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## THE PRELIMINARY HEARING— BETTER ALTERNATIVES OR MORE OF THE SAME?

GARY L. ANDERSON\*

In recent years we have witnessed a comprehensive and unprecedented reappraisal of pre-trial criminal procedure in this country by all elements of the legal fraternity. Much of the discussion and many of the changes in criminal procedure are the result of, and are vitally affected by, recent landmark decisions of the Supreme Court of the United States on the subject of procedural Due Process.<sup>1</sup> The comprehensive and complex nature of the reappraisal is revealed in the broad proposal for legislative reform being prepared by the American Law Institute in the form of a Model Code of Pre-Arrest Procedure<sup>2</sup> and in the various recommendations and studies of the American Bar Association Project on Minimum Standards for Criminal Justice.<sup>3</sup>

In view of the many proposals being made for reform and the recent Supreme Court decision in *Coleman v. Alabama*,<sup>4</sup> a number of questions concerning the usefulness and development of the preliminary hearing should be considered. Statements have been made, most notably by prosecutors and persons interested in crime control, that the preliminary hearing is a waste of time and effort.<sup>5</sup> On the other hand, many defense attor-

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1. *E.g.*, *Coleman v. Alabama*, 90 S. Ct. 1999 (1970) (right to counsel at preliminary hearing); *United States v. Wade*, 388 U.S. 218 (1967); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961).

2. MODEL CODE OF PRE-ARREST PROCEDURE (Tent. Draft No. 1, 1966, No. 2, 1969, No. 3, 1970; Study Draft No. 1, 1968). None of these drafts deal with the preliminary hearing.

3. *E.g.*, STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL (Tent. Draft, 1969); STANDARDS RELATING TO PRETRIAL RELEASE (Approved Draft, 1968); STANDARDS RELATING TO PROVIDING DEFENSE SERVICES (Approved Draft, 1968).

4. 90 S. Ct. 1999 (1970), holding that the preliminary hearing is a "critical stage" in Alabama's criminal process at which the accused is as much entitled to the aid of counsel as at the trial itself. Since most states now make no provision for appointment of counsel to serve the accused at the preliminary hearing, see note 19 *infra*, the *Coleman* decision is bound to cause a reappraisal of the preliminary hearing in many states. Justice White, in a concurring opinion in *Coleman*, speculates that "requiring the appointment of counsel may result in fewer preliminary hearings in jurisdictions where the prosecutor is free to avoid them by taking a case directly to a grand jury" and that "[o]ur ruling may also invite eliminating the preliminary hearing system entirely." *Id.* at 2008.

5. *E.g.*, *Hearings on the U. S. Commissioner System before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess., pt. 2, at 126-28 (1965) (remarks of Warren Olney III, Di-

neys, and even the Supreme Court in the *Coleman* case, have found many reasons for defending the hearing as a "critical stage" of a state's criminal process.<sup>6</sup> Defenders of the hearing, while recognizing certain procedural problems, generally advocate "strengthening" the hearing through procedural reforms and by extending it to serve more functions in the criminal process. In practice, few prosecutors and defense attorneys who have seriously considered the matter are satisfied with the basic preliminary hearing procedures that have developed in this country; yet they cannot agree on reforms that would protect the interests of the individual while respecting the needs of law enforcement.

Proposals for retention and reform of preliminary hearing procedures raise the basic issue of whether the gains from such an approach outweigh the disadvantages, including the expenditure of substantial time and scarce resources on early judicial hearings and the possible cost of distorting or delaying other desirable procedural reforms. Proposals to eliminate the hearing or to reduce its functions raise the same basic issues and require the development of other procedures to perform functions now served by a hearing.

The first part of this article analyzes the preliminary hearing as a working institution. The second part sets out and evaluates current proposals and prospects for improving the hearing through reform. In the third part a set of alternative procedures is proposed which might function better than a judicial hearing with multiple functions, and comparisons are made with present and proposed hearing procedures.

Throughout the article it will be assumed that any proposal for reform should fairly and effectively protect the interests of the accused while

rector, Admin. Office of U. S. Courts) [hereinafter cited as 1965 or 1966 *Hearings*]. The Subcommittee conducted extensive hearings which indicated that the proper role of the preliminary hearing was the aspect of the system about which confusion was greatest.

6. Comment, *Preliminary Hearings—The Case for Revival*, 39 U. COLO. L. REV. 580 (1967); Napley, *The Case for Preliminary Inquiries*, 1966 CRIM. L. REV. 490; see Note, *The Preliminary Hearing—An Interest Analysis*, 51 IOWA L. REV. 164 (1965).

Speaking for three members of the majority of the Supreme Court in *Coleman v. Alabama*, 90 S. Ct. at 2003 (1970), Justice Brennan summarized the "critical stage" arguments often used by defenders of the hearing:

Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution. First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case, that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses . . . can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.

respecting the needs of law enforcement. In addition, any proposal for reform should take population growth into account and should be designed to help solve the problems of pre-trial criminal procedure in an urban setting. Finally, any proposal for reform at the preliminary hearing stage should be consistent with recent progressive proposals for reform that are being implemented at other stages of the criminal process.

### I. FUNCTIONS OF PRELIMINARY HEARING PROCEDURE

Before a proper evaluation of any procedural stage in the criminal process can be made, one must identify the goals or primary functions of the procedure and distinguish them from incidental functions that may be served. Incidental functions served by the procedure in its early years of development may be promoted later as primary goals of the procedure, particularly if there are no other procedures available to serve these functions. Promoters of reform will then argue that changes in basic procedures should be made so that the entire procedure may better serve certain functions once considered incidental. These procedural changes may be made gradually through an evolutionary process in which little consideration is given to factors other than the anticipated benefits of each minor change. The end product of these accumulated "improvements" may be an unwieldy multi-purpose procedural institution which does not serve any function very efficiently or effectively. The end product also may be a procedural structure of functional compromises which in practice satisfies no one, but which, in theory, has become so identified with the underlying values and goals of the criminal justice system that it may be considered inviolable by many. At this point some authorities are likely to urge a certain amount of constitutional protection for the institution.<sup>7</sup> Already some authorities argue that the preliminary hearing may now be so rooted in the traditions and conscience of our people that there should be a constitutional right to the hearing.<sup>8</sup> Therefore, it is time to see whether there are viable

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7. This attitude led to the widespread constitutional protection of the grand jury indictment. Felony prosecutions under federal law and in 24 states can be initiated only by indictment. U.S. CONSR. amend. V.; Calkins, *Abolition of the Grand Jury Indictment in Illinois*, 1966 U. ILL. L. F. 424 n.6 (states listed with methods of initiating felony prosecutions). Calkins argues that the grand jury has lost its historical importance and vitality and become "a cumbersome fifth wheel in the administration of criminal justice." *Id.* at 444-45. Yet he only advocates abolishing the indictment as the *sole* means of initiating prosecutions. *Id.* Since the grand jury system is not likely to be abolished, proposals for reforming other procedures must be adapted accordingly.

The development of the preliminary hearing as an evidentiary screen to eliminate unfounded charges formed the basis for arguments that the grand jury screen should be abolished. *Id.* at 430, 432-33.

8. In *Lem Woon v. Oregon*, 229 U.S. 586 (1913), it was held there is no due process right to the hearing because of its preliminary nature and lack of finality. *But see* Note, *The Preliminary Hearing—An Interest Analysis*, 51 IOWA L. REV. 164, 181-83 (1965); *Hearings on S. 3475*, 89th Cong., 2d Sess., at 154 (1965) (citing Note and recent Supreme Court cases on right to counsel and con-

alternatives developing or which could be developed to take the place of the preliminary hearing, which would be more efficient and effective than a hearing.

### A. Development of a Multi-Purpose Institution

The preliminary hearing has a long history involving the gradual accretion of new functions never contemplated by the Englishmen who brought it into being. Originating over four hundred years ago in two statutes,<sup>9</sup> the basic historic functions of the hearing were inquisition and prevention of indiscriminate releasing of prisoners.<sup>10</sup> The basic functions performed by the justice of the peace were to question witnesses and to "bind over" suspects for later criminal proceedings by committing them to jail or by requiring them to furnish bail.<sup>11</sup> Binding over was automatic unless it clearly appeared that no crime had been committed or that there were no grounds to suspect that the accused had committed the crime.<sup>12</sup> The accused was closely examined in secret, prosecution witnesses were not examined in his presence, he was not permitted to have legal counsel, and he was not entitled to see or hear the evidence against him.<sup>13</sup> Thus the entire proceeding was established for the benefit of the prosecution, and the accused usually benefited only from the setting of bail.<sup>14</sup>

#### 1. Benefits for the accused

By the early part of the nineteenth century, the practice of conducting an inquisition of the accused fell into disfavor, probably as a reaction

frontation at hearing); *but cf.* *Coleman v. Alabama*, 90 S. Ct. 1999 (1970). Some state constitutional provisions require a preliminary hearing or its waiver prior to prosecution by information. ALI CODE OF CRIMINAL PROCEDURE 435 (1930). Many other states require a preliminary hearing by statute prior to prosecution by information. *Id.* at 435-38; § 544.250 RSMo, 1969.

9. An Act Appointing an Order to Justices of Peace for the Bailment of Prisoners, 1 & 2 Phil. & M., c. 13 (1554) (repealed, provided for examination of prisoner and witnesses only if prisoner was bailed); An Act to take Examination of Prisoners Suspected of Manslaughter or Felony, 2 & 3 Phil. & M., c. 10 (repealed, examination of prisoner and witnesses when prisoner not bailed). The coroner's inquest was the earliest procedure resembling the preliminary hearing. After 1554, the coroner was empowered to bind over witnesses to appear at trial and required to put material evidence into writing. 1 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 84-85 (5th ed. 1931).

10. *Commonwealth v. O'Brien*, 181 Pa. Super. 382, 387-91 (1956).

11. *Id.* As late as 1823 the justice was held to be acting inquisitorially and not judicially in examining the prisoner and witnesses against him and in putting the material evidence into writing. 1 W. HOLDSWORTH, *supra* note 9, at 296.

12. 4 W. BLACKSTONE, COMMENTARIES \*296. The justice also could bind over prosecution witnesses to appear at trial. 1 W. HOLDSWORTH, *supra* note 9, at 296.

13. 1 W. HOLDSWORTH, *supra* note 9, at 296-97. In 1848 the accused was given rights to confrontation, to call witnesses, and to make a statement, creating a judicial proceeding. *Id.* at 297.

14. 4 W. HOLDSWORTH, *supra* note 9, at 529.

against harsh and oppressive "star chamber" methods of investigation.<sup>15</sup> Emphasis shifted to a goal of judicial inquiry into the evidentiary foundation of complaints. As a prerequisite to binding over, the prosecution was required to present enough evidence to show that a crime had been committed and that there was "probable cause" to believe that the accused had committed it.<sup>16</sup>

As the hearing developed in this country into an evidentiary screen to eliminate unfounded charges, reformers argued that an adversary proceeding would serve better to protect the accused from illegal detention and also serve to protect him from the annoyance and costs of having to defend himself at a public trial.<sup>17</sup> It followed that the accused must be allowed the right to secure counsel for the hearing,<sup>18</sup> and legislation has been considered in recent years to require appointment of counsel for the indigent accused.<sup>19</sup> It also followed that at an adversary hearing the accused should have the right to make a statement in his own behalf,<sup>20</sup> to produce witnesses

15. ALI CODE OF CRIMINAL PROCEDURE 266 (1930). The practice of inquisition did not follow the preliminary hearing to America because of early constitutional provisions against self-incrimination. *Id.* at 271-73.

16. This standard developed in America, and variations may be found in the statutes; e.g., "sufficient cause," found in many statutes. ALI CODE OF CRIMINAL PROCEDURE 308-11 (1930).

17. The accused usually cannot appear or present evidence to the grand jury. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1170 n.60 (1960). In *Thies v. State*, 178 Wis. 98, 103, 189 N.W. 539, 541 (1922), the court stated:

The object or purpose of the preliminary investigation is to prevent hasty, malicious, improvident and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of a public trial, and to save the defendant from the humiliation and anxiety involved in a public prosecution, and to discover whether or not there are substantial grounds upon which a prosecution may be based.

18. By 1930, at least 32 states permitted the accused to have assistance of counsel at the hearing. ALI CODE OF CRIMINAL PROCEDURE 279-80 (1930) (statutes only). By 1969, all states except Maryland, Mississippi, and Rhode Island specifically permitted the accused to have counsel at the hearing, by statute, court rule, or case law. Maryland, Mississippi, and Rhode Island require prosecution by indictment in felony cases.

19. In 1930, apparently no state required appointment of counsel to assist an indigent accused at the hearing. *Id.* By 1969, at least 14 states required such appointment unless the hearing or the right to counsel is waived: California, Delaware, Idaho, Iowa, Kentucky, Michigan, New Jersey, Nevada, New York, New Mexico, Oregon, South Dakota, Vermont, and Wyoming. Many other states probably began to require appointment of counsel as a matter of practice in felony cases after *White v. Maryland*, 373 U.S. 59 (1963), and *Pointer v. Texas*, 380 U.S. 400 (1965). *Coleman v. Alabama*, 90 S. Ct. 1999 (1970), clearly requires appointment of counsel for the hearing. See notes 4 & 6 *supra*. If counsel is not provided and the accused is later tried and convicted, the conviction will be sustained only if the denial of counsel was harmless error under the test of *Chapman v. California*, 386 U.S. 18 (1967). 90 S. Ct. at 2004.

20. In 1930, statutes in 8 states permitted the accused to make an unsworn statement in his behalf. ALI CODE OF CRIMINAL PROCEDURE 289-91 (1930). By 1969, at least 15 states permitted this: Alaska, Arizona, Georgia, Illinois, Indiana, Nevada, New York, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, Texas, and Utah.

in his defense,<sup>21</sup> and to confront and cross-examine witnesses for the prosecution.<sup>22</sup> Model legislation was proposed and followed by many states that sought to extend basic trial rights to the preliminary hearing.<sup>23</sup>

Reformers further argued that the preliminary hearing should be required promptly so that persons would not be arrested on "suspicion" or unnecessarily detained in jail. A mere requirement that the accused be brought before a magistrate without unnecessary delay<sup>24</sup> would not prevent many investigative arrests or unnecessary detention; an early judicial determination of probable cause was needed.<sup>25</sup> These arguments were made first in horse-and-buggy days when the grand jury, the final evidentiary screen in the pretrial process, met at infrequent intervals. A person arrested on "suspicion" who did not receive a prompt preliminary hearing might be held in jail without probable cause for months while the prosecution continued its investigation.<sup>26</sup> If no probable cause developed in the course of the investigation, the suspect might be deprived of his liberty without redress until the next grand jury returned an ignoramus or until a preliminary hearing was held. Even if probable cause did appear at some point, there previously had been a period of illegal "suspect" detention.<sup>27</sup> In

21. In 1930, statutes in 37 states permitted examination of witnesses for the accused. *Id.* at 293-94. At least 30 of these states permitted the accused to testify as a witness. *Id.* at 294-96. By 1969, all states except Indiana, Maryland, Mississippi, New Jersey, South Carolina, and Washington expressly permitted defense witnesses to testify at the hearing.

22. In 1930, statutes in 15 states required confrontation and permitted cross-examination by or on behalf of the accused. ALI CODE OF CRIMINAL PROCEDURE 287-88 (1930). 19 additional states required examination of witnesses in the presence of the accused. *Id.* at 288-89. Some of these states no doubt permitted cross-examination. By 1969, all states except Indiana, Maryland, Mississippi, Nebraska, Rhode Island, Tennessee, Vermont, and Virginia required confrontation and permitted cross-examination by or on behalf of the accused. Nebraska, Tennessee, and Virginia require examination of witnesses in the presence of the accused.

23. UNIFORM RULES OF CRIMINAL PROCEDURE (1952); ALI CODE OF CRIMINAL PROCEDURE (1930).

24. In 1930, statutes in 13 states so provided, and statutes in 5 others contained similar provisions. ALI CODE OF CRIMINAL PROCEDURE 205-6 (1930). By 1969, 26 states provided that the accused must be brought before a judge without unnecessary delay, and 13 others had similar provisions.

25. In 1930, statutes in 13 states required examination of witnesses "as soon as may be," and 14 states required examination "immediately after the appearance of counsel, or if, after waiting a reasonable time therefor, none appears . . ." *Id.* at 281. 11 of these 27 states also required an initial appearance before the magistrate without unnecessary delay. In 1969, 10 of the 13 states still required examinations "as soon as may be," and 13 of 14 states still required examinations immediately after the appearance of counsel . . ." However, 13 states had adopted similar provisions, most of them requiring the examination "within a reasonable time."

26. Statutes were adopted which placed time limits on postponements of the hearing ranging from one to thirty days, most of which required no "good cause" showing for postponement. ALI CODE OF CRIMINAL PROCEDURE 282-84 (1930). In 1930 there were 32 statutes of this kind. *Id.* Few states have changed these statutes since then, although some have adopted the "reasonable time" standard in place of a day limit and a few have shortened the time limits.

27. Deprivation of liberty becomes extremely objectionable after a brief period of "preliminary screening" during which the police and prosecutor are

each instance there was a denial of a basic right not to be subjected to physical restraint except for good cause shown.

Good cause for physical restraint cannot be equated with probable cause. When probable cause is found at the preliminary hearing and the accused is bound over, American courts have held that the risk of non-appearance at later proceedings is the only "good cause" for holding him in jail.<sup>28</sup> Thus another function of the preliminary hearing often is the setting of the proper amount of bail. Although the magistrate also must set bail when the hearing is waived, the hearing provides an opportunity for the accused and his counsel to present evidence and arguments to the magistrate and the prosecutor<sup>29</sup> which may produce a more favorable bail arrangement than otherwise could be expected. Once the magistrate has fixed bail, it takes a later showing of good cause to justify a reduction.<sup>30</sup>

The preliminary hearing also serves the function of informing the accused about the details of the charge against him. The complaint, indictment, or information seldom give sufficient information about the charge and the state's case to enable the defense to prepare for trial or to permit realistic plea bargaining.<sup>31</sup> This does not mean that defense counsel can use the hearing as a means of discovering all relevant facts known to the state, but the hearing does serve a limited discovery function incidental to its screening function.<sup>32</sup> Whether discovery is an appropriate goal of

surveying the evidence to see whether there is "probable cause" for prosecution. "It is clear that in many situations where there is 'reasonable cause' which justifies an arrest, some further investigation should precede a decision to charge." ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE xxiii (Tent. Draft No. 1, 1966).

28. W. LaFave, *Arrest, The Decision to Take a Suspect into Custody* 177, 206-7 (1965). Attempts to pass laws permitting "preventive detention" based on dangerousness have met stiff opposition on constitutional grounds. *But see* § 23-1322 of the recently enacted District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. Law No. 91-358 (July 29, 1970).

29. *See* quote from *Coleman v. Alabama*, 90 S. Ct. 1999, 2003 (1970), note 6 *supra*. A magistrate often may look to the prosecutor for guidance in making the bail decision. He may be influenced by evidence relating to the seriousness of the offense, the character of the defendant and his economic status, and any hardship to the defendant or his family which incarceration would produce. *Cf.* W. LaFave, *supra* note 28, at 178-83.

30. Statutes variously defining sufficient cause for a change in bail are collected in ALI CODE OF CRIMINAL PROCEDURE 375-76 (1930).

31. *See* quote from *Coleman v. Alabama*, 90 S. Ct. 1999, 2003 (1970), note 6 *supra*. Until recent times the indictment or information usually gave the accused extensive information about the charge against him. It was required to be precise and no variance was permitted between allegations and proof at trial. Modern indictments and information generally have lost this specificity and often a formal charge follows statutory language. A motion for a bill of particulars usually is directed to the court's discretion and may be denied on the ground that the accused is going on a "fishing expedition" for evidence. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1173-76 (1960). Thus the hearing may be the only opportunity for the defense to learn much about the charge and the state's case, in the absence of other means of criminal discovery.

32. *See* quote from *Coleman v. Alabama*, 90 S. Ct. 1999, 2003 (1970), note 6 *supra*.



the hearing is currently a matter of considerable dispute. Most courts take the historical view that it is not, but a few courts clearly have attempted to expand the hearing into a mechanism of discovery.<sup>33</sup>

As the hearing becomes more adversary in nature, other incidental functions related to discovery of evidence become more important. Effective defense counsel can make good use of an early opportunity to cross-examine key prosecution witnesses. If a record of the testimony is kept, witness testimony will be frozen, since "depositions" can be used to impeach witnesses at trial and to preserve favorable testimony of witnesses unavailable at trial.<sup>34</sup> After learning something about the strength of the state's case, defense counsel will have a better basis for plea negotiations with the prosecutor. If the state's case appears weak, defense counsel will be in a much better bargaining position. On the other hand, a strong case presented by the state may help defense counsel convince his client that he should plead guilty.

## 2. Benefits for the prosecution

Having been established for the benefit of the prosecution, the preliminary hearing continues to serve many prosecution interests. The most important benefit for the prosecution is the early opportunity afforded to weed out cases that should go no further. Defense counsel can assist the prosecutor in testing state witnesses under adversary conditions.<sup>35</sup> The prosecutor may learn that the charge is based on misinformation or prejudice.<sup>36</sup> He may also discover that certain state witnesses are weak,

33. See Note, *Preliminary Hearing in the District of Columbia—an Emerging Discovery Device*, 56 GEO. L.J. 191 (1967). Chief Justice Burger, dissenting in *Coleman v. Alabama*, 90 S. Ct. 1999, 2010 (1970), suggests that the Court may have had a need-for-greater-discovery motivation for requiring counsel at the preliminary hearing, see quote, note 6 *supra*.

Congress has acted to forestall federal court efforts to turn the hearing into a discovery device. A prior grand jury indictment now clearly moots the hearing. Federal Magistrates Act, 18 U.S.C. § 3060(e) (Supp. IV, 1969); Weinberg & Weinberg, *The Congressional Invitation to Avoid the Preliminary Hearing: An Analysis of Section 303 of the Federal Magistrates Act of 1968*, 67 MICH. L. REV. 1361, 1390 (1969).

34. See quote from *Coleman v. Alabama*, 90 S. Ct. 1999, 2003 (1970), note 6 *supra*.

Possible disadvantages of state witnesses appearing at an early adversary hearing should be noted. Witnesses may become identified with the prosecution and antagonistic to the defense when they are cross-examined without any prior contact with defense counsel. In sensational cases, the witnesses and the public may learn the morbid details of the crime as a result of the hearing. These problems often cause defense attorneys to advise waiver of the hearing. Thus the accused may lose the only opportunity, absent other means of discovery, to confront and cross-examine key witnesses prior to trial.

35. The prosecutor may not learn certain weaknesses of his witnesses when he questions them before the grand jury, in the absence of defense counsel.

36. Complaining witnesses often have selfish motives for promoting certain types of prosecutions, e.g., "to get even," to secure the payment of a debt or a bad check. See generally Miller, *The Preliminary Hearing*, 15 A.B.A.J. 414 (1929).

unwilling to cooperate, or adverse to the prosecution. The hearing may show that the charge should be changed, reduced, or dismissed. If the charge is reduced to a misdemeanor within the jurisdiction of the court, the accused may decide to plead guilty immediately. If it appears that a state witness may not be available for trial, his "deposition" can be taken at the hearing,<sup>37</sup> or the prosecutor can ask the magistrate to require a bond from a witness at the hearing to insure his appearance in later proceedings.<sup>38</sup>

The hearing may serve important incidental functions for the prosecution corresponding to those for the defense. The defendant may be induced to plead guilty after the filing of a prosecutor's information<sup>39</sup> or to enter plea negotiations because of the strength of the state case. As a practical matter prosecutors in urban areas must bargain with defense counsel in order to maintain a high rate of guilty pleas.<sup>40</sup> If the accused chooses to present evidence, the prosecutor may discover the substance of the defense.

### B. Functional frustrations under current procedures

Although the preliminary hearing theoretically can serve many important functions insuring the fair administration of criminal justice at the pre-trial stage, in practice it often fails to perform its functions well.

When held, the hearing often fails to serve as an effective evidentiary screen to weed out unfounded charges. There are many reasons for this. First of all, a large proportion of magistrates and justices of the peace who are supposed to make an informed "judicial" determination of probable cause have had little or no formal legal training.<sup>41</sup> Secondly, these judicial of-

37. Recorded testimony of witnesses is admissible at trial only if statutory or court rule requirements are met. See statutes cited in ALI CODE OF CRIMINAL PROCEDURE 303-8 (1930). In addition, the constitutional right to counsel must have been granted at the preliminary, for it is a "critical stage" in the criminal process. *Coleman v. Alabama*, 90 S. Ct. 1999 (1970). See *Pointer v. Texas*, 380 U.S. 400 (1965) (defendant lacked counsel, transcript not admissible at trial).

38. In 1930, 41 states gave this power to the magistrate. ALI CODE OF CRIMINAL PROCEDURE 316-20 (1930). For a more recent summary of the law in this area see Carlson, *Jailing the Innocent: The Plight of the Material Witness*, 55 IA. L. REV. 1 (1969).

39. The probable cause finding of the preliminary hearing is often a prerequisite to the filing of a prosecutor's information. Note, *Initiation of Prosecution by Information—Leave of Court or Preliminary Examination?*, 25 MONT. L. REV. 135, 137 n.5 (1963) (constitutions and statutes cited).

40. See generally Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865-71 (1964).

41. "In more than 30 States justices of the peace are not required to be lawyers, and the incompetence with which many perform their judicial functions has long been reported." THE CHALLENGE OF CRIME IN A FREE SOCIETY, A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE 129 (1967) [hereinafter cited as PRESIDENT'S COMMISSION REPORT]. The President's Commission recommends abolishing two-court systems and transferring the duties of lower court judges to full-time judges in unified criminal courts, or at least improving the quality, and increasing the responsibilities and training of lower court judges. *Id.* at 129-30.

ficers often have a heavy workload because they usually have jurisdiction to try most misdemeanor and all petty offense cases in addition to their power to process the preliminary stages of felony cases. The large volume of cases of all types processed by each magistrate, particularly in urban areas, is reflected in delay and inability to give more than cursory consideration to individual cases.<sup>42</sup> Furthermore, many of these officers are compensated by fees assessed against the parties, and the resulting competition for business can seriously threaten their independence from the police.<sup>43</sup> It is not surprising that these and other factors result in "assembly line justice" and a tremendous disparity between theory and practice at the preliminary hearing stage.<sup>44</sup>

The disparity between theory and practice in rural areas is probably much less because of lighter caseloads and more time for individual hearings. However, under rural or small town conditions it seems more likely that there will be a part-time magistrate who is unskilled and more dependent upon local law enforcement officers because he is compensated by costs and fees according to the number of cases he handles. His probable fear of offending the police and prosecutor, the knowledge that there is no finality to a preliminary hearing discharge of the accused,<sup>45</sup> the absence of appellate or trial court review of questionable findings of probable cause,<sup>46</sup> and the knowledge that the prosecutor is usually in a better position to decide whether a case could be prosecuted successfully, all create a common judicial disposition to bind over most accused persons. In the best of circumstances there will be little outside pressure on a magistrate to act as a responsible screen.

Even if a magistrate is skilled, not too busy, and mindful of his judicial obligation to serve as a responsible evidentiary screen, "probable cause" ordinarily is such an indefinite and minimal standard of proof that it cannot furnish the "innocent" accused with much protection against being held until the prosecutor or grand jury make a formal charge decision. Usually the prosecutor will be required to present only a skeletal out-

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42. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 31-32 (1967) [hereinafter cited as TASK FORCE REPORT: THE COURTS].

43. PRESIDENT'S COMMISSION REPORT 129.

44. TASK FORCE REPORT: THE COURTS 30-32.

45. A determination of "no probable cause" does not prevent the accused from being prosecuted by indictment, which conclusively determines the existence of probable cause. See *Ex parte* United States, 287 U.S. 241, 250 (1932); *State v. Green*, 305 S.W.2d 863, 868-69 (Mo. 1957). Moreover, in states in which a finding of probable cause at the hearing is a prerequisite to the filing of a prosecutor's information, the state may choose to start over and attempt to show probable cause at a second hearing.

46. Usually the only way the accused can challenge the sufficiency of the evidence is by habeas corpus, which will not be granted if there is any legally competent evidence to support the probable cause finding. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1168 n.53 (1960).

line of the state's evidence supporting each element of the offense and showing that the accused probably committed it.<sup>47</sup> Hearsay evidence may be used in most states to sustain this minimal burden of proof.<sup>48</sup>

Although the hearing ordinarily does not add a significant evidentiary screen to the process to weed out unfounded charges, many authorities believe that it can serve as an effective mechanism for determining the legality of detention.<sup>49</sup> Undoubtedly prompt appearance before a magistrate coupled with an early hearing can perform this function. However, common postponement of the hearing for days or weeks allows the police to continue their investigation,<sup>50</sup> and often the prosecutor will "moot" the hearing by obtaining a grand jury indictment before it is held.<sup>51</sup> Crowded dockets in lower urban courts often cause long continuances.<sup>52</sup> These practices have led some authorities to argue that the hearing procedure is obsolete and

47. In *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (search warrant case) the Court said:

In dealing with probable cause, . . . we deal with probabilities. These are not technical; they are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. . . . [P]roof is accordingly correlative to what must be proved.

48. TASK FORCE REPORT: THE COURTS 43; cf. *Costello v. United States*, 350 U.S. 359 (1956) (upholding indictment based completely on hearsay). The permissive attitude on use of hearsay is based on the fact that the accused will get a fair hearing at the time of trial; however, the state sometimes may not have enough competent evidence to sustain a formal charge, and the accused may sit in jail for many months awaiting trial.

49. See authorities and trends in legislation, notes 25 & 26 *supra*. *Hearings*, 89th Cong., 2d Sess., pt. 3, at 270 (1966) (statement of Prof. A. Kenneth Pye):

One of the most important purposes is to provide protection against arrests for investigation. It is not only a determination of probable cause but a determination of probable cause shortly after arrest which is significant.

50. Although many state provisions require a hearing to be held within a "reasonable time," a magistrate ordinarily has the power, at least "for good cause shown," to grant a continuance at the request of the prosecution or the defense. An early hearing cannot mean an immediate hearing in most instances, as this would place an impossible burden on the state to have its witnesses available at the time of arrest or initial appearance before the magistrate. In determining what is a reasonable time, the magistrate must necessarily consider time reasonably required for preparation. *E.g.*, *James v. Lawrence*, 176 F.2d 18 (D.C. Cir. 1949) (18 day continuance reasonable time). There is nothing to prevent the prosecution from using evidence gained from investigation subsequent to a continuance.

Attempts have been made to put limits on the "reasonable time" within which the hearing must be held, note 26 *supra*; Federal Magistrates Act, 18 U.S.C. § 3060(b) (Supp. IV, 1969) (10 day limit if accused in jail, otherwise 20 days).

51. A grand jury indictment eliminates any necessity for a preliminary hearing. Federal Magistrates Act, 18 U.S.C. § 3060(e) (Supp. IV, 1969); cases cited note 45 *supra*; but see *Ross v. Sirica*, 380 F.2d 557 (D.C. Cir. 1967) (remand for hearing after indictment). Many prosecutors, most notably federal district attorneys, habitually secure grand jury indictments before the date set for the hearing. In states maintaining absolute secrecy in grand jury proceedings, this maneuver may avoid any possibility of pretrial discovery by the defense.

52. TASK FORCE REPORT: THE COURTS 130 (10 to 14 days, Recorder's Court in Detroit), 143 n.26 (two to three week delay in Miami). In a Model Timetable for Processing of Criminal Cases, the REPORT, *id.* at 85, recommends a maximum time limit of 72 hours between the initial appearance and preliminary hearing.

should be eliminated.<sup>53</sup> Yet there remains a great need for some means of determining the legality of detention at an early stage, particularly in urban areas with substantial crime problems where investigative arrests are likely to be made.<sup>54</sup> A society which guarantees "the right of the people to be secure in their persons . . . against unreasonable . . . seizures"<sup>55</sup> should afford an early opportunity to challenge the cause for detention.

Considering the general low quality of justice at the preliminary hearing stage, it might seem strange that there are many authorities who advocate making greater use of the hearing.<sup>56</sup> However, it appears on closer examination that most advocates of the hearing are concerned with the need for greater criminal discovery.<sup>57</sup> These advocates see the hearing as an adaptable institution which may justify its continued existence and expanded use by providing the accused with an opportunity to discover and preserve evidence. Thus the hearing must be "improved" because in its present form and with its present limited use it cannot provide broad criminal discovery.<sup>58</sup> Some advocates of the hearing, from states which permit prosecution by information, claim to be motivated primarily by the desire to have a better judicial evidentiary screen to serve as a check on prosecutorial discretion.<sup>59</sup> They make an appealing dual argument that

53. *E.g.*, *Hearings*, *supra* note 5, at 126. In practice, "mooting" the hearing by indictment has led to the disappearance of the hearing in some jurisdictions. *See, e.g.*, *Hearings*, 89th Cong., 2d Sess., pt. 3, at 253-54 (1966) (E. D. Mich. rarely has, grand jury sits every other week); *id.* at 220 (no defendant in S.D.N.Y. has ever had hearing). State prosecutors are more selective and usually do not engage in blanket "mooting" of all hearings.

54. The writ of habeas corpus may be used to secure the early release of some persons; but this remedy is limited in effectiveness. Note 46 *supra*.

55. U.S. CONST. amend. IV, applicable to the states through amend. XIV. This right cannot be protected adequately by substituting early *ex parte* determinations of probable cause by busy grand juries for the protection of judicial review of the evidence. Calkins, *Abolition of the Grand Jury Indictment in Illinois*, 1966 U. ILL. L. F. 423, 432-33.

56. Note 6 *supra*; K. GRAHAM and L. LETWIN, *A STUDY OF THE PRELIMINARY HEARING IN LOS ANGELES* 172 (1969).

57. *See, e.g.*, TASK FORCE REPORT: THE COURTS 43 (recognizing weaknesses but advocating greater discovery function); Comment, *Preliminary Hearings—The Case for Revival*, 39 U. COLO. L. REV. 580, 583-84 (1967); *Hearings*, 89th Cong., 2d Sess., pt. 3, at 211, 214 (1966).

58. There are many reasons for this. In addition to the practice of "mooting" hearings by indictment and the minimal evidence which the prosecution must present to show probable cause, it is possible that the accused may obtain some discovery concerning the initial charge but then be indicted and tried on a different charge. Also, the goal of an early hearing to prevent unlawful detention conflicts with the practical consideration that counsel needs time and "preliminary discovery" before he can effectively use the hearing as a discovery device. In short, the hearing provides only "preliminary discovery" about the charge, the accusers, and the strength of the prosecution's case. *See generally Hearings on S. 945 Before the Subcomm. on Improvements in the Judicial Machinery of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess., at 241-41a (1967) (remarks of Sen. Joseph Tydings on Senate floor).

59. This argument is effective where the preliminary hearing or its waiver is a prerequisite to the filing of a prosecutor's information. Note 39 *supra*.

alterations in hearing procedure should be made not only to provide a tighter evidentiary screen, so that only persons who are "really guilty" are likely to be prosecuted, but also to provide more criminal discovery.

## II. PROSPECTS FOR IMPROVING THE EXISTING INSTITUTION

At this point it should be apparent that if we desire to attain the goals of the modern preliminary hearing in practice, including the goal of greater criminal discovery, we must either reform existing hearing procedures or develop alternate procedures. These two basic approaches, reform and replacement of existing procedures, will be investigated and discussed individually and then compared.<sup>60</sup>

In order to properly evaluate the advantages and disadvantages of each approach, one needs a device to serve as a framework for discussion and comparison. We will proceed to build two models of "ideal procedure," one reflecting current trends and recommendations on ways to improve preliminary hearing procedure, and the other reflecting the author's thesis that a better system of procedures might be developed to eliminate or drastically reduce the need for hearings while adequately protecting the interests of all parties concerned.

### A. Model Preliminary Hearing Procedure

The first model, which shall be referred to as the "Hearing Model," is based upon standards for the improvement of preliminary hearing procedure which have been promulgated and discussed by many authorities. The Hearing Model strives to achieve the goals, solve the problems, and silence the critics of the preliminary hearing through reforms that supposedly will improve the effectiveness of the hearing while providing greater opportunities for criminal discovery. It seeks the solution to present problems in a multi-purpose adversary judicial hearing which theoretically would give anyone accused of crime (1) an early chance to test the legality of his detention; (2) a better opportunity to protect himself against formal prosecution where there is inadequate "legal evidence" to establish

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60. An intermediate type approach, no longer practicable after *Coleman v. Alabama*, 90 S. Ct. 1999 (1970), was suggested by D. Oaks and W. Lehman in *A CRIMINAL JUSTICE SYSTEM AND THE INDIGENT* 53, n.91 (1968). This approach would have involved placing the pretrial screening process principally in the hands of the preliminary hearing court, thereby reducing the prosecutor's control over charge decisions. While "judicializing" the charge decision, it would have de-emphasized the adversary nature of the hearing by doing away with the right to counsel, now guaranteed under the *Coleman* decision. This "would probably produce an increase, though small, in the number of defendants reaching trial court for final adjudication . . ." *Id.* Oaks and Lehman anticipated that their proposed system might be held unconstitutional for lack of counsel. *Id.* at 116-17.

every element of the crime;<sup>61</sup> and (3) a better means of obtaining greater discovery of evidence.

Under the Hearing Model any arrested person must be brought without unnecessary delay before a magistrate<sup>62</sup> who is a member of the bar.<sup>63</sup> The magistrate immediately must inform the person of the charge,<sup>64</sup> of his important right to counsel at every stage of the proceedings,<sup>65</sup> that counsel will be appointed for him if he is unable for any reason to obtain counsel,<sup>66</sup> and of his right to have a preliminary hearing to determine the legality of his detention.<sup>67</sup> No waiver of assistance of counsel or of the right to a preliminary hearing should be accepted unless the accused has consulted with a lawyer.<sup>68</sup> Unless the hearing is waived, the accused must be allowed reasonable time and opportunity to consult counsel and should be admitted to bail pending the hearing.<sup>69</sup> The magistrate must hear the evidence within a reasonable time,<sup>70</sup> which should be strictly limited<sup>71</sup>

61. The goal is to give protection against formal prosecution and trial when there is insufficient *competent* state evidence to make out a *prima facie* case. Also, if the accused believes that he can sufficiently explain the evidence against him or defend himself at the hearing so that the prosecutor or magistrate will decide that the prosecution should proceed no further, the Hearing Model provides the means for the accused to show his innocence. Cf. Goldstein, note 46 *supra*, at 1170-71, summarizing the various attempts to "judicialize" the grand jury proceeding during the nineteenth century so that indictments would be returned only on the basis of "legal evidence." Statutes were passed in most states permitting grand juries to hear the defendant or his witnesses. Then the feeling arose in this century that the grand jury is a "rubber stamp" for the discretion of the prosecutor. *Id.* This may have started the current trend to "judicialize" the preliminary hearing.

62. FED. R. CRIM. P. 5(a); UNIFORM RULE OF CRIMINAL PROCEDURE 6(a). If the arrest was made without a warrant, a complaint must be filed forthwith. *Id.*

63. See authorities cited note 41 *supra*.

64. FED. R. CRIM. P. 5(b); UNIFORM RULE OF CRIMINAL PROCEDURE 6(b); ALI CODE OF CRIMINAL PROCEDURE § 39 (1930).

65. FED. R. CRIM. P. 5(b); UNIFORM RULE OF CRIMINAL PROCEDURE 6(b); ALI CODE OF CRIMINAL PROCEDURE § 39 (1930).

66. This is now required for state indigents by *Coleman v. Alabama*, 90 S. Ct. 1999 (1970); FED. R. CRIM. P. 5(b); see authorities and trend in note 19 *supra*. The accused should be informed that counsel *will* be appointed for him if he is unable to obtain counsel for *any* reason. Although normally made only for indigent persons, appointments should be made for unpopular persons and others who are unable to obtain counsel. Waiver decisions should not be made without advice of counsel, note 68 *infra* and accompanying text.

67. FED. R. CRIM. P. 5(b) & (c); UNIFORM RULE OF CRIMINAL PROCEDURE 5(b); ALI CODE OF CRIMINAL PROCEDURE § 39 (1930).

68. ABA STANDARDS RELATING TO PROVIDING DEFENSE SERVICES § 7.3 (Approved Draft, 1968). Ignorant waiver of rights is currently one of the most common causes of avoidance of the preliminary hearing. TASK FORCE REPORT: THE COURTS 143 (1967); Miller & Dawson, *Non-Use of the Preliminary Examination: A Study of Current Practices*, 1964 Wis. L. Rev. 252, 274. The accused must be made to understand the great significance of his right to a hearing under the Hearing Model.

69. FED. R. CRIM. P. 5(b); ALI CODE OF CRIMINAL PROCEDURE § 44 (1930) (bail if hearing postponed).

70. FED. R. CRIM. P. 5(b); see note 25 *supra* for possible alternative time standards.

71. Many states provide that postponements may not be for more than two days at a time, nor more than six days in all unless by consent of the defendant.

unless good cause is shown for a continuance.<sup>72</sup> Under no circumstances should the hearing date be set so that a finding of probable cause by indictment can intervene;<sup>73</sup> and the accused should be granted a hearing even if an indictment does intervene.<sup>74</sup> No information may be filed against the person until he has had or waived the preliminary hearing.<sup>75</sup> Notwithstanding a waiver of the hearing by the accused, on demand of the prosecutor the magistrate shall examine the witnesses for the state.<sup>76</sup> At the hearing, or at any examination of the state's witnesses before the magistrate, the accused should be allowed to confront and cross-examine the witnesses,<sup>77</sup> and the magistrate should enforce the rules of evidence applicable to trials,<sup>78</sup> including constitutional rules of admissibility.<sup>79</sup> At the hearing the accused must be permitted to testify or make a statement in his behalf,

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ALI CODE OF CRIMINAL PROCEDURE § 43, Commentary (1930). See note 26 *supra* for trends. TASK FORCE REPORT: THE COURTS 85 recommends a 72 hour limit. See *Hearings on S. 3475 Before the Subcomm. on Improvements in the Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess., at 105-6 (1966) (objections to allowing 10 and 20 day limits in Federal Magistrates Act). The government should be prepared to show probable cause within a few days; otherwise, the accused should not have been arrested and should not be detained.

72. ALI CODE OF CRIMINAL PROCEDURE § 43 (1930). The state should not be granted a continuance to build its case, or the hearing loses its effect on investigative arrests. Unavailability of witnesses should not be good cause for more than brief continuances. *Hearings, supra* note 71, at 105.

73. An indictment "moots" the hearing, note 51 *supra*, and this has become an important reason for routine postponement of hearings until an indictment is returned. *Hearings*, 89th Cong., 2d Sess., pt. 3, at 220 (1966).

74. As long as grand jury proceedings remain secret and other discovery opportunities are limited, it seems unfair to permit the state to avoid the hearing discovery opportunity simply by obtaining an indictment. Under the Hearing Model, the accused would be permitted to compel the attendance of material witnesses, including state witnesses, and examine them after indictment. The magistrate should not be permitted to overrule the grand jury's finding of probable cause.

75. ALI CODE OF CRIMINAL PROCEDURE § 115 (1930).

76. UNIFORM RULE OF CRIMINAL PROCEDURE 6(c); ALI CODE OF CRIMINAL PROCEDURE § 40 (1930). The Hearing Model recognizes the potential value of the hearing for perpetuating testimony and for the discovery of weaknesses in the state's witnesses. Notes 35 & 36 *supra* and accompanying text.

77. FED. R. CRIM. P. 5(c); UNIFORM RULE OF CRIMINAL PROCEDURE 6(c); ALI CODE OF CRIMINAL PROCEDURE § 46 (1930); see authorities and trend in note 22 *supra*. Confrontation is constitutionally required at some point if the testimony is to be used at trial. See *California v. Green*, 90 S.Ct. 1930 (1970).

78. The state should not be permitted to avoid most of the discovery function of the hearing by relying upon hearsay evidence. *Hearings*, 89th Cong., 2d Sess., pt. 3, at 211 (1966). As a matter of practice, many federal magistrates exclude hearsay. *Hearings on S. 945, supra* note 58, at 493 (46% so reported). Few states now follow trial rules of evidence at the hearing, e.g., OHIO REV. CODE ANN. § 2937.11 (Page Supp. 1969), W. VA. CODE ANN. § 62-1-8 (1966); see authorities cited in Note, *The Rules of Evidence as a Factor in Probable Cause in Grand Jury Proceedings and Preliminary Examinations*, 1963 WASH. U. L.Q. 102, 116-18.

79. Under the Hearing Model we are concerned with the probability of conviction at trial, an issue which forces the state to present more evidence, thereby providing a better discovery opportunity for the accused. Unless the state can



and to introduce evidence.<sup>80</sup> At the request of either the state or the accused, the magistrate must issue subpoenas to summon material witnesses within the state.<sup>81</sup> Unless both parties otherwise agree, all proceedings at the hearing and all testimony at an examination must be recorded by a court reporter or by an electronic recording device and transcribed.<sup>82</sup> If a hearing is held, a prosecuting attorney should be present to represent the state.<sup>83</sup> If the hearing is waived or if it appears to the magistrate after the hearing that there is probable cause to believe that an offense has been committed and that the accused person has committed it, the accused must be held to answer by admitting him to bail or committing him to custody pending further proceedings in the trial court.<sup>84</sup> If the accused is unable to furnish the amount of bail fixed, the magistrate should order an immediate investigation to determine whether the accused should be released on a lesser amount of bail or on his personal recognizance.<sup>85</sup> In those cases in which the magistrate orders the complete discharge of the person, no further prosecution on the same charge should be permitted except by leave of the trial court.<sup>86</sup> If the person is

establish at least a substantial possibility of conviction, based on admissible evidence, the accused should not be put to the expense, humiliation, and anxiety resulting from public prosecution. *See* note 61 *supra*.

80. FED. R. CRIM. P. 5(c); UNIFORM RULE OF CRIMINAL PROCEDURE 6(c); ALI CODE OF CRIMINAL PROCEDURE § 49 (1930). Most states now permit the accused to introduce evidence, note 21 *supra*, and many permit an unsworn statement by the accused, note 20 *supra*.

81. UNIFORM RULE OF CRIMINAL PROCEDURE 5(c). FED. R. CRIM. P. 17(b), requiring a "court" to issue subpoenas for indigent defendants upon a showing that the witnesses are "necessary to an adequate defense," has been interpreted in one circuit to grant a right to subpoena witnesses for the preliminary hearing. *Ross v. Sirica*, 380 F.2d 557 (D.C.Cir. 1967), *citing* *Washington v. Clemmer*, 339 F.2d 715 (D.C.Cir. 1964). The subpoena right extends "to alibi witnesses. . . the complainant and other material witnesses named in the complaint who for some reason have not been called by the Government." *Id.* at 718. Under the Hearing Model, the trend would be to allow the accused to subpoena witnesses to establish *any* defense, as this would be the only way to provide broad discovery at the hearing.

82. Federal Magistrates Act, 18 U.S.C. § 3060 (f) (Supp. IV, 1969) requires a court reporter or recordation by suitable recording equipment and a copy made available to an indigent accused. *See generally* UNIFORM RULE OF CRIMINAL PROCEDURE 6(c). A record is essential if discovery is a primary goal of the hearing.

83. Since the hearing is truly adversary under the Hearing Model, the magistrate cannot be expected to remain neutral while examining prosecution witnesses; nor should police officers be permitted to prosecute. Responsible exercise of prosecutorial discretion requires early contact with the case. *See generally* PRESIDENT'S COMMISSION REPORT 128, 133-34.

84. FED. R. CRIM. P. 5(c); UNIFORM RULE OF CRIMINAL PROCEDURE 6(c). *See* notes 61 & 79 *supra* on the Hearing Model probable cause standard.

85. This approach would require lower court probation officers which most states have not provided. PRESIDENT'S COMMISSION REPORT 129. Another possible approach requires the trial court to exercise supervision over detention pending trial. FED. R. CRIM. P. 46 (h).

86. UNIFORM RULE OF CRIMINAL PROCEDURE 15 and ALI CODE OF CRIMINAL PROCEDURE § 116 (1930) prohibit any formal charge by information after discharge but say nothing about later indictment. Under the Hearing Model the prosecutor

bound over, formal prosecution should be limited to the charge considered at the preliminary hearing, or to a lesser included offense.<sup>87</sup>

Further elaboration of the Hearing Model will not be necessary in order to compare it effectively with present procedures and with the alternate procedures to be proposed. There may be disagreement with certain "improvements" of the Hearing Model, but it must be kept in mind that the Hearing Model was designed to illustrate proposed "ideal" preliminary hearing procedures and to reflect current trends in legislation.<sup>88</sup>

### B. *Functional Frustrations and Complications*

The Hearing Model was designed to turn the preliminary hearing into a more effective multi-purpose proceeding, and under ideal circumstances it would provide many benefits not available under present procedures. However, we should not be so overwhelmed by theoretical individual improvements that we ignore the practical disadvantages of further "judicializing" the hearing.<sup>89</sup>

By first viewing the Hearing Model as a whole, we can see some of the functional problems it would encounter. The most striking feature of many hearings under the Hearing Model might be their resemblance to full-scale trials. The Hearing Model merely continues the long-term trend of adding "fair trial" procedures and safeguards to the hearing, many of which may not be needed in the ordinary case.<sup>90</sup> Yet they are all available, promising greater rewards to the defense counsel who demands a hearing, while nothing is granted if the hearing is waived. If there were no broad alternative means of obtaining criminal discovery, it would usually be foolish for defense counsel to advise waiver of the hearing.<sup>91</sup> Thus if the Hearing Model is promoted as a panacea, we probably would be faced with increases in the number, length and cost of preliminary hearings.<sup>92</sup>

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who fails to show probable cause would be required to show the trial court why he should be permitted to file an information or to take the case to the grand jury. By giving greater finality to a discharge, there is more justification for "judicializing" the hearing in various ways.

87. This is essential to guarantee some judicial review of the prosecutor's charge decision and to provide preliminary hearing discovery on the trial court charge. See K. Graham & L. Letwin, *A STUDY OF THE PRELIMINARY HEARING IN LOS ANGELES* 124 (1969).

88. For trends in legislation since 1930, see notes 18-22, 24-26 *supra*.

89. Cf. Goldstein, *supra* note 46 at 1170-71, and note 61, covering efforts to "judicialize" grand jury proceedings.

90. *E.g.*, the accused can subpoena material defense witnesses under the Hearing Model, *supra* note 81; but unless he feels that the state has a weak case or needs process to compel a reluctant defense witness to reveal his story, the accused is not likely to reveal the nature of his defense or his witnesses at the hearing.

91. *But see* Miller & Dawson, *Non-Use of the Preliminary Examination: A Study of Current Practices*, 1964 Wis. L. Rev. 252, in which the authors conclude that the present system tends to maximize irrational waivers of the preliminary hearing by many persons who do not understand its functions and significance and who could benefit from the opportunity for discovery. *Id.* at 274.

92. The less criminal discovery that is available through other procedures and the less effective the prosecutor is before the hearing in screening out weak cases,

Under the Hearing Model it could truly be said that any accused person is entitled to "two days in court" because of the "preliminary trial" in a lower court to determine the preliminary issue of probable cause.<sup>93</sup> Unless many more magistrates, assistant prosecutors, defense attorneys, and courtroom facilities were provided to conduct these adversary discovery and probable cause hearings, delays would be certain to arise to deny many accused persons their statutory right to a speedy "preliminary trial" as well as their constitutional right to a speedy jury trial.<sup>94</sup> In many cases prosecutors faced with defendants demanding their early hearing rights and also faced with a backlog of preliminary hearings might be pressured into making "deals" just to avoid some hearings.<sup>95</sup>

Assuming that adequate resources might be made available for the Hearing Model to handle adequately a greater number of longer hearings without delay, it would take the prosecutor and defense counsel more time than at present to prepare for many hearings. With hearsay inadmissible and witnesses to be subpoenaed throughout the state for some hearings, it would be difficult to place any strict limitation on the "reasonable time" within which the hearing must be held.<sup>96</sup> To generalize about all this, the more society tries to expand and improve the screening and discovery functions of the hearing, the more time society should grant to each party to prepare for and conduct a preliminary trial.<sup>97</sup> Yet the longer the delay before the hearing, the less early protection the hearing provides against illegal arrest and detention.<sup>98</sup>

Many other difficulties will arise if the preliminary hearing is further "judicialized." The Hearing Model requires all magistrates to be sufficiently trained so that they can apply technical trial rules of evidence, including

the more likely it is that an accused person will demand a hearing. Emphasis on criminal discovery and effective judicial screening at the hearing are likely to detract from establishment of other discovery procedures and from responsible prosecutorial screening.

93. In an overloaded criminal justice system this "preliminary trial" might become the final trial for many defendants. In Los Angeles the transcript of the preliminary hearing often is used at trial in place of witnesses. Known as "submission on the transcript," this voluntary practice, based on stipulation of the parties, has been sharply criticized. K. Graham & L. Letwin, A STUDY OF THE PRELIMINARY HEARING IN LOS ANGELES 142, 147-48 (1969).

94. Under U.S. CONST. amend. VI & XIV, the speedy trial right is applicable to the states. *Klopfer v. North Carolina*, 386 U.S. 213 (1967).

95. Under the Hearing Model, prosecutors would not be able to take cases to the grand jury to avoid time-consuming preliminary hearings. Note 74 *supra*. If a time limit of 72 hours between the initial appearance and preliminary hearing were adopted, *supra* note 52, extreme pressure could be brought to bear on a prosecutor when backlogs developed, particularly if the person must be released if not granted a prompt hearing. See Federal Magistrates Act, 18 U.S.C. § 3060(d) (Supp. IV, 1969).

96. See notes 50, 52 & 95 *supra*.

97. Unavoidable delays in gathering evidence for the hearing are "good cause" for formal or agreed postponement of a hearing.

98. See note 49 *supra*.

constitutional rules of admissibility.<sup>99</sup> Even though the Hearing Model insures that hearings can be demanded simply for discovery purposes, often it would be easy for the prosecutor to present a minimum case establishing probable cause for holding the accused for further prosecution without revealing much of his case.<sup>100</sup> Rigid application of orthodox trial rules of evidence would further limit the scope of discovery available at the hearing.<sup>101</sup> On the other hand, if trial rules of evidence were not followed, we could expect longer "discovery hearings" in which magistrates would have to permit "fishing expeditions." It is difficult to see why valuable court time should be wasted in a case simply to permit the parties to obtain discovery or to take depositions to preserve testimony. Broad discovery is available in civil litigation in most states, but there are no advocates of civil "discovery hearings." Recording and transcribing the "depositions" of all witnesses at these criminal "discovery hearings" often would be wasteful and could produce delays in proceedings after the hearing.<sup>102</sup> Finally, even in contested cases there is ordinarily no difficult probable cause determination to be made.<sup>103</sup> In many states the prosecutor normally screens all

99. See note 41 *supra*. Very difficult problems of exclusion of evidence on constitutional grounds would complicate the hearing. Reserving such matters for trial court action seems more appropriate and efficient, but by then the accused ordinarily will have been charged publicly by indictment or information which may have been based on unconstitutionally obtained evidence. The Alternate Model seeks to solve this problem, notes 166 to 168 *infra* and accompanying text.

100. See note 47 *supra*. Although the prosecutor must present witnesses, not hearsay, under the Hearing Model, there is no assurance that he will call all or even most key witnesses to the hearing. Most prosecutors would soon learn how much evidence a particular magistrate requires to find probable cause, which may be much less than the amount of evidence that should be subject to discovery or the amount of evidence a trial court judge would require to find a *prima facie* case.

101. Any questioning of witnesses would have to be relevant to the issue of probable cause to be determined by the magistrate. Also, the scope of available discovery would depend on the magistrate's views on relevance, which might vary depending upon his caseload. K. Graham & L. Letwin, A STUDY OF THE PRELIMINARY HEARING IN LOS ANGELES 132 (1969). Ordinarily in taking depositions in civil actions "the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . ." FED. R. CIV. P. 26(b). Such rules permit much broader discovery of information about the case, much of which would be inadmissible at trial but could lead to the discovery of admissible evidence.

102. In 1968 England abolished the practice of requiring the prosecution to present at the preliminary hearing all the evidence it intends to use at trial, including witness testimony. One reason for this action was the waste of court time and effort in preparing depositions of state witnesses at the hearing stage in cases in which the facts were uncomplicated and a plea of guilty likely. Criminal Justice Act of 1967, c. 80, § 1(1). See note 134 *infra* on the use of witness statements in place of testimony at English preliminary hearings.

103. TASK FORCE REPORT: THE COURTS 43 (1967), which states, after listing some of the deficiencies of present hearing procedures:

One major reason for these deficiencies is the fact that the preliminary hearing is designed to serve a function that is relevant to a small minority of cases, that is, to test whether there is cause to hold an accused person for trial. Yet this standard is clearly met in almost all contested cases. An over-

felony cases at an earlier stage to determine if complaints should be filed, so that in the vast majority of cases there will be sufficient competent evidence to show probable cause for formal prosecution.<sup>104</sup>

Upon encountering these and other functional problems of Hearing Model procedures, some authorities no doubt would make further suggestions for refinements and "improvements" in hearing procedures. However, we have seen that functional compromises must be made in order to "improve" a multi-purpose hearing, particularly in an urban environment. As a result, the structure may not serve any major function well. An ideal "probable cause hearing" cannot serve as an ideal "discovery hearing," and an early "probable cause for arrest and detention hearing" cannot provide the additional safeguards of a later "probable cause for formal prosecution hearing."

In spite of these functional problems, many authorities argue that we can justify retaining the preliminary "probable cause" hearing by making it more useful as a "discovery hearing."<sup>105</sup> Such arguments have surface appeal, but their advocates are short-sighted and usually take no account of the functional compromises that would need to be made even in the promotion of criminal discovery. Nor do they take account of the danger of distorting, delaying or complicating the development of separate procedures to serve needs which an "ideal hearing" could not serve well.<sup>106</sup>

Enough has been written to indicate why it is undesirable to further "judicialize" the preliminary hearing. Formal, adjudicative, adversary fact-finding hearings should be introduced into the criminal process only when they are needed to determine important issues of fact. They should not be called upon or maintained merely to serve multiple functions unrelated or only incidentally related to the ultimate factfinding function.

burdened system will not hold a large number of carefully conducted and deliberative hearings when they are meaningful in only a small percentage of the cases.

Yet the REPORT follows the Hearing Model trend by recommending that the rules be changed to make the hearing more useful in perpetuating testimony and in permitting fuller examination of witnesses, relying upon the good judgment of defense counsel to limit the number of hearings to manageable levels. *Id.*

104. *Id.* K. Graham & L. Letwin, *supra* note 101, at 98-99; see D. Oaks & W. Lehman, A CRIMINAL JUSTICE SYSTEM AND THE INDIGENT 41 (1968).

105. *E.g.*, note 103 *supra*.

106. Modifications in procedure should not be made without appreciation of the intrinsic relationships among the parts of the criminal process. Thus there is a need for a unified legislative approach to procedural problems to avoid "patch-quilt" results. See ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Reporters' Introductory Memorandum at xviii-xix (Tent. Draft No. 1, 1966). Legislative inaction may lead to patchwork by the courts. See *Coleman v. Alabama*, 90 S.Ct. 1999 (1970); Note, *Preliminary Hearing in the District of Columbia—An Emerging Discovery Device*, 56 GEO. L.J. 191 (1967).

### III. PROGRESSIVE ALTERNATIVES TO A MULTI-PURPOSE HEARING

Since the Hearing Model cannot effectuate the desired combination of functions without compromise, it is submitted that we should develop a set of alternative procedures that are specifically designed to serve these functions. This does not mean that we must abandon all procedures of the Hearing Model, but it does require us to resist forces pushing for "improvement" of the preliminary hearing along the lines of the Hearing Model.

In developing alternatives to a "judicialized preliminary discovery and probable cause hearing," we should promote practices and procedures which directly or indirectly will lead to fulfillment of the ultimate objectives of the Hearing Model. By focusing attention on ultimate goals and asking how these objectives can best be attained outside the context of a multi-purpose hearing, we are no longer confronted with the necessity of making great functional compromises or supplementing the preliminary hearing with procedures that may compensate for the compromises.

Although it could be argued that we should postpone drafting an "Alternate Model" until more decisions are made on such current issues as alternatives to arrest, the time and nature of initial appearance, bail, and criminal discovery, there is a great danger that progressive developments in these and other areas of pretrial criminal procedure may be limited or affected by the assumption that the preliminary hearing will be "judicialized," turned into an instrument of discovery, or at least left in its present form. Before this happens we should consider the possibility of abolishing the preliminary hearing or minimizing its use.

#### A. *The Alternate Model*

The Alternate Model is constructed for comparison purposes and to indicate one approach that might be taken to maintain the protections of an early preliminary hearing while emphasis is placed on other pretrial procedures. The major differences between the Alternate Model and the Hearing Model are based on the assumption that separate procedures tailored to meet special needs at separate stages of the criminal process will work more efficiently and effectively to protect the interests of the parties than a single, multi-purpose adversary hearing. These separate procedures will not be built around a hearing to serve as supplements to its inadequate performance. Instead, they must justify their separate existence by better serving functions which the preliminary hearing would serve under the Hearing Model.

Like the Hearing Model, the Alternate Model is built upon certain ideals. Separate procedures must be developed (1) to provide early protection against illegal detention, (2) to provide better protection against formal prosecution when there is inadequate "legal evidence" to establish

every element of the crime,<sup>107</sup> and (3) to provide better criminal discovery opportunities.<sup>108</sup>

Since the need for procedures to test the legality of arrest and detention does not arise until there has been a "seizure" of a person, the Alternate Model promotes procedures that would discourage the common police practice of arresting and holding persons indiscriminately without making any attempt to determine whether arrest or detention of the person is needed to insure his appearance in court.<sup>109</sup> A citation or summons to appear in court can be used safely for certain types of indictable offenses,<sup>110</sup> particularly when the accused has sufficient ties with the community so that the risk of flight is minimal.<sup>111</sup>

Once an arrest is made, any person not released from police custody within a brief time<sup>112</sup> must be brought as soon as possible before a mag-

107. Note 61 *supra*. The Alternate Model also aims at developing effective procedures to challenge prosecutions based on illegally obtained evidence. Note 99 *supra*. Like the Hearing Model, the Alternate Model seeks to protect innocent and "guilty" but unconvictable persons from exposure to adverse publicity and the burdens of trial, but through more effective procedures than could be made available at the preliminary hearing stage.

108. Early discovery under the Alternate Model will not be limited by trial rules of evidence that would be applicable to "judicialized" preliminary hearings. Separate discovery procedures, tailored to provide the amount of criminal discovery deemed appropriate by society, would be available.

109. W. LaFave, *ARREST* 168-69 (1965).

110. Encouraging experiments have been conducted showing that if police are furnished information upon which to judge whether a person should be arrested, citations and summonses may be issued, saving many police man-hours in guarding and transporting arrested persons to their first court appearance. These procedures have been used in various felony and serious misdemeanor cases. See *Hearings on Bills to Revise Existing Bail Practices in U. S. Courts, and for Other Purposes, before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong., 2d Sess., at 88-89 (1966) (description of Manhattan summons project expansion to serious misdemeanor and felony cases); PRESIDENT'S COMMISSION REPORT 132-33 (recommending prompt release of as many arrested persons as possible upon issuance of citation or summons).

Recommended standards on police authority to issue citations include serious offenses. ABA STANDARDS RELATING TO PRETRIAL RELEASE § 2.3 (Approved Draft, 1968) (stationhouse release).

111. Of course, police must be *required* to investigate any person they propose to arrest and hold or the practice of indiscriminate arrest and detention will continue. Exceptions should be made for dangerous felonies, where arrest is always appropriate.

112. Any arrested person not released by the arresting officer should be brought immediately to a police station. ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 3.09 (Tent. Draft No. 1, 1966). There a station officer should warn him of his *Miranda* rights, that as soon as possible he will be taken before a magistrate who will make arrangements for him to be represented by counsel if he has not done so, and that he will not be questioned prior to his appearance before the magistrate unless he has a lawyer who is present or has consented to such questioning. ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § C 1001 (Study Draft No. 1, 1968). The Alternate Model seeks to reduce the need for early judicial procedures to remedy investigative arrests by removing the greatest incentives for such arrests. The preliminary hearing probably never could be held sufficiently early to provide much deterrence against investigative arrests. See note 97 *supra*.

istrate,<sup>113</sup> who is a member of the bar.<sup>114</sup> Whether or not a complaint has been filed, the magistrate must inform the arrested person of the charge for which he is being held, of his immediate right to counsel,<sup>115</sup> that counsel will be appointed for him if he is unable for any reason to obtain counsel immediately,<sup>116</sup> and that early assistance of counsel is important for a person in his position.<sup>117</sup> If no prosecutor's complaint has been filed before the initial appearance, the police must obtain a complaint from the responsible prosecutor within a few hours after the arrest.<sup>118</sup> Thus the common practice of having an early charge decision made by the prosecutor is mandatory under the Alternate Model.<sup>119</sup> Unless the prosecutor re-

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113. Cross-references will be made in the following footnotes to related portions of the Hearing Model. Note 62 *supra* and accompanying text. An early appearance before a judicial officer is needed to deter investigative arrests. Any delay in the initial appearance must not be based on a need to conduct further investigation or questioning to provide probable cause for detention. See generally Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 *Geo. L.J.* 1, 22-23, 27 (1958). *Miranda v. Arizona*, 384 U.S. 436 (1966), does not deprive police of the incentive to arrest suspects for questioning in the hope that they can be induced to waive their constitutional rights to silence and counsel before they fully realize their importance.

Some identification procedures, notably fingerprinting and photographing, might be permitted before appearance, because the delays they might cause would be minimal and there is no need for the protection of counsel. Lineups before appearance would not be permitted. See ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § C 1002 (Study Draft No. 1, 1968).

114. Note 63 *supra* and accompanying text. Although ordinarily no early hearing will be held under the Alternate Model, only a lawyer would be likely to have the necessary knowledge and independence of the prosecutor and police to serve as an effective judicial screen against investigative arrests.

115. The station officer will have given the first warning of rights, note 112 *supra*. See ABA STANDARDS RELATING TO PROVIDING DEFENSE SERVICES § 5.1 and Commentary (Approved Draft, 1968), advocating provision of counsel as soon as possible after arrest.

116. Note 66 *supra* and accompanying text. See ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § CD 1004 (Study Draft No. 1, 1968).

117. *Id.* The role of counsel is important to the proper functioning of the Alternate Model. The accused should not be asked to depend upon the magistrate or prosecutor for adequate protection against unjustified detention and prosecution. See TASK FORCE REPORT: THE COURTS 52 (1967); Miller & Dawson, *Non-Use of the Preliminary Examination: A Study of Current Practices*, 1964 *Wis. L. Rev.* 252.

118. Complaints in indictable cases should be filed only by a prosecuting attorney having jurisdiction over prosecution of the offense. ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 6.02(1) (Tent. Draft No. 1, 1966). If an arrest is made without a warrant, as most arrests are, the police should be given a short period of time to inform the prosecutor about available evidence and the circumstances leading to the arrest so that he can determine whether the case can successfully be prosecuted in court. Absent express prosecutor control over the filing of complaints, the first screening will be done by the police, followed by the magistrate, before the prosecutor's influence will be felt. See D. Oaks & W. Lehman, *A CRIMINAL JUSTICE SYSTEM AND THE INDIGENT* 30-31 (1968) (Cook County, Illinois experience).

119. D. Oaks & W. Lehman, *supra* note 118, at 29, describing the anomaly of the "post-arrest warrant" by which prosecutors in some states control which arrests will lead to prosecution. In Los Angeles County the District Attorney's office issues felony complaints in about 50% of the felony cases presented by the police, and about



quests a remand for a lineup or other identification procedures<sup>120</sup> or can show other "good cause" for a brief postponement before making a charge decision,<sup>121</sup> the person must be charged within this limited time or released from custody.<sup>122</sup>

An early judicial check against illegal arrest should be available in cases of arrest without a warrant.<sup>123</sup> Under the Alternate Model the police must deliver to the magistrate within a few hours after arrest a sworn statement narrating the events and police observations upon which the police and the arresting officer concluded that a particular crime had been committed and determined that there was probable cause for the arrest.<sup>124</sup> Upon receipt of the police arrest statement the magistrate must determine whether there was probable cause for the arrest, and in the absence of

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25% of the persons arrested on felony charges are released outright as a result of police or prosecutor screening, mostly prosecutor screening based on insufficiency of evidence. K. Graham & L. Letwin, A STUDY OF THE PRELIMINARY HEARING IN LOS ANGELES 76-77 (1969). Such figures suggest that if the police policy is to exercise little discretion in enforcement (a common policy), prosecutorial control over the charge decision is needed to screen out weak cases. Most busy prosecutors would have a bias in favor of early elimination of weak cases, before they get to court.

120. ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § CD 1007 (Study Draft No. 1, 1968) (remand if it appears necessary to determine whether complaint should issue). To prevent investigative arrests for lineup purposes, the magistrate must find reasonable cause to believe that the lineup or other procedure is *likely* to result in information necessary for the charge decision. *Id.* § CD 1007 (1). Unless the magistrate believes brief continued custody is necessary to insure later appearance at the identification procedure, he should release the person on condition that he appear for the procedure. *Id.* § CD 1007(3). If the magistrate makes a determination that the police had no probable cause for the arrest, note 125 *infra* and accompanying text, the person should be relieved of any obligation to submit to further identification procedures.

121. The Alternate Model requires early screening by the prosecutor through close communication with the police. The prosecutor would have "good cause" for a brief postponement of a few hours if some of the expected evidence needed to make a decision were unavoidably unavailable and apparently would be available soon.

122. See ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § CD 1006 (Study Draft No. 1, 1968). Early release would not prevent later arrest and prosecution if additional evidence were discovered. Nor would it be inconsistent with a provision for remand for questioning if the person is represented by counsel or has waived counsel, and consents to such remand, *id.* § CD 1008.

123. Otherwise, police would seldom obtain an arrest warrant based on a prosecutor's complaint and could make investigatory arrests with impunity. A prosecutor's decision not to charge would not provide adequate basis for a suit for false arrest, nor would a later preliminary hearing determination of no probable cause. The hearing is basically suited for determining probable cause for further detention and prosecution, not probable cause for arrest.

124. The duty of having to sign such a statement should make officers consider the issue of probable cause seriously before arresting. A tremendous saving of police time would result if arrest statements were used in place of court appearances by police. TASK FORCE REPORT: THE COURTS 42, 91, recommending use of a "written statement of the facts of the offense prepared by the officer immediately after the arrest and signed by him." More police time could be saved with the aid of modern communication and recording devices. *E.g.*, statements could be dictated over the radio by an officer on duty in the field to be signed later. Initially, a tape recording of the report might be delivered to the magistrate to establish probable cause.

probable cause he must release the person from custody unless the police have obtained additional information justifying another arrest.<sup>125</sup>

After a complaint is filed under the Alternate Model, the magistrate must inform the accused of the charge against him,<sup>126</sup> of his continuing right to counsel,<sup>127</sup> and of his right to have a "probable cause determination" to test the legality of holding him on the charge for further proceedings.<sup>128</sup> No attempted waiver of assistance of counsel or of the right to a probable cause determination<sup>129</sup> would be accepted unless the accused has consulted with counsel.<sup>130</sup> The probable cause determination is not a preliminary hearing at which witnesses for the state and the accused are examined, although witnesses for the state sometimes may appear for questioning.<sup>131</sup> Its purpose is the determination, ordinarily from statements of state witnesses, whether there is probable cause for binding over and for further detaining the accused in jail, on bail, or under conditional release pending proceedings in the trial court. The accused who is bound

125. Under the Alternate Model there is no hearing at this point. However, in borderline cases the magistrate might contact or send for the arresting officer for further information or questioning before deciding whether or not to release the person.

It would be almost futile to release the person arrested without probable cause if the police would arrest him again immediately because of information not contained in the police arrest statement. The police should be given a very brief time to file a supplemental arrest statement.

126. Note 64 *supra* and accompanying text.

127. Early proceedings under the Alternate Model would be adversary only in the sense that counsel could appear to argue the question of the legality of further detention. Later, if a probable cause determination is held, the accused may make an explanatory statement and at times witnesses may be called for the state and be subject to cross-examination. However, the role of counsel is important to the proper operation of the Alternate Model.

128. "Probable cause" at this point relates more to probability of guilt than to probability of conviction. Note 132 *infra*. If the accused is bound over he will have opportunities in the trial court, after exercising discovery rights, to challenge his formal prosecution by indictment or information. It seems more appropriate and realistic to deal with probabilities of conviction at a later stage in the trial court.

129. As will be seen, the statements of state witnesses and any other evidence upon which the probable cause determination would be made provide a foundation for immediate out-of-court discovery rights if the accused is bound over. If the accused waives the determination, the state still must present sufficient written evidence to the magistrate to establish probable cause to hold him, but the magistrate will automatically bind him over without examining the evidence. To insure that the state will present sufficient written evidence to hold the accused, thereby creating a sufficient evidentiary basis for defense discovery, conditional waiver of the determination should be permitted. If defense counsel feels that probable cause is lacking after examining the state's written evidence, he could then demand a determination. See notes 134 & 135 *infra* on the use of statements and other written evidence.

130. See note 68 *supra* on ignorant waiver and common avoidance of the preliminary hearing.

131. In some cases the prosecution may not have time to get all the witnesses' statements needed or the prosecutor may wish to subject one or more of his witnesses to rigorous examination and cross-examination to determine the strength of the case. See notes 35 & 36 *supra*. The Alternate Model attempts to preserve these benefits for the prosecution.

over, either after a probable cause determination or a final waiver of the determination, will have a later opportunity in a more appropriate forum to demonstrate that there is no "probable cause for prosecution."<sup>132</sup>

If the accused requests a probable cause determination, it should be held within forty-eight hours after the arrest.<sup>133</sup> Prior to the time for the determination, or within three days after the arrest if the determination is waived, the state must deliver to the magistrate and to the accused's attorney copies of sworn statements of state witnesses<sup>134</sup> and a report of the

132. As the state exercises increasing degrees of control over the individual, procedures giving increased protections against official abuse should be made available to the accused. The Alternate Model seeks to provide increasing protection in stages rather than to depend upon an omnibus "preliminary trial" (Hearing Model) or a "probable cause determination," note 128 *supra*, to decide all questions at one stage.

At the "determination" stage, note 128 *supra*, the probable cause question would be whether the state has presented sufficient evidence, assuming that its witnesses who gave statements or testified and the other evidence produced or described in the written report will be available and admissible at trial, to "lead a man of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused." *People v. Shaffer*, 182 Cal. App.2d 39, 5 Cal. Rptr. 844, 846 (1960). The state should present at least some evidence to support each element of the offense in order to justify holding the accused.

At the "probable cause for prosecution" stage the trial court may be asked to determine questions of admissibility of evidence and then may be asked to decide whether there is sufficient competent, legal evidence to establish every element of the crime. The Alternate Model accepts the goal of the Hearing Model that no person should be tried or publicly prosecuted unless the prosecution can satisfy a judge that it has a *prima facie* case. Note 61 *supra*.

133. A shorter time limit can be fixed for holding a hearsay determination of probable cause, based on witnesses' statements, than for holding an adversary preliminary hearing to which prosecution and defense witnesses must be summoned.

134. Considering that early discovery by deposition will be available under the Alternate Model, sworn statements of the state witnesses relied upon to establish probable cause should provide adequate "preliminary discovery" to the accused and an adequate basis for "preliminary screening" by the magistrate.

Since January 1, 1968, commitments for trial in England have been permitted without a preliminary hearing where all testimonial evidence submitted to the magistrate consists of written statements, the accused is represented by counsel, and neither party objects to the use of statements. Criminal Justice Act of 1967, c. 80, § 1 (1). The statements tendered to the committing magistrates are the originals taken from witnesses by police. *Id.* § 2 (2). The witness swears in the statement that it is true to the best of his knowledge and belief and that he made the statement knowing that, if it were tendered in evidence, he would be subject to prosecution for any willful falsehood. *Id.* § 2 (2) (b). Before any statement is offered in evidence a copy must be delivered to the accused. *Id.* § 2 (2) (c). If the accused objects to a statement the magistrate must require the witness to appear and testify, subject to cross-examination. *Id.* § 2 (4). However, the accused has no later right to take the deposition of a witness whose statement is used in place of testimony, and there is no later opportunity to challenge the prosecution of the case. Unless the accused requests a determination of "no submission" for trial, the committing magistrates do not even have to examine the statements to determine whether there is sufficient evidence to put the accused on trial. *Id.* § 1(1).

England abolished the grand jury and substituted the committing magistrate in 1933 because of the expense, inconvenience and limited safeguard of the grand jury system. The Administration of Justice Act, 23 & 24 Geo. 5, c. 36, § 1. Since 1848, the prosecution has been required to present at the preliminary hearing all evi-

prosecutor describing specifically the nature of any other evidence<sup>135</sup> relied upon to establish probable cause to hold the accused.<sup>136</sup> Whether or not the statement of a particular witness had been taken, the magistrate and the prosecutor would have discretion to call witnesses into court for questioning,<sup>137</sup> even if the accused waives the determination.<sup>138</sup> Any witness so called must confront the accused and be subject to cross-examination.<sup>139</sup>

At the probable cause determination, after the magistrate has examined and heard any evidence for the state, he should inform the accused that he may make a statement, not under oath, or be sworn and testify regarding the charge against him.<sup>140</sup> However, the accused may not call other wit-

dence it intends to use at trial. Indictable Offenses Act, 11 & 12 Vict., c. 42. Use of witness statements now saves much police, witness and court time. *See generally* D. NAPLEY, A GUIDE TO LAW AND PRACTICE UNDER THE CRIMINAL JUSTICE ACT OF 1967 6-12 (1968); A. Krulwich, The Committal Proceeding in England: Its Uses and Abuses 64-65 (1968) (unpublished manuscript on file at Institute of Criminal Law, Georgetown University Law Center).

If the state can show good cause for not disclosing the identity or statement of a certain witness, or a witness is temporarily unavailable, the prosecutor should be permitted to make a proffer of the expected evidence to establish a basis for holding the accused. Sometimes sworn statements of anonymous informers could be taken and furnished to the accused without the name. Later the trial court could make a decision on whether discovery should be permitted and whether a protective order is needed. If the procedure just outlined appears subject to abuse by the prosecution, grand jury proceedings could be made the exclusive means of maintaining initial secrecy, subject to trial court control of later discovery by the accused. *See* note 161 *infra* and accompanying text.

135. The report might include a summary of chemical, fingerprint and other tests relied upon, and a description of physical evidence. Such a report, plus statements of witnesses containing references to the described physical evidence, should provide a sufficiently reliable basis for determining probable cause to bind over. The state could present physical evidence at the determination if necessary; otherwise, use of the report would avoid possible later prosecution difficulties in establishing the "chain of possession" foundation for admission of the evidence at trial.

136. Note 132 *supra* sets out the test for probable cause at the "determination" stage.

137. This discretion is given to the magistrate and prosecutor in England. Criminal Justice Act of 1967, c. 80, § 2 (4). Although the accused would not be permitted to call witnesses under the Alternate Model because of his later discovery and screening rights, in some cases the accused might convince the magistrate or prosecutor that by questioning a certain witness immediately the case might be disposed of without further proceedings. Although the prosecutor can take depositions or require witnesses to furnish security for their later appearance under the Alternate Model, *see* FED. R. CRIM. P. 15 (a) & 46 (b), he may prefer to have some of them appear in court for questioning. *See* notes 35 & 36 *supra*.

138. The prosecution should not be deprived of any benefits it might derive from a hearing simply because the accused decides to waive his rights.

139. *See* note 37 *supra*. If the prosecutor or magistrate chooses to question a witness, his deposition might as well be taken at this point for possible use as evidence. Signed statements or testimony without confrontation at any time could be used only for impeachment at trial. *See* State v. Green, 90 S. Ct. 1930 (1970).

140. ALI CODE OF CRIMINAL PROCEDURE §§ 47, 49 (1930). Note 80 *supra* and accompanying text permit such a statement under the Hearing Model. The accused sometimes may want to make a statement or to explain the evidence against him.

nesses.<sup>141</sup> Unless both parties agree otherwise, the testimony of any witness who testifies shall be recorded and transcribed.<sup>142</sup>

If the determination is waived,<sup>143</sup> or if it appears to the magistrate from all the evidence that there is probable cause to believe that an offense has been committed and that the accused has committed it,<sup>144</sup> he must hold the accused to answer by releasing him on order to appear, on his own recognizance,<sup>145</sup> or after imposing the least onerous condition reasonably likely to assure the accused's appearance in the trial court.<sup>146</sup>

The early definition of the most appropriate conditions for release becomes the focus of great attention under the Alternate Model.<sup>147</sup> Release of the accused on bail or appropriate alternative conditions removes the main burden suffered by a person "bound over" to the trial court.<sup>148</sup> The magistrate should have the responsibility of minimizing unnecessary detention pending the probable cause determination and the initial responsibility, at least, for minimizing unnecessary detention after the accused is bound over.<sup>149</sup> An inquiry should be conducted concerning all personal factors relevant to the determination of appropriate conditions for release of the accused unless the prosecutor does not oppose release on order to appear or on the accused's recognizance.<sup>150</sup> This inquiry should com-

141. Since the accused will be able to obtain discovery and present the resulting evidence to the trial court at a later stage, there is no need to turn the "determination" into an adversary proceeding or hearing. Compare this with notes 80 & 81 *supra* and accompanying text.

142. Note 82 *supra* and accompanying text.

143. See note 129 *supra* on conditional waiver, which would cause a slight delay in binding the accused over until defense counsel was satisfied that the state evidence established probable cause.

144. Note 132 *supra* states the burden of proof at the determination stage. The magistrate would not consider arguments that the evidence was obtained by unconstitutional means, unless this were clearly the case, nor weigh the credibility of state witnesses, unless their statements or testimony were incredible.

145. Unless the prosecutor objects to such release, it should be automatic. See ABA STANDARDS RELATING TO PRETRIAL RELEASE §§ 4.4, 4.5 (a) (Approved Draft, 1968).

146. If the prosecutor opposes release on recognizance or order to appear, the magistrate should determine whether such release is unwarranted before imposing supervision or other reasonable restrictions on the accused. *Id.* § 5.2, listing various restrictions; see Bail Reform Act, 18 U.S.C. § 3146 (1969).

147. It is recognized that the early probable cause determination will not give as much protection to a few "innocent" persons as an early preliminary hearing might provide. No doubt a few more of these persons would be bound over and held for further proceedings, resulting in greater delay before their ultimate release from the system. By minimizing early detention for *all* persons, the Alternate Model seeks to minimize the burden on these few innocent persons as well as the guilty while achieving major economies. See D. Oaks & W. Lehman, *A Criminal Justice System and the Indigent* 52 (1968); cf. note 110 *supra*. Imprisonment of even the "guilty" person pending trial is harsh and oppressive unless warranted by a legitimate purpose of the criminal process. ABA STANDARDS RELATING TO PRETRIAL RELEASE § 1.1 and Commentary at 23-25 (Approved Draft, 1968).

148. See ABA STANDARDS, Commentary at 23-25, note 147 *supra*.

149. See note 85 *supra* and accompanying text.

150. Note 145 *supra*. Factors relevant to release conditions are listed in ABA STANDARDS RELATING TO PRETRIAL RELEASE § 4.5 (d) (Approved Draft, 1968).

mence as soon as it appears that the accused should not be released on an order to appear or on his own recognizance.<sup>151</sup>

As soon as the accused is bound over, he would be entitled to confront and take discovery depositions of any witnesses whose statements were relied upon by the state to show probable cause.<sup>152</sup> Depositions taken out of court at an early stage of the proceedings should be an adequate substitute for cross-examination and discovery by the accused at the preliminary hearing.<sup>153</sup> The accused also could take depositions of other witnesses with the consent of the prosecution or by obtaining permission of the trial court.<sup>154</sup> In addition, the accused should be permitted to inspect and copy or photograph any evidence described in any written report filed with the magistrate to show probable cause.<sup>155</sup>

Additional discovery mechanisms could be added under the Alternate Model. For example, the accused might be permitted to file interrogatories to be answered by the state. The state should be granted certain discovery rights, carefully limited to avoid infringement of the accused's privilege to remain silent and not to produce evidence at trial.<sup>156</sup> For the protection of both the state and the accused, the trial court should be permitted to

151. *Id.* § 4.5 (a).

152. Thus the Alternate Model provides a sound basis for automatic early discovery rights. The need for early discovery procedures and the scant attention paid to this need in the past are emphasized in TASK FORCE REPORT: THE COURTS 43-44: It is undesirable to confine the use of depositions only to the preservation of testimony of witnesses who may be unavailable at trial. Depositions may be used to find facts as well as to preserve testimony. A deposition could resolve a factual dispute during the negotiating stage, and it could provide the basis for a stipulation of witnesses' testimony at trial. *In cases where it is not necessary to conduct a full preliminary hearing before a judge, depositions may be submitted to the court for determination of probable cause.* Finally, the depositions of certain witnesses may be made a part of the record in order to demonstrate in court the basis for a negotiated guilty plea. (Emphasis added.) *Id.* at 43.

153. This requires public support to help defray the cost of discovery depositions. In the case of the indigent accused, the entire cost would have to be paid by the public. However, this procedure should be less expensive than paying for all witnesses to appear at a preliminary hearing and having a court reporter take down and perhaps transcribe all their testimony. Also, a primary goal of the Alternate Model is to save court time that is now wasted when an accused uses the preliminary hearing occasion simply to obtain discovery or when he demands a hearing because of ignorance of the state's case in the vain hope that probable cause will be found lacking.

154. The trial court should be liberal in authorizing extra depositions requested by the defense. Many grounds for further discovery could be recognized, see ABA STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL § 1.1 (Tent. Draft, 1969). The prosecutor might disclose written or recorded statements of other witnesses to the accused and avoid the need for some formal discovery. *Id.* § 2.1 (a).

155. See FED. R. CRIM. P. 16 (b) and note 135 *supra*.

156. See FED. R. CRIM. P. 16 (c); *Jones v. Superior Court*, 58 Cal.2d 56, 22 Cal. Rptr. 879, 372 P.2d 919 (1962).

order that discovery or inspection be denied, restricted, or deferred, or to make such other protective orders as are appropriate.<sup>157</sup>

No formal charge by post-arrest indictment or prosecutor's information could be publicly filed or made known until the accused has waived or has had a reasonable time to exercise these initial discovery rights<sup>158</sup> and his right to challenge the filing of a formal charge in the trial court.<sup>159</sup>

If the accused is arrested after the return of a grand jury indictment, he must be brought as soon as possible before the trial court and informed of the charge, of his immediate right to counsel, of his right to discover the evidence upon which the indictment was based, of his right to additional discovery, and of his right to challenge the filing of the indictment.<sup>160</sup> The indicted defendant should have the right to a post-indictment determination of probable cause under rules which give him approximately the same amount of discovery and protection as the defendant who is charged by information.<sup>161</sup> Therefore, he should be given a copy of the indictment and signed statements of the testimony of each witness who appeared before the grand jury.<sup>162</sup> He should be entitled to take the discovery deposition of any witness who testified, to inspect and copy or photograph any other evidence presented to the grand jury, and to exercise any other discovery rights in the same manner and to the same extent as if he had been arrested and charged by complaint, subject to any power of the court to deny, restrict, or defer discovery or to make other appropriate protective orders.<sup>163</sup>

157. FED. R. CRIM. P. 16 (e); see ABA STANDARDS RELATING TO PRETRIAL RELEASE § 5.5 (Approved Draft, 1968).

158. The accused should be granted a reasonable time after receiving the state's written evidence within which to exercise his discovery rights and to decide whether to challenge formal prosecution. It would be difficult to fix an absolute time limit, but diligent pursuit of discovery should be required.

159. Note 167 *infra* and accompanying text.

160. Under the Alternate Model an indictment returned by laymen, but not yet publicly filed, is given the same respect as a judicial finding by the magistrate that there is probable cause to hold the accused for further proceedings. Therefore, the accused arrested after indictment should have rights equivalent to those given the accused charged by complaint.

161. The trial court cannot maintain control over the filing of formal charges, note 166 *infra*, and the accused cannot challenge a prosecution effectively if the prosecutor can avoid discovery and the trial court screening process simply by going to a "rubber stamp" grand jury to obtain an indictment prior to arrest. See note 51 *supra*. If early secrecy is important, the prosecutor may use the grand jury to conduct a closed investigation and to return indictments without immediately having to reveal his case. All discovery after indictment could be made subject to trial court restriction for good cause shown. See note 157 *supra* and accompanying text.

162. The shroud of secrecy surrounding grand jury proceedings in most jurisdictions should be removed. At least five states now give the accused an absolute right to inspect grand jury transcripts prior to trial: California, Iowa, Kentucky, Minnesota, and Oklahoma. ABA STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL 65 (Tent. Draft, 1969). The ABA Advisory Committee recommends that grand jury testimony be revealed to the accused. *Id.* § 2.1 (a) (iii) and at 66.

163. Several states permit discovery depositions by the accused after a formal charge is filed, e.g., § 545.400, RSMo 1969. See notes 154, 155 & 157 *supra*.

As in the case of post-arrest indictments and informations, no formal charge by pre-arrest indictment could be filed or made public until the accused either has exercised or waived his post-indictment discovery rights and his right to challenge the filing of the formal charge in the trial court.<sup>164</sup> Thus it should make little practical difference under the Alternate Model whether the accused is arrested before or after indictment, and the prosecutor will have little or no incentive to take a case directly to the grand jury.<sup>165</sup>

Under the Alternate Model the trial court, not lower court magistrates, would be given greater control over formal prosecution by indictment or information.<sup>166</sup> As previously stated, prior to the public filing of any formal charge, the accused would have a right to challenge his formal prosecution. He could "move to dismiss the case" on the ground that there is no "probable cause for prosecution."<sup>167</sup> The accused would be required to combine with his motion to dismiss any related motion for a return of property illegally seized or to suppress any evidence illegally obtained.<sup>168</sup> The decision on these motions usually would be based pri-

164. Note 158 *supra*; note 167 *infra* and accompanying text.

165. See note 161 *supra*.

166. An underlying premise of the Hearing Model is that trial court judges are in a better position than lower court magistrates to decide difficult questions of admissibility and the ultimate "probable cause for prosecution" issue. Also, it might appear unseemly for a lower court magistrate to overrule indictments in the trial court.

167. Any dismissal would be without final prejudice, and the prosecution could start over if more evidence became available. Note 173 *infra* and accompanying text. Note 132 *supra* sets out the "prima facie case" standard to be applied by the trial court in determining whether there is "probable cause for prosecution."

The Alternate Model provides better protection against public indictments based on incompetent, illegal, or insufficient evidence. Consider Judge Frank's statement in *In re Fried*, 161 F.2d 453, 458 (1947):

The government . . . argues that an indictment founded upon such illicit evidence will do the applicant no harm, since such evidence will not be admitted at the trial which follows the indictment. That is an astonishingly callous argument which ignores the obvious. For a wrongful indictment is no laughing matter; often it works a grievous, irreparable injury to the person indicted. The stigma cannot be easily erased. In the public mind, the blot on a man's escutcheon, resulting from such a public accusation of wrongdoing, is seldom wiped out by a subsequent judgment of not guilty. Frequently, the public remembers the accusation, and still suspects guilt, even after an acquittal (Emphasis added).

New York courts quash indictments based on incompetent, illegal or insufficient evidence, since the grand jury is supposed to screen out cases unless "convinced . . . [that] the evidence . . . , unexplained and uncontradicted, would warrant a conviction by a trial jury." N.Y. CODE CRIM. PROC. § 251; *People v. Jackson*, 18 N.Y.2d 516, 223 N.E.2d 790, 277 N.Y.S.2d 263 (1966) (evidence held insufficient to sustain a conviction, indictment dismissed). However, under New York procedure the accused is publicly indicted before the indictment can be challenged.

*But see Costello v. United States*, 350 U.S. 359, 363 (1956).

168. FED. R. CRIM. P. 41(e). See *In re Fried*, 161 F.2d 453 (1947), and Judge Frank's statement from the *Fried* case, note 167 *supra*.

In *DiBella v. United States*, 369 U.S. 121 (1962), the Supreme Court held



marily on depositions and other discovery obtained by the state or the accused, a transcript of the sworn statements of state witnesses and witness testimony presented to the magistrate, and any stipulations of the parties.<sup>169</sup> After examining the written evidence and contentions of the parties, the court in its discretion could receive additional evidence and would listen to oral argument on any issue of fact or law necessary to a decision.<sup>170</sup> If the right to challenge formal prosecution were waived, or if the court believed that the state had shown sufficient admissible evidence to warrant a conviction by a jury, the formal charge could be filed and made public.<sup>171</sup> Otherwise, the case would be dismissed and the defendant discharged.<sup>172</sup> No later prosecution on the same charge could be initiated except by leave of the trial court upon good cause shown.<sup>173</sup>

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that there is no finality and can be no appeal from a pre-indictment motion to suppress ruling because of serious disruption to the conduct of a criminal case. For this same reason, interlocutory appeals from pretrial rulings against the accused under the Alternate Model would not be permitted. However, the accused still should receive more initial protection from a trial court pretrial ruling than from a lower court ruling.

169. Any hearing at this stage would be limited in scope by the discovery presented by the parties. The Alternate Model would not save much court or witness time if anything like the Hearing Model preliminary hearings were held at this stage. Few hearings or "determinations" of probable cause for prosecution should be anticipated at this stage, for the written evidence ordinarily would be more than adequate to support formal prosecution.

Some authorities might object to the use of witness statements to help the trial court make a final determination of probable cause or a preliminary determination of admissibility of evidence, since there may have been no confrontation of the accused with a particular witness. However, under the Alternate Model the accused would have the *opportunity* to confront and cross-examine any state witness relied upon to establish probable cause or the admissibility of evidence. In addition, it is the right to confront the witnesses against him at the time of trial which is the basic guarantee of the sixth amendment. See *California v. Green*, 90 S. Ct. 1930 (1970). A grand jury finding of probable cause constitutionally may be based solely on hearsay. *Costello v. United States*, 350 U.S. 359 (1956).

170. See note 169 *supra*. If the probable cause question were close, either the prosecutor or defense counsel might wish to present more evidence. The court should be given control over the amount of additional evidence presented to prevent any hearing on the probable cause issue from turning into a preliminary trial. However, the court ordinarily would want to receive all evidence available on a motion to suppress evidence to prevent relitigation of the question at the time of trial. See note 169 *supra* on the confrontation problem.

171. See note 132 *supra* on the "probable cause for prosecution" standard. It would not be the court's function to attempt to judge credibility, unless the story of a witness were incredible. However, if the accused could show through limited discovery that the state has a weak case, perhaps because one or more witnesses are unreliable or because an excellent defense has been found, the court could perform the valuable function of advising the prosecutor that it would be wise to drop the case or to reduce the charge before a formal charge is filed, even though the state technically might be entitled to proceed. The prosecutor probably would heed the court's advice unless he had additional evidence to present at trial to cover the weak points in his case.

172. If an indictment had been returned to the court, it should be kept unfiled and secret or destroyed. The grand jury is sworn to secrecy and this should cover dismissed indictments.

173. Note 86 *supra* and accompanying text. In some cases additional evidence will be found, and the prosecutor could ask the court's permission to proceed

Although it would be possible to go into greater detail to answer more of the questions raised by the Alternate Model, further elaboration could complicate and distort its comparison with the previous outline of the Hearing Model and with present procedures.

It should be apparent that many combinations of separate procedures could be put together to form viable models for comparison purposes. There may be disagreement with a few or many of the provisions of the Alternate Model; however, it incorporates many procedures recommended by authoritative groups that have taken stands on contemporary issues. Thus it should serve as an adequate basis for comparison with the Hearing Model and should help us to determine which type of approach should be taken not only to solve present problems, but also to establish a procedural framework that can be adapted to meet future needs.

#### B. *Competing systems in operation in an urban environment*

A comparison of the Hearing Model and Alternate Model could be made through general or specific observations about apparent advantages and disadvantages of each system. However, enough has been written about the goals and theory of each model, and about the functional disadvantages of the Hearing Model, to enable the reader to form some tentative conclusions.

Perhaps the best way to "test" these models and to make a fair comparison before final conclusions are drawn is to attempt to visualize them in operation in a typical urban environment. In order to do this, let us examine two allegories about identical twins, D1 and D2, each of whom was arrested for allegedly committing grand larceny<sup>174</sup> of a suit of clothes. D1 was arrested in city C1 and D2 in city C2. Both cities are located in state S and are identical in every respect except that the pretrial criminal process in C1 operates under the Hearing Model, while in C2 the Alternate Model is followed. We will follow each case through the early stages of criminal proceedings, including appearances before lower court magistrates, M1 in C1 and M2 in C2, both members of the bar. Assistant prosecutors P1 in C1 and P2 in C2 represent the state, and defense attorneys DC1 in C1 and DC2 in C2 are appointed and adequately paid to represent D1 and D2 throughout the proceedings.

Additional background information is needed. To make the cases more relevant to current problems and to the contemporary reappraisal of

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by way of information or indictment. The accused should be notified and given an opportunity to contest further prosecution.

174. The applicable larceny statute of state S provides:

Every person convicted of larceny if the value of the property stolen exceeds the value of \$50 shall be imprisoned in the penitentiary not less than one, nor more than 10 years; if the property stolen is of the value of \$50, or less, the person convicted shall be confined in the county jail not exceeding one year, and be fined not exceeding \$100. [Based on ILL. REV. STAT. ch. 38, § 389 (1961)].

pretrial criminal procedure, the allegories will include more difficulties than might be encountered in the ordinary criminal case. However, by keeping this in mind, any danger of distorting the comparison of the Hearing Model and Alternate Model in operation will be minimized.

Prior to arrest, D1 and D2 had been living together in a small apartment in city X in state Y, 500 miles from state S. Both were indigent at the time of arrest, as they had just started working as traveling salesmen for employer E after a long period of unemployment. D1 had gone to C1 and D2 to C2 in search of new customers. Neither D1 nor D2 had been in state S before, and neither of them had any friends or acquaintances in S.

After the reported thefts policemen in C1 and C2 found eyewitnesses who had seen a man running from the respective clothing stores in C1 and C2 carrying a suit. The two eyewitnesses to each theft gave a detailed description of the man to police, but a description that many men would fit. D1 was arrested in C1 and D2 in C2 because they seemed to fit the descriptions. En route to the C1 and C2 police stations, D1 and D2 were asked to state their business, their local address, and to account for their whereabouts at the time of the thefts. D1 and D2 each explained that he was a traveling salesman staying at a nearby hotel, and each admitted being in the neighborhood of the clothing store at the time of the theft. They each denied stealing anything but said that it would be nice to be able to afford a new suit. No *Miranda* warnings were given by police prior to these statements.<sup>175</sup> On the way to the police stations the arresting officers in C1 and C2 stopped at the local hotels named by D1 and D2. When D1 and D2 each refused to consent to a search of his room, the officers obtained permission and a key from the hotel manager to enter and search the room. A suit was found and seized in each search that matched the description of the stolen suit; however, no price tags or other identifying marks from any clothing store were found. D1 and D2 each told the arresting officers that he had purchased the suit in X at a certain clothing store.

In C1, D1 was brought as soon as possible before M1,<sup>176</sup> who informed him of the grand larceny complaint that the police were filing against him,<sup>177</sup> of his right to counsel and of the importance of counsel for a person in his position, and of his right to a preliminary hearing on the charge.<sup>178</sup> Upon learning that D1 was indigent, M1 appointed DC1 to represent him. After filing the grand larceny complaint, the arresting officers

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175. *Miranda v. Arizona*, 384 U.S. 436 (1966).

176. Note 62 *supra* and accompanying text, the first provision of the Hearing Model.

177. The Hearing Model makes no formal provision for prosecutorial control over the filing of charges by police who arrest without a warrant. Of course, police faced with what *they* believe is a difficult legal or factual problem may consult the prosecutor for advice before filing a charge. See TASK FORCE REPORT: THE COURTS 122.

178. See notes 65 to 67 *supra* and accompanying text.

went back on patrol before DC1 appeared.<sup>179</sup> DC1 arrived and conferred briefly with his client, read the charge, and then demanded an immediate preliminary hearing. M1 denied the request and explained that it would not be possible to hold a preliminary hearing for at least four days because of a backlog of requested hearings and his knowledge that P1 and the police would need time to subpoena state witnesses.<sup>180</sup> M1 then scheduled the hearing to be held in four days but cautioned DC1 that a further postponement might be necessary, depending upon the lengths of previously scheduled hearings.<sup>181</sup> Since D1 was unknown in C1, M1 automatically fixed bail at \$1,000, and D1 was committed to jail pending the hearing.<sup>182</sup>

In C2, D2 was taken before M2 immediately after a brief stop at the police station.<sup>183</sup> M2 informed D2 that he had been arrested for grand larceny, of his right to counsel and of the importance of counsel for a person in his position.<sup>184</sup> When he learned that D2 was indigent, DC2 was immediately appointed to represent him. While waiting for DC2 to arrive, M2 explained that the police would have to obtain a complaint from the prosecutor within a few hours or D2 would be released,<sup>185</sup> unless the prosecutor could show good cause for a brief postponement or a remand before making a charge decision.<sup>186</sup> DC2 arrived and asked to see the police arrest statement.<sup>187</sup> M2 had his clerk call the police station and learned that the statement would be delivered within an hour. In the meantime P2 called M2 and requested a remand for a lineup because he felt an eyewitness identification should be made before he could justify filing a charge.<sup>188</sup>

At this stage it would be rewarding to compare what might happen to D1 and D2 as a result of these early proceedings and the options open to them and to their attorneys.

179. Officers on duty who make arrests commonly would have to spend much of their working time in court if they had to go to or remain at the initial appearance until defense counsel arrived. Since a preliminary hearing may be held soon, *see* note 25 *supra*, normally a magistrate automatically accepts any police complaint after a warrantless arrest.

180. *See* note 97 *supra* and accompanying text.

181. M1 seldom could predict in advance how long each of the preliminary hearings on his calendar would last under the Hearing Model. Even if taxpayers were willing to provide extra magistrates and courtroom facilities, there would be times when backlogs would build up temporarily, providing "good cause" for postponement beyond any short time limitations. *See* note 71 *supra*.

182. Because they are unknown in C1 and C2 and nonresidents of the state, neither D1 nor D2 could expect to be released on recognizance or order to appear. However, under the Alternate Model more arrested persons should be released at an early stage without bail. *See* notes 147 to 151 *supra* and accompanying text. While M1 is busy conducting preliminary hearings to clear his calendar, M2 can devote more attention to making appropriate conditional release decisions and is more likely to carry out his duty of minimizing unnecessary detention.

183. Notes 112 & 113 *supra* and accompanying text.

184. Notes 115 to 117 *supra* and accompanying text.

185. Notes 118 & 122 *supra* and accompanying text.

186. Notes 120 & 121 *supra* and accompanying text.

187. Note 124 *supra* and accompanying text.

188. *See* notes 198 & 199 *infra* and accompanying text for an explanation of the prosecutor's position.

In D1's case, P1 might not learn much about the events leading to the arrest and the filing of the complaint by police until the preliminary hearing, scheduled for four days after the arrest.<sup>189</sup> In the meantime D1 probably would be languishing in jail<sup>190</sup> unless he or DC1 could contact E, D1's employer, and get him to put up bond. D1 may or may not be placed in a lineup during this period to see if the eyewitnesses can identify him.<sup>191</sup> If one or both of the eyewitnesses identifies D1 or says that he looks like the man seen running from the clothing store, at least one eyewitness probably will be subpoenaed to attend the scheduled hearing to make another identification.<sup>192</sup> DC1 may not be able to learn the identity of either eyewitness before the hearing, depending upon whether there is a lineup and the attitude of P1 and the police about revealing their case beforehand.<sup>193</sup> Even if DC1 learns the identities of the eyewitnesses, perhaps at the time of a lineup, they may refuse to discuss the case with him.<sup>194</sup> DC1 may or may not be able to learn from the arresting officers the precise grounds for the arrest. Even if he discovers that there was no probable cause for the arrest because the eyewitness descriptions were not specific enough, it is unlikely that he could secure the release of his client by a writ of habeas corpus.<sup>195</sup> If D1 gives DC1 the name of a store clerk who supposedly sold

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189. Under the Hearing Model the preliminary hearing is supposed to serve the purpose of providing preliminary discovery, and the police and prosecutor are not required to provide any discovery before the hearing. "The proper scope and extent of discovery of police reports and witness statements is a matter of heated controversy . . ." TASK FORCE REPORT: THE COURTS 42.

190. P1 has no duty or incentive under the Hearing Model to review the police decision to charge. Even if he happens to determine that the arrest of D1 was without probable cause and that illegal activities led to the illegal seizure of the suit in D1's hotel room, he could not be expected to ask M1 to dismiss the police complaint before the preliminary hearing. See note 118 *supra*.

191. Thinking that they have the thief and sufficient evidence other than eyewitnesses (the suit) to establish probable cause at the preliminary hearing, C1 police may not hold a lineup. Instead they may follow the practice of showing eyewitnesses a series of pictures, including D1's mug shot, in the absence of DC1. See notes 223 & 226 *infra* and accompanying text on the impropriety of this procedure in this case. If no positive identification were made from the pictures by either of the eyewitnesses, DC1 might not learn about it until the time of the hearing, if then; and it might be too late to contact and subpoena the eyewitnesses to testify at the hearing, unless a continuance could be obtained.

192. See note 100 *supra* and accompanying text.

193. Many prosecutors and police departments are reluctant to disclose anything about the state's case which can be withheld. Since secrecy as late as the trial is still a legitimate tactic in criminal proceedings in most states, it is unlikely that many prosecutors or police departments would consider it wise to reveal the state case prior to the preliminary hearing. Secret identification procedures, see note 191 *supra*, may continue to be used unless early lineups are required or made necessary by early administrative screening procedures like those of the Alternate Model.

194. TASK FORCE REPORT: THE COURTS 43. Since he has no official status like the prosecutor and police, witnesses often refuse to discuss a case with defense counsel.

195. Cf. note 46 *supra* and accompanying text. With the hearing date so close and considering the probability that police would immediately arrest D1 again because of later-discovered evidence, few courts would grant such a drastic remedy for an illegal arrest.

him the seized suit in city X, DC1 could not subpoena the witness from state Y to attend the hearing over 500 miles away in state S.<sup>196</sup> In short, DC1 is in a very poor position to investigate the case for D1 prior to the hearing or to take early steps to secure his client's release from custody.

D2, on the other hand, is in a much better position. P2 has an immediate duty to review the circumstances of the case with the police before making his charge decision.<sup>197</sup> Assuming that a prosecutor under the Alternate Model would act as a responsible screen at this stage, P2 should soon discover that the descriptions of the two eyewitnesses are the only "legal" evidence in the case.<sup>198</sup> P2 should then convince M2 of the need for an immediate remand for a lineup.<sup>199</sup> DC2 would be present at this early lineup and should learn the identities of both eyewitnesses, since the police would be taking their statements and DC2 should have an opportunity to see whether improper suggestions are made to them when their statements are taken.<sup>200</sup> DC2 should get copies or be allowed to inspect the eyewitness statements whether or not P2 intends to rely upon both statements to show probable cause.<sup>201</sup> If neither eyewitness positively identifies D2 at the lineup, P2 probably would not file charges and D2 would be released.<sup>202</sup>

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196. See note 81 *supra* and accompanying text. While 45 states have enacted reciprocal legislation to obtain the testimony of unwilling witnesses who are nonresidents or who have fled the state, in the form of the UNIFORM ACT TO SECURE THE ATTENDANCE OF WITNESSES FROM WITHOUT A STATE IN CRIMINAL PROCEEDINGS, see 9 UNIFORM LAWS ANN. 50 (Supp. 1967), the Act does not make provision for preliminary hearings. Even if the Act were amended to cover preliminary hearings, there would not be time to comply with its provisions before the preliminary hearing should be held.

197. Note 118 *supra* and accompanying text.

198. P2 should learn while questioning the arresting officers that they failed to give D2 any *Miranda* warnings after arresting him and before any questioning, note 175 *supra* and accompanying text, and that without D2's consent the search of his hotel room was illegal even though police had obtained the hotel manager's consent. *Stoner v. California*, 376 U.S. 483 (1964) (consent of hotel clerk to search insufficient).

199. See note 120 *supra* and accompanying text. An early lineup here appears likely to result in information necessary for the charge decision.

200. DC2 must be notified of the lineup and counsel's presence is a requisite to a lineup, absent an "intelligent waiver." *United States v. Wade*, 388 U.S. 218 (1967). The writing down of the witnesses' responses upon viewing the accused should be regarded as a "critical stage" of the lineup procedure under the Alternate Model, which requires the preparation of witness statements. See note 134 *supra* and accompanying text.

201. See D. Napley, *A GUIDE TO LAW AND PRACTICE UNDER THE CRIMINAL JUSTICE ACT OF 1967* 10-11 (1968). Speaking of the new English procedure of committing cases for trial on written statements, he speculates:

Another benefit likely to follow is a change in the climate of police opinion in relation to the supplying of evidence and information in advance of the hearing. Until now it has been virtually impossible to extract copies of witnesses' statements, or information as to the details of the case, from the most cooperative of police officers. Generations of them have been reared in the belief that nothing should be disclosed which can be withheld. As time passes, they may become so used to serving copies of statements, that they may become more disposed to serve them in respect of all the witnesses even in summary cases. *Id.*

202. Note 198 *supra* and accompanying text.

Thus at this early stage D2 might be released, while D1 probably would be languishing in jail and anxiously looking forward to his preliminary hearing. Since the police ordinarily do not or could not screen cases as carefully as a prosecutor, who is much less likely to rely on illegally obtained evidence in making a decision to prosecute, D1 might remain charged and in jail even if he were not positively identified in a police lineup.

Proceeding with the story, let us assume that one of the eyewitnesses has made a positive identification of D2 in a properly conducted lineup requested by P2. After P2 files a grand larceny complaint, DC2 demands a probable cause determination.<sup>203</sup> Since most probable cause determinations in C2 are waived and the rest are based primarily on witness statements served on the accused, M2 has no backlog of probable cause determinations to make. He sets an early date for the determination, two days after the arrest, which will give the state time to obtain witness statements.<sup>204</sup> Prior to the time scheduled for the determination, DC2 receives sworn statements of the eyewitnesses describing the man they saw leaving the clothing store and containing their responses at the time they saw D2 in the lineup.<sup>205</sup> He receives a sworn statement of the manager of the clothing store describing the suit taken by the man and listing a "fair cash value"<sup>206</sup> of over \$50, the dividing line between grand and petty larceny. DC2 also receives sworn statements of the arresting officers about the circumstances of the arrest and the seizure of the suit from D2's hotel room.<sup>207</sup> Finally, he receives a report of the prosecutor describing other evidence relied upon to show probable cause, including a description of the clothing D2 was wearing when arrested. Some of this other evidence may have been identified by witnesses and referred to in their statements.<sup>208</sup> If P2 should choose to rely upon the suit found in D2's hotel room to help establish probable cause, the statement of the store manager might include a reference to it as the suit or that it looks like the suit taken from his store.<sup>209</sup>

After receiving and examining all this written evidence, DC2 would have several options. He could prepare to argue, if feasible, why the state had not established probable cause to hold D2. He could consult with his

203. Note 128 *supra* and accompanying text.

204. Notes 133 & 134 *supra* and accompanying text.

205. See note 200 *supra* and accompanying text.

206. *People v. Fognini*, 374 Ill. 161, 28 N.E.2d 95 (1940), so interpreted the statute, note 174 *supra*. For a grand larceny conviction the state must prove the "fair, cash market value at the time and place of the theft." *Id.* at 165, 28 N.E.2d at 97.

207. To avoid duplication of effort, the arresting officers' sworn statements could be included and delivered to the magistrate and defense attorney as part of the police arrest statement, note 124 *supra* and accompanying text.

208. Note 135 *supra* and accompanying text. In more difficult cases involving numerous exhibits, the prosecutor might wish to call one or more witnesses to the determination to tie in the evidence.

209. See note 135 *supra*. Of course, DC2 could challenge this identification later by discovery, but he would probably wait and move to suppress the suit as evidence in the trial court. See note 198 *supra*.

client about what explanation, if any, he could and should give in response to the state's case.<sup>210</sup> In this particular case DC2 might decide that the written evidence clearly establishes probable cause for holding D2, and he could decide to save the court's time by advising his client to waive the determination so that they could proceed immediately to the discovery stage.<sup>211</sup> DC2 is not faced with the "all or nothing" decision which D1 and DC1 have to make with respect to waiver of the preliminary hearing, for D2 can move to dismiss the case at a later stage in the trial court when he is better prepared to argue and to prove a case for dismissal.<sup>212</sup> In the meantime DC2 would build a case by discovery to support a motion to suppress any illegally obtained evidence, like the suit which was illegally seized from D2's hotel room.<sup>213</sup> DC2 also might seek to prove by deposition that D2 bought the suit in X, as he told police,<sup>214</sup> or that suit was not worth \$50 as claimed by the manager of the clothing store.<sup>215</sup> This discovery could lead to early informed negotiations about disposition of the case on a mis-

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210. Note 140 *supra* and accompanying text.

211. To achieve a maximum rate of intelligent waivers of the determination, there should be a requirement in the Alternate Model that all written evidence upon which the state intends to rely must be served on the defense attorney at least a few hours before the scheduled determination. Under present procedures and the Hearing Model there is often no way for counsel to determine prior to the preliminary hearing whether the state can show probable cause, and thus no way to make an intelligent waiver. Moreover, under the Hearing Model defense counsel could never waive the hearing if he wished to pursue early discovery. Thus the Hearing Model would *increase* the number of preliminary hearings, while early discovery under the Alternate Model should *decrease* the number of probable cause determinations.

212. Note 167 *supra* and accompanying text. Of course, if there is a case to be made against D2, the state also should be better prepared by that time.

213. If P2 were not willing to stipulate that the suit was illegally seized, DC2 could take the depositions of the arresting officers and should be permitted by the trial court to take the hotel manager's deposition so that a full hearing on the motion to suppress would not be necessary.

214. DC2 is not limited by the inability to subpoena witnesses from out of state to attend a hearing, *see* note 196 *supra* and accompanying text. If DC2 could find the store clerk in X who allegedly sold D2 the suit that was seized from his hotel room in C2, he could photograph the suit for identification purposes, note 155 *supra* and accompanying text. If the clerk and perhaps the store records in X may back up D2's story, DC2 should be permitted by the trial court to take the clerk's deposition on written interrogatories. Note 154 *supra*. A convincing deposition from the clerk might convince P2 that D2 is not the thief and lead to dismissal of the case. D1 could not obtain such discovery at this stage and in most states never would be able to obtain defense evidence in this manner. Note 163 *supra*.

215. D2 has the right to confront and cross-examine the store manager about the suit and its cost, how long it has been in stock (he might subpoena the store records), and any other relevant details. Note 152 *supra* and accompanying text. DC2 could prepare for cross-examination by checking with other clothing merchants to determine the "fair cash value" of such a suit in C2. In a borderline case, the trial court should permit DC2 to take other depositions on value before deciding whether there was a *prima facie* grand larceny case. *See* notes 154 and 167 *supra* and accompanying text.



demeanor larceny charge,<sup>216</sup> or DC2 might convince P2 or the trial court that the case should be dismissed without any public prosecution.<sup>217</sup>

Returning to the case of D1, we find him making his second appearance before M1 four days after the initial appearance. Fortunately, no postponements were caused by the unavoidable unavailability of any key state witness or the unexpected length of other hearings previously scheduled.<sup>218</sup> As the hearing starts, D1 and DC1 are expecting to learn much more about the state's case, and they hope that P1 will not be able to present enough evidence to show probable cause for formal prosecution.<sup>219</sup> DC1 was unable to discover the identities of all of the state's witnesses prior to the hearing, and he has no idea what some of them will say.<sup>220</sup> Thus he does not feel he should advise his client to waive the hearing. DC1 hopes that his renowned ability to "think on his feet" will permit him to cross-examine all the witnesses effectively in order to expose and freeze inconsistencies and weaknesses in their testimony and to discover other evidence which might aid him in plea negotiations or in preparing for trial.<sup>221</sup>

P1 produced one eyewitness at the preliminary hearing who identified D1 as the man he had seen running from the store with a suit. P1 also called the arresting officers, who related the events leading up to the arrest, and the store manager, who described the suit taken and gave a \$60 estimate of its value.

DC1 diligently cross-examined each state witness. The eyewitness admitted that there had been another eyewitness at the scene, but neither he nor the arresting officers knew his name or whereabouts.<sup>222</sup> The eyewitness also testified on cross-examination that he had first identified D1 from a series of police mug shots shown to him two days prior to the hearing.<sup>223</sup> When DC1 learned that none of the other persons pictured in the series of mug shots resembled D1 (who has a very swarthy complexion) and that the eyewitness was some distance from the clothing store when the man ran out and away from him, he moved to strike the eyewitness identification

216. P2 or the trial court might decide that the charge should be lowered to petty larceny, and D2 would at least avoid the stigma of having been publicly charged with a felony. If plea negotiations take place, discovery prevents negotiation in ignorance. TASK FORCE REPORT: THE COURTS 44.

217. See note 171 *supra*.

218. See notes 72 & 97 *supra*.

219. Compare this "one shot" approach under the Hearing Model with the "multiple opportunity" approach of the Alternate Model, which includes a final opportunity to check the prosecution through trial court action.

220. See notes 189 & 193 *supra*.

221. See notes 32 & 34 *supra* and accompanying text.

222. Since there was no lineup, the police would have little motive to have the eyewitnesses view the pictures at the same time, which might provide a basis for impeaching their mug shot identification technique. The arresting officers usually would not handle the identification procedure or serve as detectives to investigate the case.

223. See note 191 *supra*. D1 would not have the benefit of prosecutorial screening that probably would lead to an early lineup. Notes 197 to 199 *supra* and accompanying text.

on constitutional grounds. Based upon recollections about the decisions in *United States v. Wade*<sup>224</sup> and *Stovall v. Denno*,<sup>225</sup> he argued that in the absence of counsel the police had used improper suggestion in showing photographs to the eyewitness and that there was no clear government evidence that the hearing identification of D1 was based upon any observation of D1 other than his photograph. Therefore, he claimed that D1 had been denied due process of law. P1 responded by arguing that the *Wade* and *Stovall* "lineup" cases could easily be distinguished,<sup>226</sup> and that the matters revealed on cross-examination affected only the credibility of the eyewitness identification, a matter for the trial jury. Of course, neither DC1 nor P1 had submitted briefs on the unanticipated issue.<sup>227</sup> M1 overruled DC1's motion with the explanation that *Wade* and *Stovall* could be distinguished and that in any event the issue could be raised again in the trial court.<sup>228</sup>

If P1 had decided to present the suit found in D1's hotel room to help establish probable cause,<sup>229</sup> DC1 might have been faced with a similar situation and attitude on the part of M1.<sup>230</sup> A busy magistrate can always

224. 388 U.S. 218 (1967) (right to counsel at lineups).

225. 388 U.S. 293 (1967) (unnecessarily suggestive confrontation with eyewitnesses may deny due process).

226. P1 might have cited *Simmons v. United States*, 390 U.S. 377 (1968), permitting mug shot identifications in the absence of counsel; but DC1 also could rely on *Simmons* and argue that the photographic identification procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Id.* at 384.

227. Seldom would the defense counsel or prosecutor be able to anticipate all difficult evidentiary problems in advance of the preliminary hearing or have time to do extensive briefing. Thus evidentiary problems and constitutional issues probably would be argued in most instances in the "rough and tumble manner" described by K. Graham and L. Letwin, in *A STUDY OF THE PRELIMINARY HEARING IN LOS ANGELES*, at 43-44 (1969).

228. However, under the Hearing Model the issue could not be raised again until *after* a public charge in the trial court, perhaps not until the trial when the state asks the eyewitness to identify D1 again.

229. In the absence of a prior duty to screen the evidence, *see* note 198 *supra* and the Alternate Model, many prosecutors might rely on the magistrate to rule on evidentiary questions.

230. Here it seems less likely that M1 would pass the buck to the trial court than in the "mug shot" situation, note 191 *supra*, for one of the functions of a magistrate is to determine whether there is probable cause to issue search warrants. With his greater knowledge of the law of search and seizure, M1 might be familiar with cases like *Stoner v. California*, 376 U.S. 483 (1964) (consent of hotel clerk to search insufficient).

However, the judges of the Judicial Conference Committee on the Administration of Criminal Law, in considering the possible use of U. S. commissioners to decide difficult constitutional questions, were "unanimous in feeling that those questions were too difficult to submit to any commissioner, no matter how well qualified he might be." *Hearings*, 89th Cong., 1st Sess., pt. 2, at 143 (1965). As a result, Warren Olney III, the Director of the Administrative office of U. S. Courts, recommended doing away with the preliminary hearing and replacing it with a deadline on indictments and a hearing *after indictment* before the trial court to decide "all issues relating to the legality of arrest, the promptness of arraignment, the legality of search, the admissibility of all admissions or confessions . . . ." *Id.* at 128.

take the convenient position that in the absence of briefs from both sides on a debatable or difficult question of constitutional law, particularly when there is other evidence apparently establishing probable cause, it might be better to give the state the benefit of the doubt and leave the decision to the trial court.<sup>231</sup> A busy magistrate who takes such a position is unlikely to grant continuances so that the parties can prepare and submit briefs on unanticipated issues of law.

DC1 carefully cross-examined the store manager, who had testified that the "fair cash market value" of the stolen suit was \$60. He learned that the suit had been purchased at a wholesale cost of \$55 and had been stolen from a "sales rack" of suits. The manager could not remember when he had purchased the suit, although he admitted that he might be able to get this information by examining his purchase records. DC1 moved for a continuance on the grounds that he might be able to find defense witnesses who would testify that the suit was not worth \$50 and that this would give the store manager time to check his records for the purchase date. M1 denied the continuance, stating that he had heard enough evidence on value to establish probable cause to hold D1 for prosecution for grand larceny and would not grant a continuance based on counsel's speculation about a possible defense.<sup>232</sup>

We can now further summarize and compare the relative positions of D1 and D2 at the end of the initial proceedings in the magistrate court. Both were bound over to the trial court and probably will remain in jail pending further proceedings.<sup>233</sup> However, D2 is in a much better position, as partially outlined above.<sup>234</sup> He cannot be prosecuted publicly by indictment or information unless he waives or until he exercises his initial discovery rights, after which he may take further action against formal prosecution. If he exercises these discovery rights, DC2 will not be cross-examining essential state witnesses from a position of ignorance.<sup>235</sup> As a result of discovery, D2 may be able to secure his discharge prior to any public felony charge by moving to suppress certain evidence and to dismiss the grand larceny case.<sup>236</sup> If this does not result in a complete release, it may precipi-

231. See notes 42 to 44 *supra* and accompanying text. The Hearing Model would do little to prevent these problems even if many more well-trained judges were provided.

232. "Good cause" required for a continuance, note 72 *supra*, applies not only to the state but also to the accused. He should not be permitted to secure a continuance and prevent a bindover merely by showing that there *might* be some defense available if he were given more time to investigate. Here the state's evidence on value shows a substantial possibility of conviction of grand larceny, see note 79 *supra*.

233. Note 182 *supra*.

234. Notes 210 to 217 *supra* and accompanying text.

235. Notes 205 to 209 *supra* and accompanying text.

236. A motion to dismiss, note 167 *supra* and accompanying text, need not be directed at the entire prosecution, but in the alternative could request at least a dismissal of the felony prosecution. If the magistrate court has sole jurisdiction of misdemeanors, a dismissal of the grand larceny charge because the suit is not worth \$50 would mean that P2 could go back to the lower court to prosecute.

tate plea negotiations or lead to a charge reduction in the trial court to petty larceny. P2 may be saved from a humiliating total or partial defeat at trial, and the state may be saved the expense of an unnecessary jury trial which might at most result in a petty larceny verdict.<sup>237</sup>

D1 is in a precarious position after the preliminary hearing. He has received very little protection from formal prosecution and probably will not receive any more judicial protection.<sup>238</sup> P1 is likely to move quickly to file an information or to obtain a grand larceny indictment in the trial court. Thus there is little time and no good incentive for DC1 to move for trial court suppression of evidence which should not be relied upon as a basis for a formal charge. He might as well advise his client to wait until after the formal charge is filed and then make a pretrial motion to suppress. DC1 might enter early plea negotiations with P1, but after the preliminary hearing he would be bargaining from a relative position of weakness and ignorance in spite of his valiant attempts to discover more of the state's evidence and to suppress certain evidence.<sup>239</sup> He may be able to obtain more discovery after a formal charge is filed, but by then P1's bargaining position will be more limited and inflexible.<sup>240</sup> And by that time severe damage may have been done to whatever reputation D1 had as a good citizen, he may have lost his job, and he will find it more difficult to return to a normal life even if he is acquitted at the trial.<sup>241</sup>

#### IV. CONCLUSIONS

Any sound reappraisal of pre-trial criminal procedure must take into account the past development as well as the proper future role of the preliminary hearing. With only legislative history as a guide, we might predict a continuation of the twentieth century trend to "judicialize" the

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237. Discovery by the accused will often aid the prosecutor, who has a great interest in maintaining a high "win record" to facilitate the disposition of cases before trial by guilty pleas.

238. Another judicial screening procedure could be built into the Hearing Model; however, there would be a great waste of judicial time and effort if both the magistrate and the trial judge were required to determine whether the state could show probable cause for prosecution.

239. D1 would be in a better position if he had funds to pay for private investigation, so that he could *informally* provide P1 with information that might cause him to drop or reduce the charge. The Alternate Model permits *formal* discovery and presentation of evidence to the court, thus reducing the danger of overreaching by the prosecutor during plea negotiations which operate in an informal, invisible manner. See *generally* TASK FORCE REPORT: THE COURTS 9-11 on the dangers of informal and uninformed plea bargaining. Any court reviewing the basis for a guilty plea under the Alternate Model would have a sound basis for determining whether or not to accept the plea.

240. Plea negotiations after the filing of a formal charge are likely to be restricted in scope by the limited alternatives then available. See TASK FORCE REPORT: THE COURTS 135 (Detroit, usually restricted to reducing charge or by plea to one of several offenses charged).

241. See Judge Frank's statement in *In re Fried*, 161 F.2d 453, 458 (1947), note 167 *supra*.

hearing by the addition of more "fair trial" procedures.<sup>242</sup> However, added to this we have a judicial history of numerous efforts to "judicialize" the hearing. The recent "right to counsel" decision in *Coleman v. Alabama*<sup>243</sup> portends increasing pressure on state courts and legislatures to grant more rights to the accused in connection with the preliminary hearing and may portend future efforts to guarantee that a hearing must be held unless waived. If this judicializing trend continues, we can predict that the present statutory right to a preliminary hearing will turn into an absolute statutory or perhaps even a constitutional right to a "preliminary trial" on the issue of probable cause. We would then be confronted with at least a de facto "two trial" criminal process.

However, in our increasingly urban society the numerous theoretical benefits of such a "preliminary trial" would seldom be realized in practice. Again using past history as a guide, we would predict that "assembly line preliminary trials" would be held in overloaded lower court systems. Even if there were a constitutional mandate to hold preliminary hearings, it is doubtful that society would willingly provide sufficient additional resources to permit development of an adequate "two trial" criminal process. Furthermore, considering the functional compromises that must be made in any attempt to improve a preliminary, adversary, multi-purpose judicial hearing, it does not appear sensible in theory to "judicialize" or to absolutely require the hearing—assuming that better and less costly alternative procedures could be made available.

It is easier to find reasons why "model" preliminary hearing procedures have not and could not be expected to perform well than it is to find or develop a system of better alternative procedures. However, an Alternate Model has been designed and "tested" in this article to help determine whether there are viable and better alternatives to current and proposed Hearing Model procedures. The Alternate Model contains a set of procedures that would almost eliminate the application of trial court rules in early stages of the criminal process, while the Hearing Model indicates how the system would operate if current trends are continued and most criminal trial rules and rights became applicable to the preliminary hearing.

The allegories about D1 and D2 show that the combination of procedures in the Alternate Model should operate more efficiently, effectively and economically in achieving the goals of Hearing Model procedure. In addition, the allegory about D2 and his Alternate Model experiences indicates that these procedures would provide great protection to an accused person in an urban environment, without hampering law enforcement. Finally, since most of the features of the Alternate Model have already been defined in recent progressive proposals for reform, there appears to be a

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242. See notes 18 to 22, 24 to 26 *supra*.

243. 90 S. Ct. 1999 (1970).

solid foundation for a viable new system of procedures if we abandon Hearing Model trends and sentiments.

A basic strength of the Alternate Model is its premise that a trial court judge is more responsible and capable than the ordinary magistrate to make important decisions affecting the prosecution of a case. If the trial judge is able to make accurate decisions on whether there is probable cause for prosecution, the role of the preliminary hearing can be eliminated or played down. And if the trial judge can make most of these probable cause determinations without full hearings, as contemplated under the discovery-oriented Alternate Model, the savings made by eliminating or phasing out the preliminary hearing will not be wasted on later probable cause hearings in the trial court.

Obviously, the Alternate Model system is not the only viable combination of procedures that could be substituted for the "one shot" multi-purpose preliminary hearing. Anyone who still considers the preliminary hearing sacrosanct or who disagrees with some of the procedures in the Alternate Model might prefer another combination of procedures and perhaps a real test of an alternate system. In order to give courts, law enforcement officials, and defense attorneys a chance to test an alternate system and to adjust to it in practice, a state could adopt the system temporarily as an optional set of procedures. Defense attorneys who have promoted improvements in the preliminary hearing to aid their clients should have no objection to the addition of an alternate system of procedures that could be used in place of the preliminary hearing at the option of the attorney. And prosecutors who find the preliminary hearing useful should have no objections to an alternate system either, particularly if it follows the Alternate Model in permitting but not requiring prosecutors to call witnesses before the magistrate to establish probable cause.

In conclusion, it is submitted that we should abandon efforts to "improve" the preliminary hearing and concentrate on developing more flexible alternative procedures which will better perform the basic functions of the preliminary hearing while respecting the needs of law enforcement and the accused.