminal behavior which can neither be termed subjective nor objective. This is the “extra gene” theory which espouses a link between criminality and an XYY chromosome complement. See Note, The XYY Chromosome Defense, 57 Geo. L.J. 892 (1969). While no court has yet accepted the defense of chromosomal abnormality as establishing a lack of legal responsibility there is persuasive support for such a theory. See Comment, The XYY Chromosome Abnormality and Criminal Behavior, 3 Conn. L. Rev. 484 (1971); Note, The XYY Chromosome Defense, 57 Geo. L.J. 892 (1969); Note, 6 Tulsa L. Rev. 293 (1970). If such a theory should be established, imprisonment would be useless and hospitalization would seem to be the only tenable cure. Comment, The XYY Chromosome Abnormality and Criminal Behavior, 3 Conn. L. Rev. 484, 509-10 (1971).

17. This purpose is the prevention of crime (note 12 supra and accompanying text), the most effective deterrent of which is swift and certain punishment. Note 4 supra and accompanying text.

18. See note 26 infra and accompanying text.
conduct prohibited by the criminal law. Rather, a person is to be held legally guilty of a crime only if the factual determination that he did what he is accused of is based upon reliable evidence and is made in a procedurally regular fashion by a duly authorized and competent authority. In the fourteenth and fifteenth centuries, however, the adjudication of guilt or innocence in England was determined in a contrary and quite bizarre manner. The accused was subjected to various tortures until or unless the state received the information or confession it desired. Such methods were condoned on the ground that the state and society were in constant danger. Thus the state trials of the period were regarded, not as impartial enquiries into the guilt or innocence of a prisoner, but as incidents in the never ceasing warfare between the state and its enemies. As such, though the accused may not have actually committed the act proscribed, he was nevertheless

None of these requirements [e.g., jurisdiction, double jeopardy, venue, statute of limitations] has anything to do with the factual question of whether the person did or did not engage in the conduct that is charged as the offense against him; yet favorable answers to any of them will mean that he is legally innocent.

The variance between the concepts of legal guilt and factual guilt is dependent upon the prevailing philosophy concerning the relation of the defendant to the state. A defendant-oriented society will place great emphasis upon the various screening factors through which one must pass before he is adjudged legally guilty or legally innocent. In such a society, a great variance necessarily exists between legal guilt and factual guilt, while little variance would exist between legal innocence and factual guilt. However, in a society which places a stronger emphasis upon crime prevention and control, there will exist little variance between legal guilt and factual guilt, with a much greater variance between legal innocence and factual guilt.

20. Torture was used not alone in the Star Chamber, but "as a matter of course in all grave accusations, at the mere discretion of the King and the Privy Council, and uncontrolled by any law besides the prerogative of the Sovereign." Ploscowe, The Development of Present-Day Criminal Procedures in Europe and America, 48 HARV. L. REV. 433, 458 (1935), quoting JARDINE, A READING ON THE USE OF TORTURE IN THE CRIMINAL LAW OF ENGLAND 17 (1837).

The Racke appeared to be the favorite and most effective method of extracting desired information.

The Racke is usu'd no where as in England. In other Countries tis usu'd in Judicature, when there is a semi-plena probatio, a half proofe against a man, then to see if they cann make it full, they racke him to try if hee will Confess. But here in England, they take a man & racke him, I doe not know why, nor when, not in time of Judicature, but when some body bidds. TABLE TALK OF JOHN SELDEN 133 (Pollock ed. 1927).

While the use of torture may have seemed antithetical to the common law, its use was acknowledged and at times approved by some of the noted scholars of that era. See 5 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 185-87 (3rd ed. 1945).


22. 5 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 189-90 (3rd ed. 1945).
23. Id. at 190.
adjudged legally guilty in order to placate the fears and anxieties of the state.

With the inevitable abandonment of judicial torture, the English criminal procedure witnessed a gradual development in favor of the accused.24 Certain procedural safeguards were afforded in order to redress the overbearing bias toward the state,25 and theorists espoused the validity of allowing ten guilty men to go free in order to save one innocent person.26 In the late nineteenth century, additional protections were forged for the defendant.27 The concept of legal guilt assumed a posture quite dissimilar to its all-encompassing forerunner of centuries past, and the scales of justice swung discernibly to the side of the accused and away from the interests of society.

In the United States the procedural rights of the criminally accused developed apace along with their counterparts in England. By 1923 the effects of this development led Judge Learned Hand to caustically observe:

While the prosecution is held rigidly to the charge, he [the defendant] need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there

25. The right to trial by jury developed into its modern form in the early fifteenth century. See T. Plucknett, A Concise History of the Common Law 129 (5th ed. 1956). The right to cross-examine witnesses developed in the seventeenth century (Plucknett, supra at 130), while the right to call witnesses on one's behalf became established in the eighteenth century. Plucknett, supra 436.
26. In the seventeenth century, Justice Matthew Hale believed that five guilty men should be acquitted before one innocent man was convicted. See 2 M. Hale, Pleas of the Crown 288 (W. Stokes & E. Ingersoll ed. 1847). Blackstone believed the ratio to be 10 to 1 (4 W. Blackstone, Commentaries *358) while Starkie believed that the ratio should be 99 to 1. See 1 T. Starkie, A Practical Treatise on the Law of Evidence 506 (4th Am. ed. 1832). For a discussion of this rather puzzling geometric increase in the ratio see text accompanying notes 165-175 infra. While the tenet that some of the guilty should escape before any of the innocent are punished is fundamental to our common law heritage, attempts to affix a quantitative definition on this tenet can only reflect the prevailing mood of the times. In this time of crime crisis, the ratio should be substantially reduced in order to assure that fewer guilty are allowed to sift through the nets of justice.
27. The rights to counsel and to testify on one's behalf were not established until the latter part of the nineteenth century. Plucknett, supra note 25, at 434-35, 437. In light of the consummate formulation of these rights, it is questionable whether certain of the protections afforded earlier (e.g., jury trial and reasonable doubt standard) are requisite to the proper balance between the rights of the accused and of society. More particularly, it is contended herein that the elimination of these earlier "substitute" protections will further the proper conviction of the many factually guilty persons who are presently allowed to sift through the system of justice.
is the least fair doubt in the minds of any one of the twelve. . . . Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.\(^2\)

In the forty-nine years since Judge Hand's prophetic statement even more significant protections have been afforded the accused.\(^2\) The hiatus between the concepts of legal guilt and factual guilt has con-

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28. United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923) (denying a motion to inspect grand jury minutes in order to establish a case to quash an indictment).

29. For example, at the pre-arrest stage, before an arrest or search warrant may be issued, the existence of substantial and corroborating underlying circumstances justifying the issuance of a warrant must be shown to a neutral and detached magistrate. Further, any informants must be shown to be reliable or credible. Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964); Giordenello v. United States, 357 U.S. 480 (1958). At the arrest stage, the accused must be informed of his right to remain silent, that statements may be used against him, of his right to counsel, and, if indigent, of his right to appointed counsel. Miranda v. Arizona, 384 U.S. 436 (1966). These warnings must be given at any stage where the accused may be considered to be under custodial interrogation, i.e., significantly deprived of his freedom of action. See Orozco v. Texas, 394 U.S. 324 (1969). At the trial stage, the accused may avail himself of liberal discovery rules unheard of in Learned Hand's time. See Fed. R. Crim. P. 16. While the government also has the advantage of certain discovery, proposed amendments to Rule 16 would allow the defendant even more leeway in discovery while subjecting the government's discovery to constitutional limitations. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Rules of Criminal Procedure, 48 F.R.D. 553, 587-610 (1969); ABA, Report of the Special Committee on Federal Rules of Procedure, 52 F.R.D. 87, 96-101 (1971).

There is, however, one vestige of our outdated criminal procedure which definitely has not proved advantageous to the accused. This is the use of the grand jury as the exclusive method of initiating a criminal proceeding for serious crimes. The grand jury, instead of properly reflecting community-wide notions of fairness, is merely a pawn in the hands of the prosecutor, and is dependent upon him for direction, for guidance, and for rules of law. See Antell, The Modern Grand Jury: Benighted Supergovernment, 51 A.B.A.J. 153 (1965); Morse, A Survey of the Grand Jury System, 10 Ore. L. Rev. 295 (1931). As such, the use of the grand jury amounts to a nigh form of underhandedness, and certainly cannot be condoned in any efficient and effective administration of justice. While the federal constitutional mandate that criminal proceedings be initiated by a grand jury indictment is not applicable to the states (Gaines v. Washington, 277 U.S. 81 (1928); Hurtado v. California, 110 U.S. 516 (1884); Morford v. Hocker, 394 F.2d 169 (9th Cir. 1968) ), certain states have retained the indictment as the exclusive method of commencing serious criminal prosecutions. See Comment, The Grand Jury, Past and Present: A Survey, 2 Am. Crim. L. Q. 119 (1964). It is submitted that these states would be well-advised to adopt the "information" as an alternative means of commencing criminal actions, and that the grand jury be retained, if at all, only for investigatory purposes and for those notorious scandals deemed "just too hot to handle."
tinually widened while that between factual guilt and legal innocence has portentously contracted. While a distinction between these determinative concepts was once justified in order to overcome the oppressions of a paranoid state, the gulf which exists today serves only to debilitate the purpose of the criminal law. And despite the prevailing sophistry which equates guilt with proof of that guilt, and innocence with the mere failure of that proof, the fact of guilt or innocence must be the relevant consideration in every criminal case.

Today we are faced with a crime crisis. While no one would advocate a return to the capricious practices of centuries past, it must be recognized that the prevailing temperament of our society appears to be one of fear—not fear of the state but instead fear for the well-being of ourselves and our society. The generous rights of the accused have taken an undue precedence over the rights of the innocent victims of crime within our society. Restoration of a proper balance between these conflicting and counterpoised rights necessarily opens for debate the validity of many of our heretofore fundamental rights, rules and procedures. The following proposals will hopefully engender such debate.

I. PERMIT THE USE OF PHYSICAL EVIDENCE SEIZED DURING ANY SEARCH AND SEIZURE

The United States Supreme Court ushered in this century by unanimously holding there is no doctrine guaranteeing private security in person and property nor the sanctity of the home to the extent of excluding evidence obtained by unlawful means, if it is otherwise competent. Since then many changes have been wrought both in our society and

30. According to the FBI, more than one in every forty people in this country will be the victim of crime this year. Many will be the victims of serious crimes. See UNIFORM CRIME REPORTS, supra note 2, at 5.

31. Justice Breitel is a firm upholder of victims' rights and has cogently noted:

While no cost or necessity will justify the thumbscrew or the rack, however effective or reliable (and they may be reliable when artfully used, if only the suspect is not told what to say), it is also true that the present or future victim, especially of violence, should not be sacrificed to preserve the rights of wrongdoers. Victims, too, have an individuality to protect. Victims, too, are entitled to freedom from invasion. If it were conceivable to strike a quantitative equivalence between the victim of violence and grave depredation and the wrongdoer, and if there were no choice except to have the injury applied to the one or have the state apply its force to the other, there is no question what choice would be made by reasonable men. If it were demonstrably true that a choice is unavoidable between exposing a victim to the crime of rape or obtaining a confession from a rapist with regard to a prior offense without the benefit of counsel—if that were literally the only choice—there is no doubt what choice should be made. Breitel, Criminal Law and Equal Justice, 1966 UTAH L. REV. 1, 18-19.

32. Adams v. New York, 192 U.S. 585 (1904). Mr. Justice Day stated: "When papers are offered in evidence the court can take no notice how they were obtained, whether lawfully or unlawfully. . ." Id. at 595.
in our legal system. The rule laid down by Justice Day has been twisted, bent, and broken to form an exclusionary rule which every day seems to stretch itself in more imaginative contortions. It is unfortunate, but for most courts and members of the Bar, the exclusionary rule has become a concept evoking thought only of its scope and never its purpose. Nothing less than a rethinking of the purposes and effects of the exclusionary rule, as it is applied to physical evidence, is called

33. The development of the exclusionary rule may be traced by noting four cases. In Boyd v. United States, 116 U.S. 616 (1886), there was dictum hinting that evidence resulting from a Fourth Amendment violation should be excluded at time of trial. This dictum was adopted as federal law in Weeks v. United States, 232 U.S. 383 (1914). The exclusionary rule at first remained optional with the states under Wolf v. Colorado, 338 U.S. 25 (1949), but finally became mandatory under Mapp v. Ohio, 367 U.S. 643 (1961).

Numerous articles have been written expressing disillusionment with the exclusionary rule. A representative sampling is found in the appendix to Chief Justice Burger's dissenting opinion in Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971), which contains the following list at 426-27:

5. LaFave, Improving Police Performance Through the Exclusionary Rule (pts. 1 & 2), 30 Mo. L. Rev. 391, 566 (1965).
14. 8 J. Wigmore, Evidence § 2184a (McNaughton rev. 1961).


34. Justice Oliver Wendell Holmes once observed: "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." Hyde v. United States, 225 U.S. 347, 391 (1912) (dissenting opinion),
for if our legal system is to rid itself of the distortions of justice which now pollute our decisional law. Action is mandated to restore our legal system to a more reasoned condition by restricting the scope of the exclusionary rule to illegally obtained statements.

The reasons advanced in favor of the exclusionary rule have never varied since first fixed in *Weeks v. United States.* They are two-fold: (1) the exclusion of evidence obtained as a result of an illegal search and seizure is the only effective means of deterring police infringement of an individual’s fourth amendment right of privacy, and (2) illegally obtained evidence must be excluded if the dignity of the Court is to be upheld since admission of such evidence would condone the flouting of the law by public officials. Neither of these reasons has been put to an empirical test but there is evidence which strongly suggests that the reasons on which the exclusionary rule is bottomed are invalid.

Professor Dallin Oaks has authored a brilliant article in which he suggests that the underpinning of the exclusionary rule is indeed shaky. Observing the weakness of the exclusionary rule as a deterrent to illegal police conduct, Professor Oaks notes that “its penal effect is felt only when a case comes to court and there is an attempt to introduce illegally obtained evidence to secure a conviction.” If police misconduct is to be deterred, the exclusionary rule should exert a direct effect on the offending officer. But it fails to do this. Professor Oaks illustrates some of the unfavorable conditions for deterrence. A policeman guilty of conducting an illegal search is not affected in his person or his

35. 232 U.S. 383 (1914).

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. CONST. amend. IV (emphasis added).

An argument that has seemingly never been met is why must a search, albeit an illegal one, that uncovers admissible physical evidence be considered “unreasonable”. It would seem that a search which leads to a successful conclusion in the discovery of tangible evidence is quite reasonable. Further, the Fourth Amendment makes no provision for the exclusion of evidence.

38. *Id.* at 720. This article points out that the exclusionary rule as a deterrent device against official misconduct is of little value when the “misconduct is not directed toward acquiring evidence or if it is not likely to result in a prosecution.” It is particularly relevant to know that a large proportion of persons arrested are never actually charged with an offense. PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 186-87 (1967).
pocketbook by the application of the rule. The impact of having evi-
dence excluded falls on the prosecutor, and hence the public, and not
on the officer who may feel his act is morally justified and within the
norms of behavior for his particular police unit. The nuances of the
exclusionary rule are often unclear or have not been communicated to
the police or, as is often the case, the motivation for conducting an ille-
gal search and recovering contraband outweighs in an officer's mind
the later difficulties presented at a suppression hearing.⁸⁰

A more telling attack on the deterrent value of the exclusionary rule
is found in the large number of suppression hearings held after its in-
ception.⁴⁰ These statistics demonstrate the ineffectiveness per se of the
deterrent aspects of the rule. Moreover, the threatened exclusion of
evidence illegally obtained sometimes causes the police to deliberately
give false testimony in order to justify their search.⁴¹

The second justification—the necessity of judicial integrity—given
for the exclusionary rule has never received much support other than
rhetoric found in Supreme Court decisions.⁴² The Supreme Court has
grounded most of its opinions on the deterrence rationale.⁴³ In addi-
tion, common law jurisdictions such as England and Canada, uni-
vously recognized as models of judicial practice, have never employed
an exclusionary rule.⁴⁴ What is difficult to explain is why, if eviden-
tial suppression is indeed underpinned by the desire to protect judicial

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40. See Comment, Search and Seizure in Illinois: Enforcement of the Constitu-
tional Right of Privacy, 47 Nw. U.L. Rev. 493 (1952). After extensively considering
suppression motions in Chicago Municipal Court, the Comment concluded at 497-98:
[T]he rule has failed to deter any substantial number of illegal searches. . .
. . . . These figures . . . may indicate that the exclusionary rule is most effective in
discouraging illegal searches in cases involving serious offenses, where conviction
is important. Conversely, where the police believe that a policy of harassment is
an effective means of law enforcement, the exclusionary rule will not deter their
use of unlawful methods.

See generally Oaks, supra note 37, at 706-09; Graham, The Court May Propose But
the Police Dispose, N.Y. Times, Dec. 1, 1968, § 4, at 9, col. 1, wherein the author
concludes, based upon the fact that for the year 1966 only 17 requests for search
warrants were made by the San Francisco police, that “there has been no perceptible
change in the habits of the nation’s police [since Mapp v. Ohio].”
41. J. Skolnick, Justice Without Trial 215 (1967); see also Comment, Effect of
42. Oaks, supra note 37, at 669.
43. Id. at 669-70.
44. See generally Martin, The Exclusionary Rule under Foreign Law—Canada, 52
J. Crim. L.C. & P.S. 271 (1961); Williams, The Exclusionary Rule under Foreign
Law—England, 52 J. Crim. L.C. & P.S. 272 (1961); Taft, Protecting the Public from
integrity, the exclusionary rule is applied when a judicial officer impro-
vidently issues a search or arrest warrant. Clearly, judicial integrity
is not the basis of the exclusionary rule. In fact, the tendency of the
present Court is to promote judicial integrity by refusing to invalidate
warrants in situations where suppression would previously have been
indicated.

Consideration must be given to the negative effects of the exclu-
sionary rule. The words of Justice Jackson in *Irvine v. California* are
instructive:

That the rule of exclusion and reversal results in the escape of guilty
persons is more capable of demonstration than that it deters invasion
of right by the police. . . . Rejection of the evidence does nothing to
punish the wrong-doing official, while it may, and likely will, release
the wrong-doing defendant. It deprives society of its remedy against
one lawbreaker because he has been pursued by another. It protects
one against whom incriminating evidence is discovered, but does noth-
ing to protect innocent persons who are the victims of illegal but fruit-
less searches.

The exclusionary rule also causes delay in the administration of justice
while suppression hearings are held, makes possible the immunity of a
criminal through the collusive act of a police officer and encourages po-
lice imposition of extra-judicial punishment on persons who escape con-
viction. But the greatest negative effect of the exclusionary rule is
that so long as it is accorded constitutional dimension it cannot be re-
placed. While it exists, efforts to establish a corrective granting redress
to the innocent whose privacy was improperly invaded by the police

45. See *Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S.

46. Indeed, even illegally obtained evidence which had been suppressed at trial may
be used by a trial judge at time of fixing sentencing where the evidence is reliable and
has not been gathered for the express purpose of improperly influencing the sentencing

279 A.2d 675 (1971). In *Bisaccia* the New Jersey Supreme Court, in considering
whether a search warrant based upon an affidavit which incorrectly gave the street
number of the premises but fully described the property was invalid, stated:

In the case now before us, there is no definitive opinion of the United
States Supreme Court holding the search to be invalid. Our task is to anticipate
whether a majority of that Court would extend *Mapp* to the circumstances before
us. We would hope that it would not. Here the policeman and the magistrate in
good faith sought to abide by the Constitution. *Id.* at 589, 279 A.2d 678.

The opinion was filed without dissent.


49. See *Oaks, supra* note 37, at 736-52.
Before the decision of the United States Supreme Court in *Mapp v. Ohio* it was unclear whether the federal exclusionary rule of *Weeks v. United States* was based upon the provisions of the Fourth Amendment or upon the Supervisory Power of the Supreme Court. The application of the exclusionary rule in *Mapp*, a state court case, resolved all doubt. Since the Supervisory Power is applicable only to Article III courts, *Mapp* raised the exclusionary rule to constitutional stature. To unchain our courts, at least those of the states, from the burdens encumbering them under the exclusionary rule will require the overruling of *Mapp v. Ohio*. Such action has been proposed or intimated by case and periodical alike.

*Mapp* should not be overruled, however, until a substitute protection of personal privacy is forged. There are, of course, already existing remedies to prevent unnecessary police intrusions upon a man's home or person. For example, law enforcement agents assume a risk of tort liability or injunctive prohibition against harassment if their guess is wrong. But redress against the police through tort liability, as

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50. Id. at 753.
52. 232 U.S. 383 (1914).
53. U.S. CONST. art. III, §§ 1-2 is the source of the Supreme Court's Supervisory Power.
56. See note 33 supra. A caustic appraisal of *Mapp* was recently afforded by Chief Justice Weintraub speaking for the New Jersey Supreme Court in *State v. Bisaccia*, 58 N.J. 586, 588, 279 A.2d 675, 677 (1971):

> When the truth is suppressed and the criminal is set free, the pain of suppression is felt, not by the inanimate State or by some penitent policeman, but by the offender's next victims for whose protection we hold office. In that direct way, *Mapp* denies the innocent the protection due them.

> But *Mapp* impairs the primary right of the individual to protection from crime in still other ways. The release of the guilty must blunt and breed contempt for the deterrent thrust of the criminal law. Moreover the case-by-case process of law-making in the application of *Mapp* has left State officers quite at sea as to what is expected of them. The time-distance between the Supreme Court and the firing line is just too great and the case-by-case process too lumbering and too cumbersome, to permit that Court to exercise effective and responsible management of the criminal business of the States. As a result, the State courts (and the federal bench as well) are drained of energy sorely needed for the trial of criminal and civil cases, as motions to suppress are piled upon motions, appeals upon appeals, and post-conviction proceedings upon post-conviction proceedings.
presently constituted, or injunctive prohibition is often ineffective.\textsuperscript{57} Perhaps the Supreme Court has already taken the initiative in providing an effective remedy in \textit{Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics}\textsuperscript{58} by interpreting the Fourth Amendment as positive law, the violation of which by federal officers authorizes the maintenance of a civil action. The establishment in \textit{Bivens} of a federal cause of action for illegal searches and seizures may foreshadow the demise of \textit{Mapp}. What is needed to hasten its demise, however, are legislators who are willing to engineer the drafting of legislation offering redress to the aggrieved individual whose rights have been abused by police misconduct.\textsuperscript{69}

\section*{II. ALLOW EVIDENCE OF PRIOR CONVICTIONS TO BE ADMITTED DURING THE CASE-IN-CHIEF}

The philosophy underlying a criminal trial is that each crime must be considered apart from its perpetrator. The fact that a defendant has been guilty of a hundred similar crimes is usually deemed by the courts to be as irrelevant as the fact that until this accusation the defendant has led a completely blameless life.\textsuperscript{60} The prosecution can thus ordinarily in-


\textsuperscript{58} 403 U.S. 388 (1971). In \textit{Bivens} the United States Supreme Court recognized that an individual could bring an action against federal agents who violated the individual's Fourth Amendment rights. An undecided question, however, is whether the government can claim immunity when such an action is maintained.

\textsuperscript{59} If the Supreme Court persists in finding the \textit{Mapp} decision to be based upon the Fourth Amendment as made applicable to the states through the Fourteenth Amendment Due Process Clause, Congress should, in that event, preempt the field by legislating a remedy for the innocent party whose Fourth Amendment rights have been violated by either state or federal agents. Power to legislate a federal remedy is found in § 5 of the Fourteenth Amendment which provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.

\textsuperscript{60} See, e.g., Lane v. Warden, 320 F.2d 179, 181 (4th Cir. 1963); Railton v. United States, 127 F.2d 691, 693 (5th Cir. 1942); 1 J. Wigmore, \textit{Evidence} § 194 (3d ed. 1940). See also People v. Kelley, 66 Cal. 2d 232, 238-39, 424 P.2d 947, 953 (1967); State v. Cote, 108 N.H. 290, 294, 235 A.2d 111, 114 (1967).

Strangely, "character evidence" is not evidence of a defendant's character but is evidence of his good \textit{reputation} in the community. E. Morgan, \textit{Basic Problems of Evidence} 200-05 (1962). If the witness possesses knowledge of the defendant's reputation for being law abiding, he is competent; however, if the witness knows from personal experience that the defendant is law-abiding, \textit{i.e.}, has a law-abiding character, the witness is not competent to testify.
introduce no direct evidence of the accused's prior convictions. Therefore, if a recidivist defendant decides not to testify, the trier of fact can never be informed of the nature of his checkered past.

To overcome some of the inherent infirmities presented by the evidential exclusion of a defendant's previous criminal record a legal fiction has been created. If a defendant elects to testify in his own stead (which, of course, he need not do), the prosecutor is permitted to inquire whether he has been convicted previously of a crime. If the accused admits to conviction for the offense or offenses, that ends the matter. If he denies the convictions, the prosecutor is enabled to prove them. In either event, the trier of fact learns of the criminal background of the defendant. The theory underlying the fiction is that prior convictions are relevant to a defendant's disposition to tell the truth, particularly if the accused has in the past been convicted of a crime involving dishonesty, such as perjury. However, no logical argument can be marshalled to support the belief that a once-convicted robber will lie under oath while a first time offender—perhaps charged with perjury—will speak the truth. It is just as likely, considering the stakes involved, that every defendant in a criminal case will stretch the truth, if provided the chance, in order to promote his interests. On the other hand, if the defendant has a history which demonstrates a disregard for the law, this background is relevant to the credibility of the

61. Certain limited exceptions are made when the evidence is relevant to the proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Spencer v. Texas, 385 U.S. 554, 560-61 (1967); Prop. Fed. R. Evid. 404(b) (Rev. Draft March 1971); E. Morgan, Basic Problems of Evidence 213-14 (1962). See also Note, Evidentiary Use of Prior Felony Convictions, 21 Hast. L.J. 968 (1970) which discusses Shorter v. United States, 412 F.2d 428 (9th Cir. 1969), cert. denied, 401 U.S. 1012 (1969) (defendant who himself offered evidence of his prior convictions cannot complain that since said convictions were alleged to be obtained in violation of his constitutional rights, they should be excluded).


It is significant that the proposed Federal Rules of Evidence, which undoubtedly will affect many state evidentiary revisions, do not limit impeachment by prior conviction to those convictions which involved dishonesty. Prop. Fed. R. Evid. 609(a) (Rev. Draft March 1971).

64. 3 J. Wigmore, Evidence §§ 920-30 (3d ed. 1940); C. McCormick, Law of Evidence § 44 (1954); Ladd, Techniques and Theory of Character Testimony, 24 Iowa L. Rev. 498 (1939).
government's case, especially if the defendant has been convicted for the same or a similar crime to the one charged.\textsuperscript{65}

It is illogical to allow the jury to decide the credibility of a defendant witness with his criminal record but not permit the credibility of the government's case to be adjudged with the same information. Yet whenever evidence of a defendant's prior criminal conviction is ad-duced to impeach, the jury is afterwards instructed to consider the prior only in assessing the accused's veracity and never in substantiating his guilt.\textsuperscript{66} The jury is assumed to be capable of drawing this fine distinction—a supposition which is totally unfounded.\textsuperscript{67} Moreover, the

\begin{footnotesize}
\begin{enumerate}
\item The language of the New Hampshire Supreme Court in State v. Duke, 100 N.H. 292, 123 A.2d 745 (1956), is worthy of mention:

\begin{quote}
We are aware of the arguments for a rule which would limit impeachment... to crimes directly involving lack of veracity. ... It seems to us that such a rule represents too narrow and artificial a view. The object of a trial is not solely to surround an accused with legal safeguards but also to discover the truth. What a person is often determines whether he should be believed. When a defendant voluntarily testifies in a criminal case, he asks the jury to accept his word. No sufficient reason appears why the jury should not be informed what sort of person is asking them to take his word. In transactions of everyday life this is probably the first thing that they would wish to know. So it seems to us in a real sense when a defendant goes into the stand, "he takes his character with him."... Lack of trustworthiness may be evidenced by his abiding and repeated contempt for laws which he is legally and morally bound to obey... though the violations are not concerned solely with crimes involving "dishonesty and false statement." \textit{Id.} at 294, 123 A.2d at 746.
\end{quote}

\textit{See also} 1 J. WIGMORE, \textit{EVIDENCE} § 216 (3d ed. 1940).

\item E.g., 1 E. DEVITT & C. BLACKMAR, \textit{FEDERAL JURY PRACTICE AND INSTRUCTIONS} § 12.09 (1970) which reads:

\begin{quote}
Evidence of a defendant's previous conviction of a felony is to be considered by the jury, only insofar as it may affect the credibility of the defendant as a witness, and must never be considered as evidence of guilt of the crime for which the defendant is on trial.
\end{quote}

\item A recent survey of national scope showed that 98 per cent of the attorneys and 43 per cent of the judges who responded did not believe a jury was capable of following an instruction to consider prior convictions evidence only as bearing upon a defendant's credibility and not as evidence of his guilt. \textit{Note, To Take the Stand or Not To Take the Stand: The Dilemma of the Defendant With a Criminal Record}, 4 \textit{COLUM. J. LAW & SOC. PROB.} 215, 218 (1968). Other jury investigations undertaken by the University of Chicago underscore this point. The examination disclosed that jurors have an

\begin{quote}
“almost universal inability and/or unwillingness either to understand or follow the court's instruction on the use of defendant's prior criminal record for impeachment purposes. The jurors almost universally used defendant's record to conclude that he was a bad man and hence was more likely than not guilty of the crime for which he was then standing trial.” Letter from Dale W. Broeder, Associate Professor, the University of Nebraska College of Law, who conducted the interviews, to \textit{Yale Law Journal}, dated March 7, 1960, \textit{quoted in Note, Other Crimes and Evidence at Trial: Of Balancing and Other Matters}, 70 \textit{YALE L.J.} 763, 777 (1961) (footnote omitted).
\end{quote}

\item Justice Jackson's oft-quoted comment in \textit{Krulewitch v. United States}, 336 U.S. 440, 453 (1949) (concurring opinion) (citation omitted): “The naive assumption that prejudicial effects can be overcome by instructions to the jury... all practicing
present state of the law penalizes a defendant who takes the stand to
defend himself, but rewards a defendant who refuses to testify. The
impeachment exception to the exclusion of priors has been shown to ad-
versely affect the accused since its use inhibits him from testifying.
If priors were made admissible during the government's case-in-chief,
with reasonable guidelines regulating their introduction, this inhibi-
tion would disappear.

In other countries evidence proffered to show a penchant of the de-
fendant for illicit activity is accepted under the belief that one should be
judged to some extent by his background. The validity of this con-
cept is irrecusable since an accused's past criminal conduct is material to
determination of whether he is guilty of an act similar to that for
which he now protests his innocence. Statistics on recidivism belie the
assumption underlying the American rule that a previously convicted
person is no more likely to commit a crime than a person accused of his
first offense. Once a person commits a crime his propensity for com-

68. A survey has indicated that a defendant with a prior criminal record of which
the jury is aware is almost twice as likely to be convicted as is a defendant without a
criminal record or with one which is concealed from the jury. H. KALVEN & H.
ZIESEL, THE AMERICAN JURY 160-61 (1966). Therefore a defendant with prior con-
victions who decides to testify exposes himself to an increased possibility of convic-
tion.

69. Defendants with a history of past offenses are generally advised by their attorneys
not to testify and thus preclude the damaging admission of their prior convictions. See Note, To Take the Stand or Not to Take the Stand: The Dilemma of the Defendant With a Criminal Record, 4 COLUM. J. LAW & SOC. PROB. 215, 220-21 (1968). However, it must be conceded that if an accused fails to testify, the jurors notice and tend to
consider his silence as an affirmation of guilt. See authorities collected in Note, To
Take the Stand or Not to Take the Stand: The Dilemma of the Defendant With a Crim-
inal Record, 4 COLUM. J. LAW & SOC. PROB. 215, 221-22 (1968).

70. An example of fair guidelines for admitting priors as impeachment evidence is
PROP. Fed. R. EVID. 609 (Rev. Draft March 1971). These guidelines could be
followed for the admission of priors during the case-in-chief. See also People v.
Beagle, 6 Cal. 3d 441, 492 P.2d 1, 99 Cal. Rptr. 313 (1972) (trial judge has discretion
to exclude evidence of prior felony conviction offered to impeach when the probative
evidence as to credibility is outweighed by the risk of undue prejudice).

71. See R. DAVID & H. DEVIRES, THE FRENCH LEGAL SYSTEM 77 (1958) which states:
And Anglo-American lawyers may be surprised to learn that issues of reasonable
doubt in criminal cases may be resolved by evidence and argument bearing on
prior convictions of the accused, his general behavior, even his family history.
See also GERMAN CODE CRIM. PROC. § 243 (H. Niebler transl. 1965); G. WILLIAMS,

72. See UNIFORM CRIME REPORTS, supra note 2, at 37-41. The report details the
result of a four year study, 1965-69, of recidivism. Illustrative is the following ex-
cerpt:
mitting a second crime measurably increases. The likelihood that a convicted lawbreaker will later repeat his crime is statistically predictable, and evidence relating the statistical probability should be permitted. Such evidence is relevant to ascertaining what, at the least, is manifest to the jury as a subliminal issue—the defendant's character. The probability that the defendant may have committed the offense charged may be as relevant as whether fruits of the crime were found in his possession.

To make information relating to a defendant's prior offenses mean-

When criminal repeating is viewed by type of crime for which arrested, convicted, or released in 1965, rearrests ranged from 16 percent for the income tax violators to 80 percent of the auto thieves. The predatory crime offenders had high repeat rates with 76 percent of the burglars being rearrested within 4 years, 68 percent of assault offenders, and 57 percent of the robbers released in 1965. Likewise, 69 percent of the narcotic offenders who are frequently users were re-arrested after release. The fact that 67 percent of the forgery offenders were rearrested for new violations within the 4-year follow-up, documents law enforcement experience with this type offender. Id. at 39.

Although the Uniform Crime Reports cumulate only rearrest figures and not reconviction figures, the correlation is readily translated since one-half of all arrests lead to convictions. See note 3 supra. 73. Cf. Spencer v. Texas, 385 U.S. 554, 560-61 (1967); Uniform Crime Reports, supra note 2, at 37:

A summary of 37,884 offenders arrested on federal charges in 1970 is set forth. . . . Of these offenders, 25,909 or 68 percent had previously been arrested on a criminal charge.

These 37,884 offenders had an average criminal career of 5 years and 5 months (span of years from first to last arrest). During this time they were arrested on criminal charges an average of four times each for a total of 158,000 charges. These offenders had a total of 52,936 convictions and 22,240 imprisonments of 6 months or more during their crime careers prior to their arrest in 1970.

74. See generally Uniform Crime Reports, supra note 2, at 37-42.

75. See Finkelstein & Fairley, A Bayesian Approach to Identification Evidence, 83 Harv. L. Rev. 489 (1970). Although the article deals with identification evidence, the mathematical model discussed by Finkelstein and Fairley could be applied to calculate the probability of a defendant's recidivism since this is identification evidence of a sort. This information could then be assessed by the trier of fact in conjunction with the rest of the evidence introduced.

Probability statistics on recidivism could be calculated with more accuracy than could run-of-the-mine identification evidence since recidivism statistics would be based upon generality of information rather than a particularity of information which necessitates a difficult mathematical translation. This is a significant difference even in light of the broadened admissibility of expert testimony suggested by the Proposed Federal Rules of Evidence. See Prop. Fed. R. Evid. §§ 702-05 (Rev. Draft March 1971).

76. Of course, an accused would be given a chance to offer statistical evidence rebutting the likelihood of his present guilt from proof of his prior convictions. This would mollify to some degree even those who oppose the use of mathematics in the fact-finding process. See, e.g., Tribe, Trial by Mathematics: Precision and Ritual in the Legal Process, 84 Harv. L. Rev. 1329, 1377 n.155 (1971).

77. Suppose that the defendant is being prosecuted for forgery in connection with the use of another person's credit card, that he has three prior credit card forgery convic-
ingful, the trier of fact could receive evidence which adduced the statistical probability, considering all relevant circumstances, that commission of those crimes would lead to the perpetration of the malefaction charged. Coupling the priors with statistical evidence would ensure that a trier of fact would not rely upon a personalized and unrealistic conception of their importance. If priors were given a concrete statistical treatment, then jurors could weigh the statistical evidence with the other evidence presented in arriving at their decision. Indeed, the use of probability statistics could help a jury attach some meaning to the phrase “beyond a reasonable doubt” and thereby insure greater precision in the deliberative function.

The statutes in most states would require amending to allow the admission of prior convictions as evidence during the case-in-chief. The United States Supreme Court, however, in *Spencer v. Texas* upheld a Texas recidivist procedure which permitted the jury to receive information of an accused’s prior convictions during the trial when it was incumbent upon the jury to decide punishment as well as guilt. One

78. Relevant circumstances would obviously include the number of prior convictions, the nature of the defendant, the recency of prior convictions, etc. Although it may be argued that these statistics are too subjective to be significant, courts have allowed the use of statistics even when subjective factors are involved. A prime example is the mortality table. What could be more subjective than estimating the length of a given person’s life?


[A] juror forced to derive a quantitative measure of his suspicion on the basis of evidence at trial is likely to consider that evidence more carefully and rationally, and to exclude impermissible elements such as appearance or popular prejudice.

80. Moreover, Bayesian analysis would demonstrate that the evidentiary weight of an impressive figure like one in a thousand—which might otherwise exercise an undue influence—would depend on the other evidence in the case, and might well be relatively insignificant. . . . Id.


83. 385 U.S. 554 (1967).

84. Recidivist statutes have been sustained against various contentions that they are constitutionally infirm. Oyler v. Boles, 368 U.S. 448 (1962) (due process); Gryger v. Burke, 334 U.S. 728 (1948) (double jeopardy); Graham v. West Virginia, 224 U.S. 616 (1912) (double jeopardy, due process, equal protection, privileges and immunities, cruel and unusual punishment); McDonald v. Massachusetts, 180 U.S. 311 (1901)
obvious method of permitting evidence of a defendant's prior record during the government's case is to enact a statute which commissions the jury to determine punishment immediately upon their reaching a guilty verdict. This places the statute within the perimeters of \textit{Spencer}, but such an approach could cause other problems. A more direct approach would be to allow the admission of a defendant's prior convictions as well as evidence of the statistical probability of his recidivism during the case-in-chief. The use of priors, when joined with the statistical probabilities of a defendant's recidivism, would serve well in limiting jury speculation concerning the probability of the defendant's guilt; this type of speculation, it must be assumed, occurs now when the defendant is impeached by priors. The defendant would be given the chance to rebut and, moreover, would not feel restrained by fear of impeachment from testifying. To safeguard against the possibility that the jury would determine guilt on this evidence alone and not from the other evidence adduced, the jury could be admonished that the probability statistics can never constitute proof sufficient to warrant conviction in a criminal case and must be treated accordingly.

\textit{ex post facto, equal protection, trial by jury, double jeopardy, cruel and unusual punishment}; Moore v. Missouri, 159 U.S. 673 (1895) (privileges and immunities, due process, equal protection, double jeopardy, cruel and unusual punishment).

85. 385 U.S. at 559-62 (1967).

86. Typical of these would be sentencing, which would suffer from jury inexperience and lack of consistency. In addition, the jury would not have the benefit of a probation report which considered and analyzed information either inadmissible or unavailable at the time of trial. The trial judge has the benefit of such a probation report containing pertinent information which allows him to employ the modern penological concept of individualized punishment. Williams v. New York, 337 U.S. 241, 246-49 (1949).

87. A less direct method of admitting an accused's prior record during the prosecution's case-in-chief is to construe liberally evidence of other crimes and admit it for some purpose other than merely to prove that the accused is the sort of individual who would be likely to commit the offense for which he is charged. \textit{Cf.} C. \textit{McCormick, LAw OF EVIDENCE} § 157, at 326-31 (1954).

See Note, \textit{Procedural Protections of the Criminal Defendant—A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime}, 78 Harv. L. Rev. 426, 449 (1964) wherein it is remarked:

Granting the prosecutor the opportunity to introduce relevant propensity evidence should reduce the pressure upon him to exploit every opportunity to introduce prejudicial evidence, and also reduce the tolerance that judges and legislators have shown toward questionable evidence rules.

88. See note 68 \textit{supra}.

89. See Finkelstein & Fairley, \textit{A Comment on “Trial by Mathematics”}, 84 Harv. L. Rev. 1801, 1805 (1971) wherein the authors state that “[t]he purpose of Bayesian techniques, as we propose them, is to assist the fact-finder in interpreting statistical evidence. . . .” It must be noted that should only statistical evidence be offered, however, it probably would be accorded little, if any, weight. See, e.g., 1 E. Devitt & C. Blackmar, \textit{Federal Jury Practice and Instructions} § 11.34 (2d ed. 1970):
Although there is nothing prohibiting the jury from disregarding this instruction, there is again nothing whatever to stop them from disregarding any other instruction the judge gives. Indeed, this is one of the dangers of the jury system.\textsuperscript{90}

\section*{III. Abolish Trial by Jury}

Trial by jury in criminal cases almost since its inception has been regarded as the mainstay of the criminal justice system.\textsuperscript{91} However, in this era when even the most fundamental traditions are subject to critical reexamination, all institutions must be able to justify their existence not by history alone but by their continued ability to meet the felt needs of the people. A judicial system which facilitates the speedy and efficient condemnation of the guilty without significantly impairing the protections afforded the innocent is a major contemporary requirement (or felt need of the public. There is little to indicate the petit jury system is conducive to attaining this goal and, indeed, its use seems to be dysfunctional.

The pros and cons of the jury system have been widely debated,\textsuperscript{92} and, despite the supposed sacrosanct nature of the institution, many

\begin{itemize}
\item If a party offers weaker and less satisfactory evidence when stronger and more satisfactory evidence could have been produced, you may view the evidence offered with suspicion.
\end{itemize}

\begin{itemize}
\item (You must remember, however, that the defendant is not obliged to produce any evidence or to call any witnesses.)
\end{itemize}

\begin{itemize}
\item 90. The full panoply of objections to the jury system is discussed in the following proposal.
\item 91. See, e.g., Rabinowitz v. United States, 366 F.2d 34, 44-45 (5th Cir. 1966).
\end{itemize}
eminent authorities have been scathing in their condemnation of it.93 Indeed, the law itself seems to cast doubt upon the efficacy of the jury system. Juries are regarded under the law as unable to properly assess items of proof. Elaborate and therefore time consuming rules have been designed to exclude certain evidence from the consideration of the jury.94 The law considers the juror incapable of separating either the trial judge's personal opinion of the merits of the case from the court's opinion of the sufficiency of the evidence presented,95 or the juror's own biases from an objective consideration of the facts.96 The law does not trust the jury not to resort to unfair methods of decision,97 or to exercise its fact-finding duty competently,98 or even to

93. The most noted judicial critic was, of course, Judge Jerome Frank. See J. Frank, Courts on Trial 126-45 (1949), wherein the author characterizes the jury as the "quintessence of governmental arbitrariness" and points out that the jury system "almost completely wipes out the principle of 'equality before the law.'" Id. at 132. Interestingly, he suggests as one of the methods of improving the system a revision of the exclusionary evidence rules. Id. at 143-44. See also G. Williams, The Proof of Guilt 327-28 (3d ed. 1963) wherein the author notes:

It may be taken, then, that in one way or another the jury system tends to the acquittal of criminals who if tried under a purely professional system would be convicted. This is not a defect that the lawyer by his training can readily appreciate. Yet it is an evil when a guilty person is acquitted: Not only may a dangerous criminal be turned loose on society, but the efficacy of punishment as a system of general deterrence is impaired; also if social agencies can do anything for the rehabilitation of a criminal, the sooner he is convicted of his offenses the better.

94. The often maligned hearsay rules are prime examples of the law's practice of excluding certain kinds of evidence from the jury's consideration. See, e.g., Cal. Evid. Code §§ 1200-1341 (West 1968); Prop. Fed. R. Evid. §§ 801-06 (Rev. Draft March 1971). It should be noted, however, that the trial judge is given the discretion to exclude otherwise competent evidence if he finds that admission of the evidence would unduly prejudice a party or mislead the jury. See, e.g., Cal. Evid. Code § 352 (West 1968); Cal. Pen. Code Ann. § 1044 (West 1970). The obvious conclusion to be drawn from these code sections is that a juror, unlike the judge, is deemed unable to distinguish weak from strong evidence, nor is he deemed able to avoid being prejudiced by the tenor of the evidence.

95. For example, motions for acquittal are made out of the presence of the jury. Were the judge to rule against the defendant in the presence of the jury, it is assumed that the judge would conclude that the judge believes the defendant is guilty.

96. A juror may, of course, be excused for "legal cause" when shown to be biased against the cause or a party. See, e.g., Cal. Code Civ. Proc. § 602 (West Supp. 1970-71); Reynolds v. United States, 98 U.S. 145 (1879); Fitts v. Southern Pac. Co., 149 Cal. 310, 86 P. 710 (1906).

97. A wealth of cases have been appealed on the ground that the verdict was one of chance or quotient. See, e.g., Annot., 8 A.L.R.3d 335 (1966); 53 Am. Jur. Trial §§ 1029, 1030 & n.4 (1945).

98. In California the trial court must, if any party so requests, make preliminary determinations of foundational material out of the presence of the jury. Cal. Evid. Code § 402 (West 1968). Other jurisdictions leave to the discretion of the trial
be able to disregard facts only reported and not proved. Moreover, the jury system in a sense prostitutes the professionalism of the attorneys appearing before it, abets the commission of prejudicial error by the court, and adds nothing progressive to the course of the law.

At issue, then, is whether the ability of the jury in its present configuration to satisfy systemic requirements so far exceeds the ability of the simpler and less costly alternative methods to be suggested herein to satisfy those same requirements as to justify the continued use of this otherwise cumbersome and dysfunctional means of adjudication of fact and guilt.

No advantage in obtaining a "speedy trial" redounds to the individual who is tried by jury. By its very nature the jury trial requires an amount of time exceeding that required for non-jury trials because of the necessity to voir dire the jury, to physically remove the selected veniremen from the courtroom for the many hearings which occur in the course of the average trial and which must be heard out of the jury's presence, and the tendency of attorneys to engage in extensive, time-consuming speeches in their opening statements and summations when given the audience of a jury. Yet no "judge time" is saved since the presence of a judicial officer is required in both jury and court trials—indeed, more judicial time is expended in the former than in the latter. Nor have jurors been shown to be more able fact finders than a single judge.

Defenders of the jury system often rely upon the "dispensing function" of the jury as the principal reason for retaining the system.

99. Of particular concern is the problem of pretrial publicity. See, e.g., Irvin v. Dowd, 366 U.S. 717 (1961). Oftimes a juror asserts impartiality notwithstanding his bias caused by adverse publicity to one of the parties. However, if the court retains any lingering doubts about a juror's impartiality, the juror should be excused. See, e.g., State v. Van Duyne, 43 N.J. 369, 204 A.2d 841 (1964), cert. denied, 380 U.S. 987 (1965).

100. See text accompanying notes 113-18 infra.

101. See text accompanying notes 118-22 infra.

102. See text accompanying notes 150-51 infra.

103. See notes 95 & 98 infra.

104. Studies of civil cases have shown that (1) the jury trial consumes nearly 40 percent more time than a court trial; (2) the time of opening and closing statements is twice as long; and (3) the taking of evidence is a third longer (and this excludes voir dire and jury deliberation time). See, e.g., H. Zeisel, H. Kalven & B. Buchholz, Delay in the Courts 77-81 (1959). The analogy to criminal cases is clear.


106. Everett v. United States, 336 F.2d 979, 986 (D.C. Cir. 1964) (Wright, J., dissenting). The dissent in Everett argued the defendant, charged with armed robbery,
This function has been defined by Judge Charles Wyzanski as "the device by which the rigor of the law is modified pending the enactment of new statutes." Professor James has put it more frankly: "Juries sometimes take the law into their own hands and decide a case according to popular prejudice which often embodies popular notions of what the law ought to be." Dean Pound referred to the dispensing function as simply "jury lawlessness."

The essence of this pro-jury argument is founded upon the obvious antimony that the injection of lawlessness, in Pound's words, into a legal proceeding renders the proceeding more lawful. Implicit is the assumption that a jury of twelve is more likely to comprehend changing social mores and needs than a single judge. This supposition has long been refuted by empirical evidence which discloses that the average jury is composed of persons who are Caucasian, middle or low-upper class, male, and over forty years of age. Individuals with these char-
acteristics are often those most likely to harbor racial, religious and sexual prejudices. If the American system of justice is one "of laws and not of men," it is inconceivable that such a system would find bedrock not only in twelve ordinary men unschooled in the law, but, moreover, in men apt to be more prone than any other class to obey their baser instincts. Thus the "dispensing function" is merely a misleading euphemism used to disguise reliance upon the social biases so long condemned in other contexts. While judges may be subject to the same criticisms, to sustain the present argument for abolition of the jury it is not necessary to show that the non-jury system is better equipped for the criminal process, but only that it is commensurate with the present system in its utility.

The use of the petit jury in criminal cases has an adverse effect as well upon the conduct of the attorneys appearing before it and upon the decorum so essential to the social legitimacy of the judicial system. Counsel, aware that they are addressing their arguments not to a single law-trained man but to twelve lay persons, ineluctably reach the correct conclusion that non-legal factors will influence the outcome. They therefore attempt to play upon the jury with tendentious statements and red herrings in derogation of the spirit, if not the law, of the trial process.

111. G. Allport, The Nature of Prejudice chs. 25 & 26 (1954). See also G. Allport, The Person in Psychology 195-99 (1968); S. Stouffer, The American Soldier: Adjustment During Army Life (1944). It has also been shown that the goal of impartiality is affected by the nature of the crime charged; convictions increase with the degree of violence involved.

We may prate about acquitting nine guilty men rather than risk the conviction of one innocent, but we in fact shudder at the idea of turning loose nine guilty men capable of committing crimes of violence and grave depredation. If this be true, as the balance is weighted more and more in favor of the wrongdoer, there is likely to be a counterforce set up to accept less and less evidence as sufficient to convict those charged with crimes of violence and grave depredation. Breitel, Criminal Law and Equal Justice, 1966 UTAH L. REV. 1, 11.

This is a far cry from the desire that "[t]he jury list should represent as high a degree of intelligence, morality, integrity, and common sense as possible." The Judicial Conference of the United States, The Jury System in the Federal Courts, 26 F.R.D. 409, 421 (1961). For the proposed remedies for failings in the jury selection process, see Report of the Committee on the Operation of the Jury System of the Judicial Conference of the United States, 42 F.R.D. 353 (1967).


113. Prospective jurors are subjected to a battery of questions (voir dire) designed to insure that they know neither the victim nor the defendant nor anyone else involved in the proceeding. The course of voir dire forces prospective jurors to reveal, in addition to perhaps some embarrassing information, their identities. This latter, seemingly innocuous disclosure may result in danger to their safety or that of their families from
The voir dire of prospective jurors originated with the hope that it would detect and prevent the impanelling of jurors biased in favor of either party.\textsuperscript{114} Its effectiveness in this respect, however, is subject to question; the desire of the attorneys conducting the voir dire has been in contraposition to the espoused theory.\textsuperscript{115} Witherspoon v. Illinois\textsuperscript{116} indicates the ineffectiveness of judicial attempts to correct this tendency. Prior to Witherspoon voir dire could be used to automatically exclude from the jury any individuals who bore reservation to the imposition of capital punishment. In Witherspoon the Supreme Court concluded that exclusion from the jury "for cause" of any person who expressed reservations other than an absolute inability to impose the ultimate sanction or to render an impartial determination of guilt would be a denial of due process to the defendant.\textsuperscript{117} Empirical data shows, however, that this test does not succeed in eliminating the jury bias as sought by counsel in voir dire.\textsuperscript{118}


Consider also, Fed. R. Crim. Proc. 24(b) which grants each side 20 peremptory challenges in a capital case. Moreover, the government receives six challenges and the defendant (or defendants jointly) ten challenges if the offense is punishable by imprisonment for more than 1 year. The advantage to a defendant seeking but a solitary "hold out" juror is notable.


115. "Utilization of the voir dire not merely to select an impartial jury but to influence the jurors in favor of the examining lawyer and his case has been accepted trial tactics." Tone, Voir Dire, New Supreme Court Rule 24-1: How It Works, 47 Ill. B.J. 140, 143 (1958); see ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Trial by Jury Rule 2.4 & Commentary (1968). Mere reading of the titles to the many articles on voir dire indicate that not fairness, but prejudice of the jury, is the effect sought in voir dire. See, e.g., sources collected note 114 supra.


117. Id. at 522-23 n.21. See also Boulden v. Holman, 394 U.S. 478, 482 (1970).

The necessity for jury instructions illustrates another vexation of the jury trial. Both the prosecution and defense have the opportunity to propose jury instructions regarding the law applicable to the facts of the case and may submit them to the court. Counsel's intent, if he is to properly represent his client, must be to construct proposed instructions which are as biased in his favor as possible without being erroneous statements of the law. The judge has usually prepared his own charge which closely follows language previously upheld as acceptable by appellate courts, i.e., instructions that are not too confusing or inaccurate. Giving the proper charge is a difficult and trying business for the judge. The procedure, however, provides another filter for the defendant. Should the trial judge fail to read an instruction which the defendant has requested, he runs the risk of committing error which may be ground for reversal of the defendant's conviction and award of a new trial. Accordingly, when he is in doubt a judge is inclined to bend over backward to favor the defendant since the government typically cannot obtain a reversal of a jury acquittal for any reason whatever. This includes any error of law the judge may make in favoring instructions proposed by the defense.

A related factor which underlies the failure of the jury system to accomplish its desired ends is the complexity of the modern criminal trial. "[T]here are a lot of people who can read and write and can't understand the kind of proceedings that go on in a courtroom." The abolition of the jury system is mandated not only to rid ourselves of an anachronism, but, in fact, to insure the impartial justice once thought to be secured the defendant by the jury system.

Chief Justice Burger has underscored the way to remedy the burden placed upon the court, the defendant and the prosecution by the present jury system:

When we look at the administration of justice in such enlightened countries as Holland, Denmark, Norway and Sweden, we find some interesting contrasts to the U.S. They have not found it necessary to es-

119. FED. R. CRIM. PROC. 30. Moreover, some commentators have discounted the influence of the judge's instructions on the jury, who may have already made up their minds before the instructions are given.

120. Some of these standard instructions may be found in 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS (2d ed. 1970).

121. See 1 MATTHEWS, HOW TO TRY A FEDERAL CRIMINAL CASE 666 (1960); ABA, PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY 139-42 (Tent. Draft 1968).

122. Rabinowitz v. United States, 366 F.2d 34, 41 (5th Cir. 1966) (quoting testimony of Jury Commissioner shown on the record).
tablish a system which makes a criminal trial so complex or drawn out as it is in this country. They do not employ our system of 12 jurors. Generally their trials are before three professional judges.

Abolition of the jury in all criminal cases, or at least in those cases involving non-capital crimes, and substitution of the widely employed Continental system of a judge and two laymen, “assessors,” the latter being professionally trained fact-finders, could do much to alleviate the shortcomings of the jury system without eliminating lay influence on the judicial process. This system would be more fair, more efficient and less burdensome on the public.

In the alternative, if this proposal seems too abrupt, the exaction of unanimity of decision should be repealed, at least on the state level, and replaced by a majority verdict requirement. The elimination of unanimity, moreover, is not a mere proposal but a fact in at least two


124. In Duncan v. Louisiana, 391 U.S. 145 (1968) the Supreme Court, holding that a defendant had a right to a trial by jury for all “serious crimes,” declared unconstitutional the Louisiana practice of granting trial by jury only in cases where capital punishment or imprisonment at hard labor might be imposed as sentences. “Serious crimes” were later defined in Baldwin v. New York, 399 U.S. 66 (1970), as those punishable by imprisonment for more than six months. There exists no right to a jury trial for crimes punishable by less than six months imprisonment. Duncan and Baldwin thus limit the right on the basis of possible length of imprisonment. Analysis of these cases indicates that the choice of six months was merely an expression of historical opinion, and there appears no reason why the right to jury could not be further limited on a capital or non-capital basis within the principles of Duncan.

125. This is the “intermediate solution” proposed by Williams. G. WILLIAMS, THE PROOF OF GUILT 299 (3d ed. 1963). His principal suggestion calls for decision by three judges. Id. at 298. There is some support for an argument that such a substitute for trial by jury is constitutionally permissible. See Duncan v. Louisiana, 391 U.S. 145 at n.14 (1968). As to the abandonment of the jury on the Continent after unsuccessful experiments with it, primarily due to ineffective definitions of the province of the judge and of the jury, see G. WILLIAMS, THE PROOF OF GUILT 254-56 (3d ed. 1963) and H. KALVEN & H. ZEISEL, THE AMERICAN JURY 3 n.3 (1966).

Illustrative of the Continental system are the provisions of the GERMAN COURT ORGANIZATION LAW §§ 29, 30, 81, 82 and the GERMAN CODE CRIM. PROC. § 263 (H. Niebler transl. 1965). See also Vouin, The Protection of the Accused in French Criminal Procedure, 5 INT’L & COMP. L.Q. 1, 156, 159-64 (1956).

126. Abolition of trial by jury would also have a beneficial effect on the appellate process. Criminal cases typically involve issues of credibility, something considered to be the province of the jury. Accordingly, an appellate court which never views the witness cannot ordinarily substitute its own judgment for that of the trial court, but must, if it reverses, order a new trial before another jury. See, e.g., CAL. PEN. CODE §§ 1179-1182 (West Supp. 1971). Without the impediment of a jury trial requirement the appellate court would be able to decide the case itself if a rehearing is necessary. Where an issue of credibility is crucial, there would be nothing to prevent the appellate court from calling an important witness (or all of them, should it desire) rather than send the case back to the trial court for retrial and possibly a new appeal.
states, Oregon\textsuperscript{127} and Louisiana,\textsuperscript{128} and has the approval of the American Law Institute\textsuperscript{129} as well as of the highest courts of those states.\textsuperscript{130} The underlying rationale for the rule of unanimity is grounded on the requirement of proof of guilt beyond a reasonable doubt. If there is but one dissent in twelve, this is held dispositive that there exists a reasonable doubt of a defendant's guilt.\textsuperscript{131} The rationale is patently erroneous and equates the quantity of "believers" with the quality of belief. However, in the incipient stages of the criminal justice system just such a rationale was acknowledged as the basis of the standard of proof.\textsuperscript{132}

The constitutional question presented by this proposal is whether the unanimity requirement is a fundamental right of due process applicable to the states through the Fourteenth Amendment, as is presently the right to trial by jury in serious crimes.\textsuperscript{133} There is no reason to believe unanimity is such a right, and the Supreme Court apparently so held as early as 1903.\textsuperscript{134} This declaration has never been condemned

\textsuperscript{127} The Oregon constitution provides:
In all criminal prosecutions the accused shall have the right to public trial by an impartial jury . . . provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict.

\textsuperscript{128} The Louisiana constitution provides that:
Cases, in which the punishment is necessarily at hard labor, [shall be tried] by a jury of twelve, nine of whom must concur to render a verdict.

\textsuperscript{129} The American Law Institute's Code of Criminal Procedure provides:
In capital cases no verdict may be rendered unless all the jurors concur in it. In other cases of felony a verdict concurred in by five-sixths of the jurors, and in cases of misdemeanor a verdict concurred in by two-thirds of the jurors may be rendered. A.L.I., \textit{Code of Criminal Procedure} \textsection{355} (1931).


\textsuperscript{131} S. PROFFATT, \textit{JURY TRIAL} 117 (1877).

\textsuperscript{132} Sir Patrick Devlin of Britain has analyzed the requirement of unanimity and found it to be based upon the ancient common law custom of deciding cases according to the preponderance of the number of witnesses appearing in support of each side. Twelve were required to support the prevailing party and they were, of course, unanimous in their opinions. P. DEVLIN, \textit{TRIAL BY JURY} 48 (1956).

\textsuperscript{133} Duncan v. Louisiana, 391 U.S. 145 (1968), and Bloom v. Illinois, 391 U.S. 194 (1968), hold that the right to trial by jury in serious cases is guaranteed by the Fourteenth Amendment. \textit{See also} text accompanying notes 143 & 144 infra.

\textsuperscript{134} Hawaii v. Mankichi, 190 U.S. 197, 217-18 (1903). In \textit{Mankichi} the laws of the Republic of Hawaii, recently ceded to the United States, provided for conviction
by the Court and, indeed, the indications are that it will not be over-rulled. In *Duncan v. Louisiana*, \(^\text{136}\) which extended the guarantee of trial by jury to the states, Justice White, speaking for the Court, noted that the decision would not require widespread changes in the state procedures. \(^\text{136}\) Justice Fortas, specially concurring in *Duncan*, wrote: 
"I see no reason whatever . . . to assume that our decision today should require us to impose . . . requirements such as unanimous verdicts or a jury of 12 upon the states." \(^\text{137}\) The Court has adopted the tack of avoiding any ruling on the question in cases heard after *Duncan*, \(^\text{138}\) although it is possible that a ruling will be made during the October 1971 term. \(^\text{139}\) There is, however, no reason for speculation that the Court will depart from its 1903 ruling. The requirement of unanimity has historically been the subject of criticism; \(^\text{140}\) it has been abolished in Great Britain, \(^\text{141}\) and less than unanimous verdicts have not been shown to lead to a miscarriage of justice. \(^\text{142}\) A requirement which harnesses one party with the task of persuading twelve jurors while the other party must carry the burden of persuading but one is inequitable and ought not be retained.

Total abolition of the jury will, of course, require more than a jejune

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\(\text{135. } 391 \text{ U.S. } 145, \text{ reh. denied, } 392 \text{ U.S. } 947 (1968).\)

\(\text{136. } \text{Id. at } 158.\)

\(\text{137. } \text{Id. at } 162.\)

\(\text{138. } \text{See DeStefano v. Woods, } 392 \text{ U.S. } 631, 635 (1968) (express challenge to a ten-to-two verdict under the Oregon statute on *Duncan* principles held not to apply since trial conducted prior to *Duncan*); State v. Schoonover, } 252 \text{ La. } 311, 211 \text{ So. } 2d 273, \text{ cert. denied, } 394 \text{ U.S. } 931 (1968) (express challenge to the Louisiana statute). \text{Obviously, the principle of retroactivity would not necessarily have precluded decisions in these cases had the Court wished to rule on them.}\)

\(\text{139. } \text{Johnson v. Louisiana, } 255 \text{ La. } 314, 230 \text{ So. } 2d 825 (1970), \text{ prob. juris. noted, } 400 \text{ U.S. } 900 (1970) \text{ (affirming conviction by a 9-3 verdict under Louisiana constitution article 7, section 41); State v. Apodaca, } 1 \text{ Ore. App. } 483, 462 \text{ P.2d } 691, \text{ appeal denied, } 89 \text{ Adv. Ore. } 939 (1969), \text{ cert. granted, } 400 \text{ U.S. } 901 (1970) \text{ (per curiam affirmation of less-than-unanimous felony conviction under Oregon constitution article 1, section 11 which permits a 10-2 conviction for any crime except first-degree murder). In both cases, the question presented to the Court will be whether the Sixth Amendment right to jury trial includes an absolute right to conviction by a unanimous verdict.}\)

\(\text{140. } \text{P. DEVLIN, TRIAL BY JURY 48 (1956); Deady, TRIAL BY JURY, U.S.L. REV. 398, 400 (1883); see generally notes 92 & 114 supra.}\)

\(\text{141. Criminal Justice Act of 1967, ch. 80 § 13.}\)

\(\text{142. Kalven & Zeisel, The American Jury, 48 CHI. B. REC. 195, 201 (1967). This brief study was based upon a sampling of Oregon jury verdicts.}\)
reconstruction of constitutional provisions. As a stopgap measure pending more significant reform, all states should consider at least the enacting of statutes containing provisions for less than unanimous verdicts and for six rather than twelve man juries.

IV. ALTER THE STANDARD OF PROOF

The protection of charged defendants, as well as service to the goals of law enforcement, calls for substantially more evidence to establish a criminal case by proof beyond a reasonable doubt. Where is that evidence? The crimes with which we are concerned are committed in stealth and usually with premeditated cunning. It is rare that there are available corroborative and uninvolved spectator witnesses. The traumatic shock of the crime usually unsettles the capacities for accurate observation by victim and witness alike.

In order to prevail in a civil suit a party must establish his case by the preponderance of the evidence. The veniremen impaneled for the criminal trial, on the other hand, are constrained not to balance the evidence, but to ascertain whether the government has introduced evidence which proves its case "beyond a reasonable doubt." This constitutes an invitation, despite the judge's inculcations to the contrary, for the jury to "hunt for doubts." This sort of juror reaction is directly

143. Cf. Baldwin v. New York, 399 U.S. 66 (1970); Bloom v. Illinois, 391 U.S. 194 (1968). In Baldwin, the Court declared unconstitutional New York City Crim. Court Act § 40 which provided for non-jury trial for offenses punishable by a maximum of one year's imprisonment. The Court clearly indicated that jury trial is required for all offenses punishable by a maximum penalty of over 6 months.

On the other hand, Williams v. Florida, 399 U.S. 78 (1970), held that a six-man jury, rather than the typical twelve-man one, did not violate the right to trial by jury. Justice Harlan's concurring opinion exposes the inconsistency between the Duncan, Baldwin and Williams decisions. Id. at 136-38. Although his opinion suggests the remotely possible validity of a judge and two-assessor system, provided the assessors are laymen, such a holding seems unlikely.

144. The Duncan and Williams cases both leave open the question of the constitutionality of less than unanimous verdicts, and do not overrule Maxwell v. Dow, 176 U.S. 581 (1900), on the point that such a state procedure is permissible.


attributable to the chimerical quality of pattern instructions defining "beyond a reasonable doubt." The standard definitions of "reasonable doubt", even those commended as "models of clarity", force each juror to become his own epistemologist.  

There is good reason why a judge usually defines "reasonable doubt" by an accepted rubric which is frequently incomprehensible. Suppose, for example, that during a jury trial a judge delivers a marginal instruction on "reasonable doubt" which is subsequently challenged on appeal. The appellate court must then examine the language used, setting it forth in its opinion. If the opinion concludes that the given charge is barely passable, and thus does not justify reversal, every other trial judge knows he may safely employ the instruction since he is not likely to be quickly reversed. Moreover, it is risky for a judge to attempt to improve on accepted instructions because the appellate court may then re-examine the language and find the new "improved" version unacceptable. Consequently, the safest course is followed: Trial judges use the marginal-but-sustained-on-appeal charge verbatim.

The most difficult requirement the prosecution must meet is proving its case beyond a reasonable doubt. Although not all civilized coun-

149. See, e.g., State v. Centalonza, 18 N.J. Super. 154, 86 A.2d 780 (1952) wherein the following charge was commended as a "model of clarity":

By a reasonable doubt is not meant a mere possible or imaginary doubt. It is that state of the case where, after an examination and comparison of all the evidence, or from a want of sufficient evidence, you cannot say that you feel an abiding conviction to a moral certainty of the truth of the charge. That is expressing the thought in rather negative terms. To express the same thought in positive terms: If, after an entire comparison and consideration of all the evidence, you find you can say you feel an abiding conviction to a moral certainty of the truth of the charge, you are then satisfied beyond a reasonable doubt within the meaning of that term in the law. Id. at 158, 86 A.2d at 784.

Although perhaps clearer than most such charges, it is obvious that it will mean different things to different auditors, and may well not be clear to them.

It should be noted in this connection that, although a more recent case, Regina v. Murtagh, 39 Crim. App. 72 (1955), has again sanctioned the "reasonable doubt" incantation, the British Court of Criminal Appeals ruled in 1952 that the expression "reasonable doubt" should be abandoned because it could not be satisfactorily defined. Regina v. Summers, 36 Crim. App. 14, 15 (1952). The simple charge of Summers requiring only that the jury be "satisfied" that the defendant's guilt had been proved at least had the virtue of simplicity.

150. The very indefiniteness of the term "reasonable doubt" raises a number of issues. In civil cases where the preponderance test is used, the finder of fact is often instructed in some detail on the burden of proof; yet in criminal cases there is no such specification, even though "reasonable doubt" is a far more indefinite term. Kaplan, Decision Theory and the Factfinding Process, 20 Stan. L. Rev. 1065, 1073 (1968).

It seems almost ludicrous that the courts would demand a standard which bounds on being impossible to either understand or apply. No fundamental rights are preserved when the factfinder is essentially left to float aimlessly on a sea of ambiguity.
tries saddle the government with such an onerous standard of proof in a criminal case.\textsuperscript{151} Americans have traditionally viewed the "reasonable doubt" standard as the apotheosis of criminal justice. However,

\begin{quote}
[w]e may prate about acquitting nine guilty men rather than risk the conviction of one innocent, but we in fact shudder at the idea of turning loose nine guilty men capable of committing crimes of violence and grave depredation. If this be true, as the balance is weighted more and more in favor of the wrongdoer, there is likely to be a counterforce set up to accept less and less evidence as sufficient to convict those charged with crimes of violence and grave depredation. Any experience with the spate of testimonial records in the recent confession cases, postconviction remedies, and illegal search and seizure suppressions suggests that the courts and juries are paying lip service to Supreme Court doctrine—on the law—but finding on the facts in favor of social protection.\textsuperscript{152}
\end{quote}

There may be no certainty that a jury would find it any easier to understand and apply a "fair preponderance" standard in criminal cases,\textsuperscript{153} but this is an alternative standard which merits consideration,

\textsuperscript{151} Because France recognizes the presumption of innocence (R. DAVI \& H. DE VRIES, THE FRENCH LEGAL SYSTEM 57 (1958); G. WILLIAMS, PROOF OF GUILT 183 (2d ed. 1955)), the "accused can only be condemned if proof is given of his guilt". Vouin, The Protection of the Accused in French Criminal Procedure, 5 INT'L \& COMP. L.Q. 157, 171 (1956). The only required proof of guilt is the "intime conviction" of the judge of that guilt (Vouin, \textit{supra} at 15), and later that of a jury (Vouin, \textit{supra} at 171) whose personal conviction can be formed on the basis of evidence not ordinarily admissible in an American court. See also Vouin, \textit{supra} at 171, as to probative evidence which can be considered.

For the German practice see GER. CODE CRIM. PROC. § 261 (H. Niebler transl. 1965) which provides: "With respect to the effect of the reception of the evidence, the court decides according to its free conviction obtained from the entire trial."

It is worth noting that not even the English have been irrevocably wedded to the "beyond-a-reasonable-doubt" standard. G. WILLIAMS, PROOF OF GUILT 190-94 (2d ed. 1955); see note 149 \textit{supra}.

\textsuperscript{152} Breitel, Criminal Law and Equal Justice, 1966 UTAH L. REV. 1, 11. See also D. BAZELON, The Adversary Process—Who Needs It?, 12th Annual James Madison Lecture, New York University School of Law (April, 1971), reprinted in 117 CONG. REC. 5852, 5855 (daily ed. April 29, 1971) where Judge Bazelon stated: "[The jurors, as representatives of the community, have the opportunity to inject into the proceedings at hand their sense of the standards that prevail in the community."


Perhaps a "fair preponderance" charge would prove less difficult for a jury to grasp if the instruction were attuned to probability concepts. A mathematical model based upon a conscious legislative determination, in terms of probabilities, of the competing interests ("utilities") of acquitting the guilty versus convicting the innocent, could be devised and then translated into a comprehensible verbal formula. Such a formula would be less apt to create that spurious certainty from numbers to which critics of
particularly if the jury system is retained. The maintenance of a jury instruction which is out of tune with the beliefs of the selected veniremen does nothing but foster disrespect for the integrity of our judicial system.

The higher the standard of proof required for conviction in a criminal case, the more likely it becomes that guilty men will be acquitted. If the standard of proof were lessened from that of "reasonable doubt" to "fair preponderance", fewer guilty would walk away free. This might be accomplished by retaining the term "reasonable doubt" but significantly changing the content of its present definition. An ancillary advantage of this procedure would be the preservation of any possible ritualistic and social value appended to the term "reasonable doubt". Of course, it may be argued that any change would slightly increase the probability that an innocent person would be convicted.

Sufficient correctives for protection of the innocent (not available when a guilty person has been improperly acquitted) exist, however, in the trial judge's power to grant a new trial when he is convinced that the defendant is in fact innocent, and in the jury's power of nullification. "The jury clearly has an untrammeled power to disregard the law, to refuse conviction even though the law plainly requires it . . . ", if the rules of law do not square with their sense of justice.

Of more moment is the decision of the United States Supreme Court in In re Winship which explicitly held that proof of a defendant's guilt "beyond a reasonable doubt" is mandated by due process and is thus the standard which must be borne by the government in a criminal case. The implementation of a less severe standard of proof in the use of mathematics in the trial process object. But see Tribe, Trial By Mathematics: Precision and Ritual in the Legal Process, 84 Harv. L. Rev. 1329 (1971).

But see text accompanying notes 91-144 supra.


Cf. Kaplan, Decision Theory and the Factfinding Process, 20 Stan. L. Rev. 1065, 1073-75 (1968). Again, the change in definition of "reasonable doubt" would not wreak havoc. Breitel, supra note 152, at 11, declares: "[A]lthough the standard of proof for civil cases is less than that for criminal cases, the fact is that juries and courts tolerate a level of proof in a criminal case that they would reject in a civil case."


Id. See also Breitel, supra note 152, at 11.


Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process clause protects the
a criminal case will require an about-face by the Court. Although such a drastic action should not be expected with any immediacy, the Supreme Court and Congress have recently undercut the pervasiveness of the rule, and historical perspective underscores the necessity for reevaluation.

The late Justice Black, dissenting in *Winship*, aptly pointed out:

"[M]any opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required." . . . The Court has never clearly held, however, that proof beyond a reasonable doubt is either expressly or impliedly commanded by any provision of the Constitution. . . . [N]owhere in that document [the Constitution] is there any statement that conviction of crime requires proof of guilt beyond a reasonable doubt.\(^{162}\)

Justice Black, and impliedly the Court, indicate that the relevant inquiry into the burden of proof area is: Does history still support the employment of a reasonable doubt standard in a criminal trial as an analogue of due process? Analysis will show that the dangers this standard of proof was intended to overcome have long been rectified. There appears to be no current imperative reason why reasonable doubt is required as a standard of proof in order to satisfy due process. The Court in *Winship*, and many courts prior to it, fell prey to the dangers accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *Id.* at 364.

162. *E.g.*, *Lego v. Twomey*, 92 Sup. Ct. Rptr. 619 (1972) (standard of proof in a hearing on the voluntariness of a defendant's guilty plea need not be "beyond a reasonable doubt").

In Title X of the Organized Crime Control Act of 1970, 18 U.S.C. §§ 3575-78, there is provision made for sentencing recidivists as dangerous special offenders. Under § 3575 once a defendant either enters a plea consonant with an admission of guilt or is determined by the trier of fact to be guilty, then a hearing is held (assuming the defendant has been branded as a dangerous special offender prior to trial or to entry of a guilty or nolo contendere plea) to ascertain whether the defendant should be subject to an increased sentence. The defendant may be characterized as a dangerous special offender at this hearing merely upon a showing of a *preponderance of the information*. If, as has been suggested, the rationale behind having a greater burden of proof in criminal cases is that a defendant's liberty is jeopardized, then surely Congress does not recognize that rationale since under § 3575 a defendant may be deprived of his liberty solely because of his special classification based upon a mere preponderance determination.

163. 397 U.S. at 377 (emphasis added). The majority opinion cites to many cases wherein the "reasonable doubt" requirement has long been reiterated. However, other than an historical analysis, a statement that the formula arose around 1798, and a discussion that the standard is "vital" in order to reduce factual errors, the Court never offers substantive support concerning the necessity under due process of a "beyond a reasonable doubt" standard in lieu of a fair preponderance standard. *See id.* at 362-66.
of a "'jurisprudence of conceptions', . . . [allowing] the extension of a maxim or a definition with relentless disregard of consequences to 'a dryly logical extreme.'" 164

When the reasonable doubt standard in criminal procedure began to take form, every defendant was in very grave peril; the death penalty was quite common, even for the most trivial of offenses. 165 Justice Matthew Hale, taking note of the generalized severity of sentences, specified that a high burden of proof was necessary to convict a defendant. 166 Nevertheless, in Regina v. Burton, 167 when the argument was made that the defendant's conviction was not supported by a sufficiently high burden of proof and the court was referred to Hale's statement as authority, the judges indicated that Hale's observations were only warnings and not law. 168 Shortly thereafter, however, the commentators began distorting the burden of proof requirement beyond even what Justice Hale may have intended. Blackstone reproduced a statement attributed to Hale—"the law holds it is better that ten guilty persons escape than that one innocent suffer." 169 Hale's original statement, however, would have allowed only half that number of guilty defendants be set free. 170 Starkie, whose work on evidence was probably the finest treatise compiled in its time, exaggerated the statement to the point of absurdity by pontificating: "The maxim of law is, that it is better that ninety-nine (i.e., an indefinite number of) offenders should escape than that one innocent man should be condemned." 171 Despite

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164. Hynes v. New York Cent. R. Co., 231 N.Y. 229, 231, 131 N.E. 898, 900 (1921). Justice Cardozo's statement was based upon Dean Pound's article which criticized courts for mechanically applying a rule long after the reason for the rule had ceased to exist. Pound, Mechanical Jurisprudence, 8 Colum. L. Rev. 605 (1908).


166. See M. Hale, Pleas of the Crown 289 (1694).

167. 6 Cox. Crim. Cas. 293 (1854).

168. Id. at 294.

169. 4 Blackstone Commentaries *358.

170. "It is better that five guilty persons should escape unpunished than one innocent person should be convicted." 2 M. Hale, Pleas of the Crown 288 (W. Stokes & E. Ingersoll ed. 1847). The context of this statement must not be forgotten. Certainly, an underlying consideration for the statement was the horrible punishment which awaited most convicted defendants at that time.


This is the logic which the world has accepted for half a century without scoffing. Better that any number of savings-banks be robbed than that one innocent person be condemned as a burglar! Better that any number of innocent men, women, and children should be waylaid, robbed, ravished, and murdered by wicked, willful, and depraved malefactors, than that one innocent person should be convicted and punished for the perpetration of one of this infinite multitude of crimes, by an intelligent and well-meaning though mistaken court and jury! Better any amount of crime than one mistake in well-meant endeavors to suppress
the rhetorical appeal of these slogans, however, the fact remains that the only way to ensure the nonconviction of any innocent person is to convict no one at all.\textsuperscript{172}

The use of the reasonable doubt standard manifests the proclivity of the courts to adopt Hale's distended rubric. The reasonable doubt standard seems to have first been enunciated in the High Treason cases tried in Dublin in 1798. The judges there, in commenting on the standard of proof necessary to convict, instructed that there was a maxim which required acquittal if the jury entertained any rational doubt of a defendant's guilt.\textsuperscript{173} Prior to the High Treason cases, juries had been charged in principle to convict when a clear impression of guilt existed. For example, "[e]very verdict ought to be the jury's own and ought to proceed on clear grounds of fact."\textsuperscript{174}

Historical drift, then, has led to a Procrustean rule which is unnecessary to, and in fact impedes, the development of a more efficient system of criminal justice.

[O]stensibly, under the guidance of that old cautionary doctrine, that it is better to err on the side of mercy than on the side of justice . . . we have come, by a series of glosses and dilutions and limitations, to a doctrine which logically gives justice to nobody, and mercy to those only who show none and deserve none.\textsuperscript{175}

Perhaps at one time a greater burden of proof would have been mandated by the fundamental fairness concept inherent in the Due Process Clause, but modern criminal procedures and penalties bear not even a faint resemblance to "criminal justice" as applied in the days of Lord Matthew Hale. The protections offered a defendant today ensure an impartial determination of guilt or innocence, perhaps fair to the point of presenting the state with insurmountable obstacles to the conviction of many guilty defendants.\textsuperscript{176} The presumption of innocence need not be changed; however, a burden of proof must be employed which

\footnotesize{\textsuperscript{172} or prevent it! Better for whom? we beg leave to ask; for society, or for the malefactor?}


\textsuperscript{174} See text accompanying notes 27-31 supra.


V. MODIFY THE APPELLATE PROCESS AND LIMIT THE SCOPE OF FEDERAL HABEAS CORPUS

Few more common criticisms of criminal appeals are made than that of the delay that is almost invariably involved. This criticism as much as any has led to opposition to any appeal at all. It has been argued that if punishment is to prevent or deter crime it must be swift, but cannot be [swift] because of appeal.\footnote{178}

The federal and state appellate systems are in an evident state of paralysis due to the burgeoning number of criminal appeals.\footnote{179} The present vogue of appealing convictions "all the way up" seems to have so bogged the appellate process as to destroy the effectiveness of the criminal law and to cast the entire legal system into disrepute.\footnote{180}


No person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. An accused is assumed to be innocent until convicted. (Emphasis added).

An explanation that the presumption of innocence is merely the equivalent of saying that the prosecution has the burden of proof, \textit{i.e.}, that the presumption is not evidence and adds nothing to the burden, is also necessary if the term is to be defined. \textit{Cf.} E. Morgan, \textit{Basic Problems of Evidence} 40 (1956).


179. Recent Supreme Court decisions have removed many of the obstacles which at one time impeded indigent defendants from appealing their convictions. \textit{See, e.g.}, Douglas v. California, 372 U.S. 353 (1963) (states required to furnish indigents with counsel on appeal in criminal cases); Burns v. Ohio, 360 U.S. 252 (1959) (states may not require indigent defendants in criminal cases to pay a filing fee before permitting them to file a motion for leave to appeal in one of their courts); Griffin v. Illinois, 351 U.S. 12 (1956) (states may not deny appellate review solely on account of a defendant's inability to pay for a transcript). The result of said decisions has dramatically accelerated the rate of criminal appeals. ABA, \textit{Project on Minimum Standards for Criminal Justice, Standards Relating to Criminal Appeals} 20 (Tent. Draft March 1969):

The jurisdiction with the farthest advance in rate of defendant appeals is the District of Columbia. Of defendants convicted after trial, the percentage who filed appeals in the United States Court of Appeals for the District of Columbia Circuit reached 92.6% in fiscal year 1966; this may be compared with the figure from 1950 of 18.3%.

\textit{See also The President's Advisory Council on Executive Organization, A New Regulatory Framework: Report on Selected Regulatory Agencies} 57 n.13 (1971) wherein it is noted that the total number of appeals to the United States Courts of Appeals has more than doubled in the last nine years, rising from 4204 in 1961 to 10,248 in 1968; Philips, \textit{Appellate Review in the Sixth Circuit}, 2 \textit{Memphis State U.L. Rev.} 1 (1971) wherein the author reports that the annual volume of appeals to the Sixth Circuit Court of Appeals has nigh tripled in an eight year period.

we are to inject any quantum of finality into the administration of justice, and, accordingly, instill the fear of certain and swift punishment into the guilty, the present and overburdened appellate structures of the state and federal systems must be modified.

The needed change could be accomplished through any one of three basic reforms: (1) eliminate in certain instances the right to an elective appeal;\(^\text{181}\) (2) provide appellate courts with exclusive criminal jurisdiction; or (3) provide an additional tier of review for the already morassed state and federal appellate systems. In any event, frivolous appeals would have to be strictly and carefully screened.

Neither the federal government nor the states are constitutionally required to provide appellate courts or a right to appellate review.\(^\text{182}\)

*New Blocks for Old Pyramids: Reshaping the Judicial System,* 44 S. Cal. L. Rev. 901 (1971) [hereinafter cited as Hufstedler]; Christian, *Delay in Criminal Appeals: A Functional Analysis of One Court's Work,* 23 Stan. L. Rev. 676 (1971) wherein the author notes, in a particular study of the appellate process in California, that “[t]he full course of a criminal appeal in the First Appellate District takes an average of 498 days (456 days median), well over 16 months.” *Id.* at 677 (footnote omitted).

Delay may also impede the accused from presenting an adequate defense because of the loss or destruction of documents, the death or disappearance of witnesses or the inability of witnesses to recall relevant facts. See generally *Dickey v. Florida,* 398 U.S. 30 (1970) (death and unavailability of witnesses and loss of records were relevant factors in finding that defendant's right to speedy trial under Sixth Amendment had been infringed); *Tynan v. United States,* 376 F.2d 761 (D.C. Cir. 1967) (loss of documents due to flooding held not to have unduly prejudiced defendant in bringing appeal).

Delay is perhaps felt strongest at the trial court level. The Los Angeles County Superior Court, though probably the most updated system in the country, has a current backlog of 50,000 cases. Hufstedler, *supra,* at 905. In *United States ex rel. Frizer v. McMann,* 437 F.2d 1312 (2d Cir. 1970), the court took notice of the egregious delays afflicting the New York State criminal court system. For example, there were 2,899 persons accused of a felony in New York State who had been in jail three months or more pending trial. In many homicide cases, the detention before trial had already exceeded one year. *Id.* at 1315.

181. An appeal at the election of the defendant is to be distinguished from a mandatory appeal in every instance. This elective right to appeal is the prevailing practice in the United States. Some jurisdictions, however, provide for an automatic and mandatory appeal from any conviction for which the death penalty has been given. See, e.g., *Cal. Pen. Code Ann.* § 1239(b) (West 1970).

182. *Griffin v. Illinois,* 351 U.S. 12, 18 (1956); *Andrews v. Swartz,* 156 U.S. 272 (1895): “A review by an appellate court . . . was not at common law and is not now a necessary element of due process of law.” *Id.* at 275, quoting *McKane v. Durston,* 153 U.S. 684, 687 (1894); *United States v. Coke,* 404 F.2d 836, 843 (2d Cir. 1968); *Tinkoff v. United States,* 86 F.2d 868 (7th Cir. 1936): “As there is no constitutional right to an appeal in criminal cases, the court may, within its statutory powers, affix such conditions thereto as seem fit.” *Id.* at 881. *United States v. St. Clair,* 42 F.2d 26, 29 (8th Cir. 1930). Moreover, until shortly before the turn of the century, federal criminal cases were generally not appealable. The Supreme Court
Thus a possible, and apparently constitutional, solution for our overburdened appellate courts would be to eliminate in toto the right to appeal. One jurisdiction already seems to disallow appeals from convictions of minor misdemeanors, perhaps this unlocks the door to functional appellate reform. Such a limitation of the right to appeal to only those convicted of serious crimes would apparently withstand judicial scrutiny and would certainly aid in relieving the appellate system.

Alternative methods of reform, however, would substantially preserve the process of appellate review and would accordingly placate those who have considered the right to appeal to be fundamental. An

(the only federal court of appeal at the time) would review a criminal case only when there was a division of opinion in the circuit court concerning a question of law. Act of April 29, 1802, ch. 31, § 6, 2 Stat. 156, 159-61; Act of June 1, 1872, ch. 255, § 1, 17 Stat. 196. The Act of March 3, 1891, ch. 517 § 5, 26 Stat. 827, provided for appeals in criminal cases to the newly created courts of appeals. At present, however, all the state and federal courts allow some appellate review. ABA, PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO CRIMINAL APPEALS 17 (Tent. Draft March 1969); see 28 U.S.C. § 1291 (1970); FED. R. APP. P. 3, 4.

It is curious why the framers failed to provide for appellate review as a matter of right in the Constitution itself. Though article III, § 2 of the Constitution does afford the Supreme Court limited appellate jurisdiction, it appears that said jurisdiction only applies to civil cases. U.S. CONST. art. III, § 2; Cf. THE FEDERALIST No. 81, at 550 (J.E. Coke ed. 1961) (A. Hamilton) (wherein it is indicated that there was no intention on the part of the Framers to change or expand upon the common law mode of appellate review).

183. See ABA, PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO CRIMINAL APPEALS 17 (Tent. Draft March 1969) wherein the authors note that the Louisiana Supreme Court, the only Louisiana court with criminal appellate jurisdiction, is authorized to entertain appeals from only those convictions for which a defendant is fined $300 or sentenced to serve more than six months in jail.

It appears that Arkansas disallows appeals as a matter of right from non-capital offenses. In such cases, appeal is granted at the discretion of the trial court. If refused, a further application can be made to the Arkansas Supreme Court, which will allow the appeal unless it is determined to be frivolous. ARK. STAT. ANN. §§ 43-2708, 43-2709, 43-2710, 43-2723 (1964).

184. The right to trial by jury is required in state criminal proceedings only where imprisonment for more than six months is authorized. Baldwin v. New York, 399 U.S. 66, 68-69 (1970); Bloom v. Illinois, 391 U.S. 194 (1968). Since this right, which is directly posited through the Sixth and Fourteenth Amendments, is not recognized for minor offenses, how could the right to appeal, which is not constitutionally founded at all, be said to apply to minor offenses? As such, the limitation of the right to appeal to only those convicted of serious offenses should definitely withstand attack.

185. See note 180 supra. Limiting the right to appeal would assuredly lend support to the venerable adage that if a job can be well done once, it should never be done twice. If we could provide able and scholarly trial judiciary, there would be no need to second-guess and criticize their every performance.

186. In Coppedge v. United States, 369 U.S. 438 (1962), Justice Stewart noted that: "Justice demands an independent and objective assessment of a district judge's
examination of the dual functions of appellate courts will reveal that while the first provides no compelling reason to preserve the appellate process, the second serves an essential role which illuminates the propriety of substantially retaining appellate review.

Appellate courts serve (1) to determine the correctness of lower court decisions, and (2) to provide didactic guidance on how a particular problem should be handled in the future. It is submitted that the former function alone, especially in light of the current appellate delays, could never justify the existence of appellate courts. The philosophy which underlies this function connotes a type of indeterminism, and commands that if a job is to be performed adequately it must be performed multifariously. Such a philosophy lacks objective verification. While redetermination of facts is usually not allowed on review, appellate courts often serve to correct errors in conclusions of law by delving into the factual determinations of the lower tribunal. Moreover, redetermination of legal issues for the sole sake of achieving a correct result often entails repetition, seldom involves the formulation of new principles, and deserves to be given no more credibility than the initial determination. Such consecutive attempts to determine correctness can only entail a wasteful exhaustion of resources and a needless duplication of effort. If such second-guessing is indeed deemed essential, a “final” determination after only two or three reviews could never be justified and the quixotic quest for the ultimate certitude would continue ad infinitum.

The companion and didactic function of appellate courts, however,
provides a more compelling rationale for preserving appellate review. This function ensures the requisite uniformity and certainty in the decision-making process and has been deemed the "fundamental institutional purpose" of appellate review. Of necessity there must be some process which both provides uniformity in decisions and adjudicates cases of the first impression within particular jurisdictions. Otherwise, persons similarly situated would be subjected to diverse interpretations of the law and the anomalous situation could arise where no court within a jurisdiction would recognize sister decisions as compelling or persuasive. While the performance of this function inevitably entails some redetermination of lower courts' findings and conclusions, the institutional purpose to be served is so overriding that any concomitant second-guessing can be overlooked.

Once we have recognized this animating reason for retaining some form of appellate review, two alternative modes of reform may be considered. First, the state and federal governments might consider the establishment of appellate courts with exclusive criminal jurisdiction—Criminal Appellate Courts. Such tribunals would be favored with a continuity of subject matter, allowing the justices thereon to attain a higher peak of proficiency. The Criminal Appellate Courts would afford plenary hearings for all claims and would fulfill the essential didactic and stabilizing functions of appellate courts. Decisions of these tribunals would be final within their jurisdictions and would be subject to review only by the Supreme Court.

The state Criminal Appellate Courts, depending upon the population and crime incidence of the particular state or circuit, could be partitioned into departments or divisions consisting of three or more judges apiece. Each division would decide its own cases, being guided and directed by constitutional mandates of the Supreme Court. To avoid stagnation in their decision-making roles, the judges could intermittently transfer to civil courts deriving therefrom a perhaps refreshing interlude from their one course criminal diets. Hopefully, however, the general continuity of the subject matter reviewed would permit the Criminal Appellate Court justices to more expeditiously and judiciously dispose of appeals. Dockets would be

188. Bator, supra note 186, at 453.
cleared more swiftly and delays would be shortened, not only due to the absence of a third tier of review, but also because of the expectant shorter duration required for disposition of the appeals.\textsuperscript{191} Less delay would inject a greater certainty into the adjudication process, while the lack of a superior second-guesser would impart the requisite finality.\textsuperscript{192}

Second, a vertical extension of the appellate systems might be considered. Such an extension would entail the addition of lower level tiers between the trial courts and initial courts of appeal. Judge Shirley M. Hufstedler of the Ninth Circuit Court of Appeals has recently proposed such a modification of the appellate process.\textsuperscript{193} Judge Hufstedler would provide for “Courts of Review” consisting of one trial judge and two appellate judges. These courts would afford a plenary review for final judgments, with all post conviction motions and grounds for appeal consolidated at the hearing.\textsuperscript{194} This review would constitute the only appeal as a matter of right with two senior courts of review available to accommodate the teaching function of appellate review.\textsuperscript{195}

The most compelling aspect of this proposal is the consolidation of all post trial motions into one hearing. At present, arbitrary post-conviction defense motions can effectively prolong a criminal proceeding for an indefinite period of time. A recent example of the delay involved is provided by the case of Cliff Jones, who was convicted in 1968 in the Bobby Baker payoff case, and who still remains free on bail while his attorneys incessantly harangue the appellate courts with various post

\textsuperscript{191} As the Criminal Appellate Court judges become more proficient in that field of the law, they should be able to make decisions more fluidly and in shorter time durations. While it has been contended that greater proficiency leads to greater delay through more care and deliberation (Hazard, After the Trial Court—The Realities of Appellate Review, in American Assembly, The Courts, The Public and the Law Explosion 80 (Jones ed. 1965)), it seems that the opposite conclusion is the more sound—greater proficiency, less time to formulate and deliberate, and thus less delay.

\textsuperscript{192} Oklahoma and Texas presently maintain Courts of Criminal Appeals which have exclusive criminal jurisdiction and whose decisions are final and non-reviewable. Okla. Stats. Ann. tit. 20, § 40 (1962); Tex. Code Crim. Proc. Ann. arts. 4.01, 4.03 (1966); Ex parte Waldock, 142 Okl. 258, 286 P. 765, 767 (1930); State ex rel. Wilson v. Briggs, 171 Tex. Crim. 351 S.W.2d 892 (1961). However, no empirical data exists with which to judge the efficacy of the courts vis-à-vis appellate courts of general jurisdiction.

Of course, an additional reform for the appellate morass would be the limitation of unnecessary opinion writing by the appellate judges. While this is more in the nature of a housekeeping function, perhaps prompt legislation could delimit the parameters of permissible “opinionating.”

\textsuperscript{193} Hufstedler, supra note 180.
\textsuperscript{194} Id. at 911.
\textsuperscript{195} Id. at 911-12; see text accompanying notes 187-90 supra.
trial motions. Stringently enforced time limitations governing the initial review would aid in eradicating such abusive delay, while discretionary superior review, perhaps only upon certification by the Court of Review, would assist in achieving some measure of finality.

Concomitant to an effective modification of the appellate process is a likewise effective solution to the present rash of frivolous appeals. Since convicted indigents risk nothing and spend nothing to pursue their appeals, it is reasonable to assume that the majority of such appeals will be groundless. What is needed is an equitable mechanism whereby frivolous appeals may be effectively screened-out of the appellate process. While it has been opined by some that various filtering mechanisms will fail for either constitutional or pragmatic reasons, the Fifth Circuit has recently adopted such a “mechanism" which appears to be successful. Such an effort to introduce a greater degree of finality into the appellate system has been praised by the Chief Justice; it should be emulated by the fellow circuit courts and by the states.

196. TIME, Jan. 10, 1972, at 58-59. Mr. Jones, reveling in his freedom, exclaimed: "If I'd been a poor man, or even an average guy, I wouldn't have been able to afford it." Id. at 59.

197. "An appeal is said to be 'frivolous' where it presents no debatable question or no reasonable possibility of reversal, the word meaning of little weight or importance, not worth notice, slight." United States v. Piper, 227 F. Supp. 735, 740 (N.D. Tex. 1964).

198. See cases cited in note 179 supra.


I don't know what proportion of criminal convictions are appealed today but I am sure that the proportion is rising and will continue to rise, because under existing law a defendant has absolutely nothing to lose. . . . We have many appeals after guilty pleas, and we have many appeals where it is obvious from the record that the trial judge has done everything within his power to give the defendant the most favorable break he could in the way of a sentence. Yet the defendant appeals knowing that on a retrial he can't be given anymore severe punishment the second time. . . . (citations omitted).

200. See ABA, PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO CRIMINAL APPEALS 60-72 (Tent. Draft March 1969).

201. 5th CIR. R. 20:

If upon the hearing of any interlocutory motion or as a result of a review . . . , it shall appear to the court that the appeal is frivolous and entirely without merit, the appeal will be dismissed.

202. See Nevels v. McCall, 407 F.2d 390 (5th Cir. 1969). The great majority of cases which have to date considered frivolous appeals have been decided under Rule 46(a)(2) of the Federal Rules of Criminal Procedure whereby a court may deny bail pending appeal if it appears that the appeal is frivolous. See, e.g., United States v. Sutton, 322 F. Supp. 1320 (S.D. Cal. 1971); United States v. Piper, 227 F. Supp. 735 (N.D. Tex. 1964).

The finality sought to be achieved by modifying the appellate process is entirely dependent, however, upon the scope afforded the writ of habeas corpus. Mainly because of the expansion of Fourteenth Amendment due process to the states, the Supreme Court has seen fit to widen the scope of federal habeas relief to state prisoners. As a result, the number of habeas corpus petitions from state prisoners increased from 2000 in 1963 to 8372 in 1971. The strain upon the federal courts has been enormous. Moreover, while many of these petitions never reached the hearing stage, their prolificacy evidences the tip of a monumental iceberg which threatens the entire system of justice.

While the origin of the writ of habeas corpus is uncertain, it may date back to as early as 1220 A.D. It developed as a vital part of the common law and as such was carried over to America by the colonists. The writ was guaranteed by the Constitution and the first

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204. Habeas corpus literally means "you have the body." BLACK'S LAW DICTIONARY 837 (rev. 4th ed. 1968). From its very inception, habeas corpus has provided the method whereby an individual can challenge an unlawful detention. Lay, Post Conviction Remedies and the Overburdened Judiciary: Solutions Ahead, 3 CREIGHT. L. REV. 5, 6 (1969).


205. See, e.g., Mapp v. Ohio, 367 U.S. 643 (1961), and cases cited in note 9 supra.

206. See, e.g., Sanders v. United States, 373 U.S. 1 (1963) (while this decision was restricted to section 2255 petitions from federal prisoners, its principles have extended to petitions from state prisoners as well) [for a discussion see text accompanying notes 238-41 infra]; Fay v. Noia, 372 U.S. 391 (1963) [discussed at text accompanying notes 230-33 infra]; Brown v. Allen, 344 U.S. 443 (1953).


212. Id.

213. Carpenter, Habeas Corpus in the Colonies, 8 AM. HIST. REV. 18, 19-21 (1903); see Longsdorf, Habeas Corpus A Protean Writ and Remedy, 8 F.R.D. 179 (1948).

Congress saw fit to pass the Judiciary Act of 1789 which provided in part that:

[The justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment . . . of prisoners . . . in custody, under or by colour of the authority of the United States. . . .]

In exercising this power, it is significant that the federal courts limited themselves to challenges of the sentencing court's jurisdiction over the person of the defendant and the subject matter of the suit. This jurisdictional concept was gradually expanded to include persons confined upon convictions obtained under unconstitutional statutes, convictions obtained in the absence of grand jury indictments, and convictions obtained under erroneously interpreted indictments. However, any proclivity toward a further expanded writ was discouraged in favor of retaining a balanced relationship between the federal government and the states.

Discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution.

However, in 1915, the Supreme Court indicated that it might consider more than just the traditional jurisdictional concepts in deciding whether to accept petitions of habeas corpus from state prisoners. Subsequently, in Townsend v. Sain, Fay v. Noia, and Sanders v. United States, the Supreme Court revamped the narrow scope of the Great Writ into what today may be termed the Grand Appellate Writ.

215. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81-82.
216. See, e.g., Ex parte Watkins, 28 U.S. (3 Pet.) 193, 203 (1830):

An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous.

Ex parte Parks, 93 U.S. 18 (1876); Andrews v. Swartz, 156 U.S. 272 (1895).
217. Ex parte Slebold, 100 U.S. 371 (1879).
218. Ex parte Wilson, 114 U.S. 417 (1885).
220. Ex parte Royall, 117 U.S. 241, 251 (1886).
In *Townsend* the Court demoted finality and promoted relitigation by articulating a broad standard which expanded the availability to habeas corpus petitioners of federal evidentiary hearings. Such hearings are *required* unless "the state-court trier of fact has after a full hearing reliably found the relevant facts." While perhaps rationalized upon the ground that such a requirement will compel the states to reinforce their fact-finding procedures, the *Townsend* decision in fact merely promotes needless repetition, waste and delay, and disrupts the delicate balance of federalism deemed essential by the Founding Fathers. The standard enunciated *requires* the federal courts to relitigate the facts if one of six grounds are present. Clearly, "reliability" is a standard which affords a broader and more encompassing scope than does the traditional sufficiency standard used by the appellate courts.

Nothing could be more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else. In *Fay v. Noia*, the Court further demeaned the state processes by holding that (1) the federal courts can choose to disregard state court findings of waiver or forfeiture, and (2) the adequate and

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225. Where the facts are in dispute, the federal court . . . must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. 372 U.S. at 312 (footnote omitted).

226. Id. at 313 (footnote omitted).


228. *Relitigation is required:*

[I]f (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing. 372 U.S. at 313.

In 1966, a congressional amendment to section 2254 was passed in an attempt to settle the redetermination crisis. 28 U.S.C. § 2254(d) (1970), amending 28 U.S.C. § 2254 (1964). The amendment provides that state findings of fact which are supported by reliable and adequate evidence shall be presumed to be correct unless the state proceeding was deficient in any one of eight respects. However, the amendment appears merely to reinforce the *Townsend* decision, leaving intact the requirement of relitigation if certain broad grounds are present. See *Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1141-42 (1970).


231. See id. at 398-99. The exhaustion requirement of 28 U.S.C. section 2254 (1970) (a state prisoner's remedies must be exhausted prior to filing for federal
dependent state grounds doctrine\textsuperscript{232} is merely a "function of the limitations of appellate review" which is not, according to the Court, to be applied in collateral proceedings.\textsuperscript{233} As a result, collateral proceedings assumed a posture superior and contradictory to appellate proceedings. No longer would "reviewing courts" be either limited by the factual determinations of lower tribunals, or governed by the sound and cogently conceived tenets of the past which are basic to the tenuous balance of federalism. Rather, the new Appellate Writ has taken the stead of functional appellate review and has reduced the concept of finality to an absurdity.

Professor Paul Bator has sounded a strong objection to the Writ's encroachment into the process of appellate review.\textsuperscript{234} He notes that the concepts of finality and non-redetermination which play an important role in the decision whether to retain appellate review\textsuperscript{235} even more persuasively demand a limit to the expanding writ of habeas corpus.\textsuperscript{236} Professor Bator envisions the processes of appellate review and collateral relief as distinct, each with a separate purpose to fulfill. Should we allow the collateral relief process to delimit the functions of appellate review, we would in effect be exhibiting a significant degree of mistrust in a fundamental institution. A system which allows for endless refiling and relitigation in the federal courts has an abrasive effect upon state processes, disallows meaningful reform in state criminal procedures, and enervates the goal of rehabilitation within the prison system by failing to convince the convicted that they are once-and-for-all guilty.\textsuperscript{237}

Finally, in Sanders v. United States,\textsuperscript{238} the Court effectively limited the bar of res judicata to successive petitions under sections 2244 and 2255. Sanders allowed federal habeas corpus judges, in their discre-

\textsuperscript{1}Id. at 399. But see Picard v. Connor, 40 U.S.L.W. 4088 (U.S. Dec. 20, 1971) wherein the Court took a more federalist approach in denying a habeas corpus petition where the state's highest court had no opportunity to hear the petitioner's claim:

"[I]t would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional error." Id. at 4089-90, quoting Darr v. Burford, 339 U.S. 200, 204 (1950).

\textsuperscript{2}See Herb v. Pitcairn, 324 U.S. 117 (1945); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875).

\textsuperscript{3}372 U.S. at 429.

\textsuperscript{4}Bator, supra note 186.

\textsuperscript{5}See text accompanying notes 186-188 supra.

\textsuperscript{6}Bator, supra note 186, at 444-54.

\textsuperscript{7}See id. at 452, 524-25.

\textsuperscript{8}373 U.S. 1 (1963).
tion, to afford controlling weight to denials of prior petitions when
(1) the same ground presented in the subsequent application was de-
termined adversely to the applicant on the prior application, (2) the
prior determination was on the merits, and (3) the ends of justice would
not be served by reaching the merits of the subsequent application.239
It is noteworthy that the federal judges are not compelled to deny a sec-
ond hearing if one or more of the grounds are present; they “may” de-
cline to do so if they desire. Judge Donald P. Lay of the Eighth Cir-
cuit Court of Appeals has noted:

This decision [Sanders], which has affected both state and federal pe-
titions, also had a major impact on the dockets of the federal courts.
Finality, at the expense of criminal justice, was not to be a precept of
post conviction remedies.240

The need for basic limitations upon the present writ is manifest.
The requisite changes, however, must be either judicially or congression-
ally induced and, so far, neither the Congress nor the Court has
indicated a willingness to comply.241 While one alternative would be
to limit the writ within its historical judicial perimeters, such a change
would necessarily require an about-face by Congress and the Court.
Perhaps the restriction of habeas corpus hearings to only those peti-
tioners who evidence a clear showing of innocence would provide a
more tenable solution for the present appellate writ.242 A more re-
strictive attitude toward the voluminous number of frivolous petitions
may also help curtail the commission of perjury in the writ. Moreover,

[239. Id. at 15.]
[240. Lay, Post Conviction Remedies and the Overburdened Judiciary: Solutions
Ahead, 3 CREIGHT. L. REV. 5, 12 (1969) (footnote omitted). In 1966, Congress en-
acted a new statute which applies Sanders' restricted res judicata principles to the states.
28 U.S.C. § 2244(b) (1970). This subsection provides in part that:

[Subsequent applications ... need not be entertained ... unless the applica-
tion alleges or is predicated on a factual or other ground not adjudicated on the
hearing of the earlier application for the writ. ... Id. (emphasis added).]
While the “ends of justice” criterion was not adopted by Congress, the “need not”
language of the subsection certainly implies that the habeas judge retains the discre-
tion to permit or deny an application.

[241. Congress explicitly refused to limit the writ to its proper scope by excluding
the proposed section 2256 from the Omnibus Crime Control and Safe Streets Act of
1968, Pub. L. No. 90-351, 82 Stat. 197 (codified in scattered sections of titles 5, 18,
28, 42 and 47 of the United States Code). Section 2256 would have provided that state
court judgments in criminal cases regarding questions of fact or law could be re-
viewed by federal courts on appeal or certiorari only, and would have denied collateral
review. S. REP. No. 1097, 90th Cong., 2nd Sess.

[242. See Kaufman v. United States, 394 U.S. 217, 242 (1969) (Black, J., dis-
senting): “I would always require that the convicted defendant raise the kind of con-
stitutional claim that casts some shadow of a doubt on his guilt.”]
if the United States Attorneys undertake to prosecute the many petitioners who flagrantly perjure in their applications, a significant decrease in the volume of petitions may be wrought.\textsuperscript{243}

Whatever the method or cure, however, it is indeed incumbent upon us now to question the expansive writ which forbodes the destruction of the very judicial system which nurtured and encouraged its development. "Finality at some point is indispensable to any rational—and workable—judicial system."\textsuperscript{244}

\section*{VI. Conclusion}

The object of the preceding proposals is, again, to elicit discussion and encourage debate concerning the reformation of our system of criminal procedure. If they fail to do this, it is a sad commentary. This is a time when the well-being of society is challenged by crime but when the citizen on the street demands enlightened law enforcement. It is a time when the respect manifested our criminal courts is at low ebb yet the power and influence of the law is at its height. This is a time when legal skills are prostituted to outmoded procedures but when much concern is expressed that reform be righteous. Unless thought is given immediately to such reform and unless that thought is translated into action, then all our wealth, our ideas, and our affection for fairness may be worth nothing. The words of Chief Justice Burger are apposite:

Our whole history as a nation reflects a fear of the power of government and a proper concern for individual liberty. These feelings have led us to place many protections around persons accused of crime. And this has resulted in a system in which it is often very difficult to convict even those who are plainly guilty.

Government exists chiefly to foster the rights and interests of its citizens—to protect their homes and property, their persons and their lives. If a government fails in this basic duty, it is not redeemed by providing even the most perfect system for the protection of the rights of defendants in criminal courts.\textsuperscript{245}

\textsuperscript{243} For a recent state decision affirming a conviction for perjury based upon a defendant's declaration in a habeas corpus petition, see People v. Morris, 20 Cal. App. 3d 659; 97 Cal. Rptr. 817 (1971).
\textsuperscript{245} LIFE, August 7, 1970, at 26.