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## A Fair Trial for the Accused

### FAIRNESS IN ACCUSATION OF CRIME

AUSTIN W. SCOTT, JR.\*

The following two forms of indictment for murder give some indication of the progress toward simplification which it is possible to make.

The State v. Wiley Freeman

The State of South Carolina, Edgefield District

To wit:

At a Court of Sessions, begun to be holden in and for the district of Edgefield, in the State of South Carolina, at Edgefield court house, in the district and State aforesaid, on the fourth Monday in March, in the year of our Lord one thousand eight hundred and thirty-eight, the jurors of and for the district of Edgefield aforesaid, in the State of South Carolina aforesaid, that is to say:

Upon their oaths present, that Wiley Freeman, laborer, on the tenth day of April, in the year of our Lord one thousand eight hundred and thirty-seven, with force and arms, at Edgefield court-house, in the district and State aforesaid, in and upon one Mary Freeman, in the peace of God and this State then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said Wiley Freeman, with a certain gun called a rifle gun, of the value of ten dollars, then and there charged with gun powder and two leaden bullets, which said gun he the said Wiley Freeman in both his hands then and there had and held, at and against the said Mary Freeman, then and there feloniously, wilfully, and of his malice aforethought, did shoot off and discharge, and that the said Wiley Freeman, with the leaden bullets aforesaid, by means of shooting off and discharging the said gun so loaded, to, at, and against the said Mary Freeman, as aforesaid, did then and there feloniously, wilfully, and of his malice aforethought, strike, penetrate and wound the said Mary Freeman, in and upon the left side of the said Mary Freeman, below the left breast of her the said Mary Freeman, giving to her the said Mary Freeman, then and there with the leaden bullets aforesaid, by means of shooting off and discharging the said gun so loaded, to, at, and against the said Mary Freeman, and by such striking,

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penetrating and wounding the said Mary Freeman, as aforesaid, one mortal wound in and upon the left side of the said Mary Freeman, below the left breast of the said Mary Freeman, of the depth of four inches, and of the width of one inch, of which said mortal wound the said Mary Freeman, on and from the said tenth day of April, in the year of our Lord one thousand eight hundred and thirty-seven, until the eleventh day of April, in the year of our Lord one thousand eight hundred and thirty-seven, at Edgefield court house, in the district and State aforesaid, did languish, and languishing did live, on which said eleventh day of April last aforesaid, about the hour of five o'clock in the morning, she, the said Mary Freeman, at Edgefield court house, in the district and State aforesaid, of the mortal wound aforesaid died and so the jurors aforesaid, upon their oaths do say, that the said Wiley Freeman, her, the said Mary Freeman, in manner and form aforesaid, feloniously wilfully, and of his malice aforethought, did kill and murder, against the peace and dignity of the same State aforesaid.<sup>1</sup>

The State v. Wiley Freeman

The grand jurors of the county of Edgefield accuse Wiley Freeman of murder and charge that on or about March 15, 1956, Wiley Freeman murdered Mary Freeman.<sup>2</sup>

#### MEANING OF "FAIRNESS"

At the outset, the meaning of the word "fairness" in the expression "fairness in accusation of crime" requires some explanation "fairness" is something of a slippery word which can mean different

1. This is the first count of the indictment (in two counts, one for each of two wounds) upheld in *State v. Freeman*, 1 Speers 57 (S.C. 1842), against the contention that it insufficiently alleged that the defendant murdered the victim because it did not expressly say that the gun was discharged. For substantially similar murder indictments, see *State v. Shelledy*, 8 Iowa 477 (1859) (eight counts), *People v. Graham*, 248 N.Y. 588, 162 N.E. 536 (1928), as set out in Waite, *Criminal Law and Its Enforcement* 786 n. 68 (3d ed. 1947).

2. This is substantially in the form provided for in American Law Institute, *Code of Criminal Procedure*, §§ 152, 154, 188 (1930), hereafter referred to in the notes as A.L.I. Code. *Id.* § 155, further provides that if the accusation (indictment or information) fails to inform the defendant of the particulars of the offense sufficiently to enable him to prepare his defense, he is entitled on request to a bill of particulars furnished by the prosecution.

Substantially similar short-form indictments have been upheld by the courts (where the scheme similarly involves the furnishing of a bill of particulars) *Carter v. United States*, 173 F.2d 684 (10th Cir. 1949) (Fed. R. Crim. P., App. of Forms, containing forms for charging murder, followed in this case, indictment alleged that Frank Carter, [on federal land] on or about June 13, 1946, with premeditation stabbed and murdered Fernando Cervantes), *State v. Roy*, 40 N.M. 397, 60 P.2d 646, 110 A.L.R. 1 (1936) (state adopted A.L.I. Code on short form indictments by rules of court indictment charged that Hyman Roy on September 20, 1934, at County of Bernanillo, State of New Mexico, did murder Martha Hutchinson, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of New Mexico), *People v. Bogdanoff*, 254 N.Y. 16, 171 N.E. 890, 69 A.L.R. 1378 (1930) (state statute permitted short-form indictments, indictment charged that Alexander Bogdanoff committed "murder in the first degree contrary to Penal Law, section 1044," without naming victim, date, place or means of producing death, which, however, were furnished defendant in a bill of particulars filed by the district attorney)

things in different settings. First of all, as used in this article, does the word refer to fairness to the accused, or to the prosecution, or to both? Surely it refers primarily to the accused, but that does not mean that the interests of the prosecution in the accusatory process must be neglected entirely. Such interests also should be considered in deciding what is fair in the procedure relating to criminal accusations. Fairness to the prosecution (meaning indirectly fairness to the people of the state) requires that an accused who is given enough information to prepare his defense, who is not misled or prejudiced by claimed defects in the accusation, and who has been convicted on proper proof of the crime charged, should not go free or require the state to undergo the time and expense of a new trial. Thus "fairness" here does not necessarily mean an accusatory procedure which is the fairest possible to the accused.

At the other end of the scale there is that minimum standard of fairness required by due process of law, imposed on the federal government by the fifth amendment and on the states by the fourteenth amendment to the United States Constitution. Of course, fairness as used in this article refers at least to this minimum standard. Yet when we ask ourselves how certain ways of doing things (in this article, the way in which the accusation should be made in a criminal case) match up with our concepts of fairness, we may quite properly demand a higher standard of procedure than the minimum standard which due process requires.

Besides the vague phrase "due process", with its implied requirement of fairness in accusation, almost all American jurisdictions have a constitutional provision to the effect that the criminal defendant is entitled to be informed of the charge against him. This, too, though not as vague as "due process", is pretty indefinite when it comes to applying it to specific accusations; but it also embodies notions of fairness to the accused, much as "due process" does. Then, too, most jurisdictions have constitutional provisions specifically requiring indictments (or indictments or informations) in criminal prosecutions, and while these constitutions do not spell out what a criminal accusation must contain to qualify as an "indictment" or "information", these two words by themselves impart about the same notions of fairness as to accusation which the phrase "due process" imparts. Many jurisdictions, in addition, have statutory provisions relating to criminal accusations. Sometimes these are rather vague commands to draftsmen to state the facts clearly and concisely, avoiding unnecessary prolixity and repetition. These statutes do not, of course, purport to authorize elimination of any

allegations which fairness requires. Sometimes the statutes are more specific, spelling out in effect the legislature's notions of what fairness means, such as statutes requiring that the accusation list the names of prosecution witnesses or requiring that the accused be furnished a copy of the accusation in time to study it before his arraignment. Very likely such statutes require a standard of fairness somewhat higher than the command of due process.

Thus "fairness" in this article generally means something less than the theoretically fairest possible method of accusation from the accused's point of view, and something more than the minimum standards of fairness as to accusation required by due process.

#### MODE OF ACCUSATION

Accusations of crime are of three types, depending on the originating source of the accusation (1) The indictment (or presentment), a written document emanating from the grand jury<sup>3</sup> (2) The information, a written document originating in the prosecuting attorney without any action by a grand jury (3) The complaint (used as an accusation in some states with respect to minor crimes),<sup>4</sup> a written document on oath preferred by a private individual, sometimes the victim of the crime, sometimes a police officer who witnessed the crime.<sup>5</sup>

In the federal courts all prosecutions for felony must be by indictment, except that with non-capital felonies, the defendant may waive his right to indictment and be tried on information, but an

3. The accusation is called an *indictment* when the prosecuting attorney prepares the written charge and it is approved by the grand jury, which signifies approval by finding it to be a "true bill." When the grand jury on its own initiative prefers the charge, the accusation is termed a *presentment*.

4. In local parlance this is sometimes termed the "affidavit" or "information" of some private person other than the prosecuting attorney. The following cases hold that state law authorizes prosecution for minor crimes in courts of limited jurisdiction on the complaint of a private citizen or policeman rather than on the information of a district attorney: *People v. Read*, 132 Colo. 390, 288 P.2d 347 (1955) (any misdemeanor tried in justice court), *State v. Warner*, 153 La. 557, 96 So. 120 (1923) (state liquor violations tried in city court), *People v. Wickes*, 172 N.Y.Supp. 164 (County Ct. 1918) (state traffic violations tried before city magistrate), *State v. Salmon*, 90 Utah 512, 62 P.2d 1315 (1936) (any misdemeanor tried in justice court). *Contra*, *State v. Kelm*, 79 Mo. 515 (1883) (no crime can be prosecuted on a complaint). *Cf. State ex rel. Knudson v. Municipal Court of Faribault*, 164 Minn. 328, 205 N.W. 63 (1925) (liquor offense involving maximum punishment of 90 days and \$300 fine requires information, implication that some lesser crimes in justice court can be prosecuted on complaint). Even if a complaint is an insufficient accusation for a misdemeanor prosecution, defendant's failure to raise the question before pleading to the merits may amount to a waiver. See annot., 61 A.L.R. 797, 802 (1929).

5. In the United States the finding of a coroner's jury in a death case will not serve as a proper accusation in a homicide prosecution.

information will suffice for a misdemeanor prosecution.<sup>6</sup> About half the states have indictment requirements substantially similar to those of the federal government,<sup>7</sup> but the other half now authorize all or almost all felony prosecutions to be begun by information.<sup>8</sup>

The question arises whether fairness to the accused requires prosecution for felony to be instituted by indictment in the absence of waiver, or whether justice can still be done under a system of prosecution by information. The United States Supreme Court long ago held that the requirement of fundamental fairness embodied in

6. U. S. Const. amend. IV, requiring indictment for "infamous crime"; Fed. R. Crim. P. 7 (a), (b), restating "infamous crime" as "crime punishable for a term exceeding one year", *i.e.*, felony, "or at hard labor." Insofar as misdemeanors are punishable at hard labor, prosecutions therefor must be by indictment unless waived.

7. See A.L.I. Code § 113 (1930) and comments thereon, listing the constitutional and statutory requirements as to mode of accusation in the various states.

In the states which require indictments for felonies the authorities are split as to whether the defendant may waive this requirement. See annot., 61 A.L.R. 797 (1929). Compare *People ex rel. Battista v. Christian*, 249 N.Y. 314, 164 N.E. 111, 61 A.L.R. 793 (1928) (no waiver, since right to prosecution by indictment is a right of the public as well as of the defendant) with *State v. Faile*, 43 S.C. 52, 20 S.E. 798 (1895) (waiver, since right to indictment is for the protection of the defendant alone). Fed. R. Crim. P. 7(b) allows waiver with non-capital felonies, and was upheld in *Barkman v. Sanford*, 162 F.2d 592 (5th Cir. 1947).

8. See A.L.I. Code § 113 (1930) and comments thereon; note, 8 Stan. L. Rev. 631 n. 2 (1956), listing the various states which authorize felony prosecution by information as follows: (1) for all felonies, Ariz., Ark., Cal., Colo., Idaho, Iowa, Kan., Mich., Mo., Mont., Neb., Nev., N.M., Okla., S.D., Utah, Wash., Wis., Wyo., (2) all felonies except those punishable by capital punishment or life imprisonment, Conn., Vt., (3) all felonies except capital felonies, Fla.; (4) all felonies except those punishable by life imprisonment, Minn., (5) all felonies except murder or treason, Ind.

There has been a good deal of argument as to the desirability of allowing felony prosecution by information. A.L.I. Code § 113 (1930) favors allowing the information. The Wickersham Commission, National Commission on Law Observance and Enforcement, Report on Prosecution 34-37 (1931), does too, arguing that the grand jury as an institution is expensive and time-consuming; that the indictment method slows up the administration of justice and gives the defendant the opportunity of raising purely technical procedural issues; that indictments are more difficult to amend than informations; and that while originally the grand jury was considered an important check on the prosecuting attorney's hasty and unfounded action, in practice the grand jury tends to be a rubber-stamp for the prosecuting attorney's decisions. As to the latter point, it should be noted that most states which authorize prosecution by information also require as a preliminary step a preliminary examination before a magistrate or waiver thereof. See A.L.I. Code § 115 (1930) so requiring, and comments thereon for constitutional or statutory provisions so requiring. On the other hand, Dession, *From Indictment to Information—Implications of the Shift*, 42 Yale L. J. 163 (1932), argues that the Wickersham Commission charges against the indictment procedure are not proved.

In many of the states which allow the information procedure, the grand jury indictment procedure is not entirely eliminated but is still utilized in the discretion of the prosecuting attorney in some situations. See note, 8 Stan. L. Rev. 631 (1956).

the concept of due process of law is not violated by the information mode of accusation.<sup>9</sup> It may be argued that either method is fairer than the other—as the states seem to recognize by their almost even split on the matter—but neither method is fundamentally unfair. No doubt, too, the view of some states that minor offenses may be prosecuted by complaint is not so unfair as to come under the ban of due process.

Whatever the mode of accusation—indictment, information or complaint—it is always made in writing; doubtless notions of fairness imposed by due process require this.

#### FUNCTION OF THE ACCUSATION

Most of the remaining issues concerning fairness in the accusatory process cannot properly be solved without first answering the question: What is the function of the criminal accusation? What is it supposed to accomplish?

An old case in the United States Supreme Court lists the three functions of the accusation in these words:

The object of the indictment is [1] to furnish the accused with such a description of the charge against him as will enable him to make his defense, and [2] avail himself of his conviction or acquittal for protection against a further prosecution for the same cause, and [3] to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had.<sup>10</sup>

9. *Hurtado v. California*, 110 U.S. 516 (1884) (state method of prosecution by information after preliminary examination does not violate fourteenth amendment due process). *In re Dolph*, 17 Colo. 35, 28 Pac. 470 (1891), held that information procedure does not violate the due process clause of the state constitution. In the *Dolph* case it was further argued without success that the alternative methods provided by the state—indictment or information in the district attorney's discretion—violated the equal protection clause of the fourteenth amendment as discriminatory against those prosecuted by information.

For many years a minority of the Supreme Court justices would require the states, under fourteenth amendment due process, to utilize the criminal procedure required of the federal government by the bill of rights, U.S. Const. amend. I-VIII, including the fifth amendment requirement of an indictment. The high-water mark of this viewpoint was reached in *Adamson v. California*, 332 U.S. 46 (1947) (state law allowing comment on criminal defendant's failure to take the stand held not a violation of fourteenth amendment due process, Black, Douglas, Murphy, Rutledge, JJ., dissenting because fifth amendment self-incrimination would forbid comment in federal prosecutions, and fourteenth amendment due process incorporates by reference self-incrimination provision as well as all the rest of the bill of rights). Since 1947 the tide has receded, and only Black and Douglas would probably now adhere to this view.

10. *United States v. Cruikshank*, 92 U.S. 542, 558 (1875). A more recent case states the third reason in a little different form: "to enable the court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case." *State v. Greer*, 238 N.C. 325, 327 77 S.E.2d

A recent Supreme Court case states the matter in terms of the first two reasons, dropping the third.<sup>11</sup>

There is no doubt that the first objective mentioned—that the accusation notify defendant of the charge against him so that he can prepare his defense—is the basic function of the accusation. The United States Constitution provides that in federal criminal prosecutions “the accused shall enjoy the right to be informed of the nature and cause of the accusation.”<sup>12</sup> Almost all the states have similar provisions in their constitutions,<sup>13</sup> and in the few states which have no such constitutional provision it is still the law that the accused must be informed.<sup>14</sup> Furthermore, due process requires in all criminal cases, federal or state, that the accused be informed of the accusation.<sup>15</sup>

Does the second stated objective of the accusation—that it be in such a form as to enable the defendant to raise the defense of double jeopardy if tried again for the same crime—impose on the accusation any requirement that the notice function does not? There are a number of situations where indictments have been considered sufficient even though the indictments, together with the judgments of conviction or acquittal, are not by themselves sufficient to support the plea of double jeopardy when that plea is made in a subsequent prosecution.<sup>16</sup> In any such situation the defense of double

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917, 919 (1953). Another way of expressing the third reason appears in *Report of Committee E of the American Institute of Criminal Law & Criminology*, 1 J. Crim. L., C., & P.S. 584, 587 (1910) as “the further office of providing a formal basis for the judgment of conviction.”

It is interesting to note that the function of civil pleadings is closely analogous to that of criminal pleadings. “The courts have recognized that the function of pleadings under the Federal Rules is to give *fair notice* of the claim asserted so as to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of *res judicata*, and to show the type of case brought, so that it may be assigned to the proper form of trial.” Moore, *Federal Practice* § 8.13 (2d ed. 1948).

11. *United States v. Debrow*, 346 U.S. 374 (1953).

12. U.S. Const. amend. VI.

13. See A.L.I. Code comments on §§ 154-55 (1930).

14. *Ibid.*, listing California, Idaho, Nevada, New York, and North Dakota as having no constitutional provision. But all these states have statutes requiring the accused to be informed. *Ibid.* Constitutional provisions requiring prosecution by indictment, or by indictment or information, likewise have been construed to require that the accused be informed of the charge against him. See annot., 69 A.L.R. 1392 (1930).

15. *In re Oliver*, 333 U.S. 257 (1948), *Cole v. Arkansas*, 333 U.S. 196 (1948) Both of these cases involved the due process clause of the fourteenth amendment as imposing on the states criminal procedural requirements as to notice.

16. Thus Millar, *The Function of Criminal Pleading*, 12 J. Crim. L., C. & P.S. 500, 501 (1922) suggests this case: “Suppose X be indicted, by two separate indictments, for two distinct acts of larceny, in respect of like articles, committed on different days. Under the rule that the prosecution, in its proof, is not confined to the precise day alleged, it is possible, and has been from



jeopardy is of course still available, although resort must be had to extrinsic evidence (usually the transcript of the record covering the proof at the trial) to show the identity of the offense. But there is no harm in that, it is well settled that extrinsic evidence may be used to show identity of offense under a double jeopardy plea.<sup>17</sup> Surely fairness requires that the defendant be able to show in some relatively simple manner that the offense for which he is being prosecuted is the identical offense for which he was formerly tried. It does not require that he prove the identity solely by reference to the accusation and judgment in the former prosecution.<sup>18</sup> Protection against successive prosecutions for the same offense, then, does not require of an accusation any more completeness than the notice function demands.

The statement of the third objective of the accusation—that of furnishing the court with enough information to enable it to de-

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the earliest times, for the two indictments to be in identical language, including identity in the statement of dates, and yet support the two convictions if the offenses be in fact distinct. If they be in fact distinct, no one would urge that X's conviction under the first is a bar to the second indictment, in spite of the identity of averment. The rule is about as well settled as any rule can be that parol evidence is admissible on the question of the identity of the two offenses." *People v. Bogdanoff*, 254 N.Y. 16, 171 N.E. 890, 69 A.L.R. 1378 (1930), suggests this case: If the name of the victim of homicide is unknown to the grand jury, the indictment may properly charge that defendant committed murder on a person to the grand jury unknown. The defendant is tried on this indictment and acquitted or convicted. If defendant is subsequently charged in another indictment with the murder of X, he would have to resort to extrinsic evidence to prove that the X of the present prosecution and the unknown person of the earlier prosecution are the same person.

Most jurisdictions require the defendant to make a special plea to raise the issue of double jeopardy; a few allow the defense to be raised on a not-guilty plea. Orfield, *Criminal Procedure from Arrest to Appeal* 305-06 (1947)

17 The record, which in modern times includes the transcript of the evidence as well as the pleadings and judgment, see Orfield, *Criminal Appeals in America* 142 (1939), is, of course, the first place to look to solve a double jeopardy issue. Where the record is ambiguous or incomplete, even parol evidence outside the record may be used. See *Dunbar v. United States*, 156 U.S. 185, 191 (1895), where the Court stated. "It is true [on a plea of former jeopardy] some parol testimony might be required to show the absolute identity of the smuggled goods, but such proof is often requisite to sustain a plea of once in jeopardy. [S]omething beside the record might be required to identify the property mentioned in the two indictments." On the whole subject, see 22 C.J.S. Crim. Law § 444 (1940).

18. Thus in *State v. Brozich*, 108 Ohio St. 559, 141 N.E. 491 (1923) where defendant was indicted for stealing nine "rungs" and the proof showed he stole nine rugs, his conviction of larceny of the rugs was upheld over his contention that if he were later tried for stealing the same nine rugs he could not show former jeopardy. "[T]he whole record does clearly show, for the whole record is not made up solely of the indictment, but the evidence as well, that the only property charged as having been stolen was 'rugs.' The evidence would be available on such a plea of former jeopardy." *Id.* at 563, 141 N.E. at 492. See Millar, note 10 *supra*, at 501 "And this rule [permitting use of extrinsic evidence on a plea of double jeopardy] forms an abundant safeguard to the acquitted or convicted defendant against later prosecution for the same offense."

cide whether the accusation is sufficient to support a conviction, or to decide what punishment should follow a conviction, or to provide a formal basis for the judgment of conviction—lacks concreteness and its meaning is difficult to understand. The statement that the indictment must be sufficient to enable the court to decide whether it will support a conviction<sup>19</sup> may almost be translated into the indictment must be complete enough to enable the court to decide whether it is complete enough, which hardly makes sense. The need for “providing a formal basis for the judgment of conviction, so that the indictment or information must set forth every thing which is necessary for a complete case on paper, no longer serves any useful end, produces miscarriages of justice, and should be done away with” in modern times when appellate review may be had of the whole case at the trial, not just the parchment record used in bygone days.<sup>20</sup> In short, while it is of some importance that the court be enlightened as to the nature of the case, surely this reason requires no more of an accusation than is required by the basic function of notifying the accused.

An historical reason for requiring of a criminal accusation rigid conformity to purely technical rules arose from the fact that in the England of two centuries ago there were a great many capital crimes—one hundred and sixty as late as 1800. No wonder the judges sought to soften the lot of the accused by raising technical objections wherever they could, whether in their treatment of the substantive law of crimes or in dealing with criminal procedure, including that part of criminal procedure concerned with the requirements of the accusation. But while in those days one function of the criminal charge was to make it so difficult to word that criminals who did not deserve to be hanged would escape that punishment, that function has disappeared altogether in modern times.<sup>21</sup> There is no doubt, however, that many modern courts have been reluctant to disown the technical rules established by the precedents of that era.<sup>22</sup>

One other matter may be mentioned. A criminal defendant has a constitutional right not to be convicted of a crime which he may have committed but of which he was not accused.<sup>23</sup> If indictments

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19. See *United States v. Cruikshank*, 92 U.S. 542 (1875).

20. Report, *supra* note 10, at 587.

21. See *People v. Gilbert*, 199 N.Y. 10, 92 N.E. 85 (1910), Perkins, *Short Indictments and Informations*, 15 A.B.A.J. 292 (1929).

22. See Perkins, *Absurdities in Criminal Procedure*, 11 Iowa L. Rev. 297 (1926).

23. See heading *Conviction of Crime Charged on Proof of Crime Charged, infra*, p. 519.

or informations are stated too briefly, is it not possible for the prosecuting attorney or the grand jury to have one crime in mind when drafting or approving the accusation, while at the trial the defendant is tried for and convicted of another crime?<sup>24</sup> The New York court dealt with a particularly short short-form indictment, which alleged simply that the defendant committed murder in the first degree, without stating the place, the date, the murder weapon, or even the name of the victim.<sup>25</sup> Perhaps the grand jury means to charge the defendant with the murder of X, but might not the trial jury convict him of the murder of Y? The New York court answered that even with the common law very-long-form indictments, such a result is possible;<sup>26</sup> but that as long as the defendant has the right to raise the question of what the grand jury had in mind in accusing him, he is not prejudiced by the danger that he may be convicted of a crime of which he was not accused, if he makes such a challenge before conviction the prosecution must show that the crime charged is the crime for which defendant is tried.

To conclude, it seems clear that the basic function of the criminal accusation is to inform the defendant so that he may defend himself. No other possible function requires more of the accusation than this notice function demands.

#### CONSEQUENCES OF INSUFFICIENT ACCUSATION

It will be shown, under the headings which follow, that courts frequently declare that the accusation is bad because it leaves something out which should have been put in, or because it is not entirely accurate in its allegations of fact or its spelling or grammar, or because it is defective in some other manner. The consequences of such bad pleading should, to a large extent, depend on how and when the defendant raises his objections to it, and how far he is misled by it. Obviously, if the alleged rape victim's name is misspelled, or if the property alleged to be stolen is tersely described as "personal property", a defendant who complains before pleading to the merits that the name ought to be properly spelled or that he should be informed of what sort of property he is supposed to have

24. See *State v. Murphy*, 141 Mo. 267, 270, 42 S.W. 936, 937 (1897).  
 "The charge must contain a certain description of the crime of which the defendant is accused, and a statement of the facts by which it is constituted, so as to identify the accusation, lest the grand jury should find a bill for one offense, and the defendant be put upon his trial in chief for another, without any authority."

25. *People v. Bogdanoff*, 254 N.Y. 16, 171 N.E. 890, 69 A.L.R. 1378 (1930).

26. The situations described note 16 *supra* are applicable here.

stolen should be entitled to have the accusation corrected or the proper information otherwise furnished. But if, knowing of these defects, he keeps his peace and proceeds to trial on the merits and is convicted, he should not be entitled to have the judgment arrested or on appeal have his conviction reversed without a real showing that he was somehow misled and prejudiced in presenting his defense. Thus if it is clear that during the trial he knows very well who is the victim in the rape charge, or what particular animal he is charged with stealing in the larceny charge, he cannot be prejudiced by the defective accusation. If he should learn of the defect during the trial—if for some reason the misspelling of the rape victim's name actually put him off the right track in preparing his defense—then there would be far more reason for arresting judgment or reversing on appeal, although even here perhaps a continuance for a time necessary to prepare a proper defense would be the more appropriate remedy. Some appellate courts have been much too free with their reversals of convictions for defects which could not have actually prejudiced the defendant in his defense. Fairness to the defendant in such cases does not require a reversal.

Even if the defendant is not silent but complains before trial of defects in the accusation, and even if the court refuses the relief which it might properly give, it does not necessarily follow that his conviction after a trial on the merits must be reversed. Fairness requires only that the conviction be reversed if it can be shown that he was misled by the defect in question.

On the other hand some defects may be of such an extreme nature that it is quite proper to reverse the conviction. If *A* is charged with rape of *B*, and the evidence shows that he robbed *B* or raped *C*, surely there should be a reversal, where the crime charged and the crime proved are so different in nature.

#### CONVICTION OF CRIME CHARGED ON PROOF OF CRIME CHARGED

It is a fundamental principle of procedural due process that one cannot be convicted of a crime of which he was not accused, so that an accused who is charged with one crime cannot be convicted of another crime not charged even if at the trial the proof shows he committed the latter crime. Thus a defendant charged with crime *A* cannot be convicted of crime *B* on proof of crime *B*.<sup>27</sup> So, too, where the charge is crime *A* and the proof is crime *A*, there can

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27. See *Cole v. Arkansas*, 333 U.S. 196 (1948) "It is a violation of due process to send an accused to prison following conviction of a charge on which he was never tried."

be no conviction of crime B.<sup>28</sup> Likewise if the charge is crime A and the proof is crime B, defendant cannot be convicted of crime A.<sup>29</sup>

However, even under the rule that one cannot be charged with crime A and convicted of crime B, a defendant charged with first degree murder can in most jurisdictions be convicted of second degree murder or manslaughter or perhaps battery, on a charge of assault with intent to kill there can be a conviction of simple assault, and so also of a charge of robbery and conviction of larceny or assault, and a variety of other possibilities.<sup>30</sup> This is because the charge of a greater crime or a crime of a greater degree necessarily includes a charge of "lesser included offenses" or offenses of a lesser degree. The theory is that an accusation of the greater crime (*e.g.* robbery) necessarily also charges the elements of the lesser crime (*e.g.*, assault and larceny), so that an accusation charging robbery really charges not only robbery, but larceny and assault as well, although not specifically named.<sup>31</sup>

The difficulty sometimes encountered in applying the above rules arises from the necessity to distinguish between separate though closely related and similarly punished crimes on the one hand, and separate ways of committing a single crime on the other, especially

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28. *Clark v. State*, 197 Tenn. 67, 270 S.W.2d 361 (1954), where defendant was charged with bigamous cohabitation, the proof showed bigamous cohabitation, but the conviction was of bigamy. The statute provides that if a married person remarries while his former spouse is alive, or cohabits with such second spouse, he shall be imprisoned not less than 2 nor more than 21 years. Tenn. Code Ann. § 39-701 (1956).

29. *Cole v. Arkansas*, 333 U.S. 196 (1948). Here defendant's conviction of crime A on a charge of crime A was affirmed by the state supreme court on the ground that the evidence showed he committed crime B. On remand, the state supreme court again affirmed on the ground the evidence showed he committed crime A. See 214 Ark. 387, 216 S.W.2d 402 (1949).

30. The common law rule authorizing conviction of lesser included offenses has been enacted into statute form in many states. See A.L.I. Code § 348 (1930), and commentaries thereon. A smaller number of states by statute authorize a conviction of attempted crime on a charge of the completed crime, a matter which the common law found difficult to allow, on the theory that attempt requires failure, which the completed crime does not. Fed. R. Crim. P. 31(c) authorizes conviction of a lesser included offense or attempt.

31. See notes, 56 Colum. L. Rev. 888 (1956), 11 Wis. L. Rev. 413 (1936), for the different views of the various states construing the common law or statutory law as to when a lesser crime is necessarily included in a greater crime. A.L.I., Model Penal Code, Tent. Draft No. 5 § 1.08(4) (1956), with commentary thereon, provides for a rather broad definition of lesser included offense, justifying the result on the basis of fairness both to the accused and the prosecution. "a basic premise of the draft is that it is desirable, where possible, to adjudicate the entire criminal liability of the defendant in a single trial." The notion that it is a benefit to the accused to adjudicate his entire criminal liability in one trial tends, however, to conflict with the notion that fairness requires defendant to be convicted only of the crime or crimes charged against him.

where the two are given the same name in the same sentence of the same section of the criminal code. If a statute provides that "whoever having a living spouse marries, or whoever having so married cohabits with the second spouse, is guilty of bigamy", are bigamy and bigamous cohabitation two separate crimes (crime A and crime B in the rules stated above) or are they simply two ways of committing one crime? The same problem may arise with statutes punishing, as forgery, both forging instruments and uttering forged instruments.<sup>32</sup>

To some extent at least, the legislature can take two or more related matters and either make them into two or more separate crimes or make them into a single crime which may be committed in different ways or under different circumstances. At common law burglary was the breaking and entering of a dwelling house of another at night with intent to commit a felony therein. Today most, if not all, jurisdictions have expanded the scope of burglary to include buildings other than dwellings and to include daytime operations as well as those in the night. Conceivably these legislative changes might have been accomplished by creating new crimes with new names, leaving burglary as previously defined. But actually burglary has simply been expanded. The experience with larceny has been different. When the legislature in England decided that wrongful appropriations of property belonging to another ought to be punished even in the absence of a "trespass in the taking", it created the new crimes of embezzlement and false pretenses, instead of extending larceny to cover the new types of misappropriation. Under such a tri-partite arrangement, which is followed in most of the states in the United States, procedural difficulties often arise because of the basic rule that one can be convicted only of the crime charged on proof of the crime charged. Thus one charged with larceny cannot be convicted of embezzlement on proof of embezzlement.<sup>33</sup> But a few states have provided in effect that whoever

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32. Thus *Clark v. State*, 197 Tenn. 67, 270 S.W.2d 361 (1954), holds bigamy to be a separate crime from bigamous cohabitation. But *People v. Frank*, 28 Cal. 507 (1865), holds that forgery of an instrument and uttering a forged instrument are two ways of committing one offense, forgery. See also *Wright v. People*, 116 Colo. 306, 181 P.2d 447 (1947). Compare this form of statute: whoever commits perjury (defining it), or whoever suborns another to commit perjury, is guilty of perjury or subornation of perjury, as the case may be. Here obviously perjury and subornation are two separate crimes.

33. Even legislation authorizing conviction of embezzlement on proof of embezzlement upon a charge of larceny has failed, the statute being held unconstitutional. *State v. Harmon*, 106 Mo. 635, 18 S.W. 128 (1891) (the constitutional requirement of indictment requires that conviction be of crime

commits (1) larceny or (2) embezzlement or (3) false pretenses is guilty of a single crime named theft (or larceny)<sup>34</sup> The most ambitious work of combining several different but related crimes into a single crime is found in the Model Penal Code proposal to lump together into one grand crime called theft not only larceny, embezzlement and false pretenses, but receiving stolen property, robbery, blackmail and extortion as well.<sup>35</sup> What were formerly distinct offenses are, under this plan, simply different ways a criminal can commit the one offense of making off with another's property, whether it be by stealth or force or threats or fraud.

There must of course be some limits to how much combining the legislature can constitutionally do. No doubt all crimes could not be combined into a single great crime. Doubtless too large segments of the whole field of crime such as all crimes against the person (or all crimes against property, or against the administration of justice, or against the government, or other such broad category) could not be combined into a single large crime. The difficulty would be in the requirement that defendant must be informed of the charge against him. A statute combining such distinct crimes as perjury, aiding a prisoner to escape and bribing jurymen (and thirty others) into the one large crime of hindering the administration of justice, and providing that a charge of obstructing justice can be supported by proof of perjury or bribery of a juror or aiding a prisoner to escape, etc., would not give the defendant fair warning of what he must defend against. The Model Penal Code proposal, though pretty broad, is, however, quite different from the groupings just

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charged). *Cf.* *State v. Gould*, 329 Mo. 828, 46 S.W.2d 886 (1932) Because of narrow technical distinctions between larceny and embezzlement and between larceny (by trick) and false pretenses, the fact that there are three crimes where one ought to grow makes the procedural difficulties especially acute. See Scott, *Larceny, Embezzlement and False Pretenses in Colorado—A Need for Consolidation*, 23 Rocky Mt. L. Rev. 446 (1951).

34. *Id.* at 451, citing statutes from Arizona, California, Louisiana, Massachusetts, Minnesota, Montana, New York and Washington. The new Wisconsin Criminal Code § 943.20 (1955) is a similar statute. One difficulty such statutes have encountered in New York, Minnesota, Montana and Washington is that the courts dealing with them still like to think of the three as three separate crimes instead of a single crime, e.g., *People v. Dumar*, 106 N.Y. 502, 13 N.E. 325 (1887) (indictment for "stealing" property; proof showed false pretenses, convicted of the single crime called larceny; held, reversed, since indictment made a noise like larceny whereas proof showed false pretenses) California, Louisiana and Massachusetts have upheld their statutes against the contention that they are unconstitutional because the defendant is not informed of the charge against him unless he is told the particular one of the three crimes with which he is charged. Scott, *op. cit. supra* note 33, at 452.

35. A.L.I. Model Penal Code, art. 206, Tent. Draft No. 2 (1954) Section 206.60 provides that an accusation of theft may be supported by proof of any one of the sundry formerly distinct crimes.

suggested, both in regard to the number of separate crimes involved in the consolidation and in the closeness of the relationship between the sundry crimes to be combined.

#### CONTENTS OF THE ACCUSATION

Undoubtedly the most numerous and difficult questions concerning criminal accusations have to do with their contents. How should they be worded? How accurate must they be? How much detail is required? If the defendant is to be accused of theft of property, for instance, how must the property be described? Is it enough to say that *A* stole "property" belonging to *B*, or must the property be further described? If so, is it enough for the accusation to state that *A* stole "an animal" or must it be more specific—"a horse"—or even more specific—"a mare"—or still more specific—"a grey mare"—or "a grey mare named Mary"—or must Mary's age be given, plus some other particulars, such as the fact that Mary has a lame foreleg?<sup>36</sup> It can be easily seen that the more detailed the charge, the more likely is the chance of a variance between the charge and the proof, with the possibility that the defendant's conviction must be reversed, as where Mary in the example above, alleged to be a mare, turns out at the trial to be a gelding.<sup>37</sup>

How specific should the accusation be as to time and place of the alleged crime? How far should it go in describing the means used to commit a crime, such as the weapon used and the wounds received in homicide cases? How far must the accusation go in negating possible defenses, such as self-defense in murder or lack of a medical reason to save life in abortion? What should be the consequences of clerical errors, misspellings of names and the like?

To answer these questions concerning the amount of detail and accuracy which fairness requires of a criminal accusation, we must bear in mind the basic function of the accusation. It must give the

36. *Korab v. State*, 93 Neb. 66, 139 N.W. 717, 1915B L.R.A. 83 (1913), held insufficient an indictment charging receiving stolen property where the property was described as "the personal property" of *X* of the value of \$48. *Hemphill v. State*, 52 Okla. Crim. 419, 6 P.2d 450 (1931), held that an indictment for the statutory crime of "larceny of domestic fowls", which indictment charged that *A* stole "domestic fowls", was insufficient because it did not allege what sort of fowls—chickens, turkeys, geese, ducks or whatever. See dictum in *State v. Cornellison*, 166 Tenn. 106, 59 S.W.2d 514 (1933), that it is sufficient to allege that *A* stole *B*'s "horse." See as to the description necessary to describe stolen automobile, annot., 100 A.L.R. 791 (1936).

37. Compare *Marsh v. State*, 3 Ala. App. 80, 57 So. 387 (1912) (statute made it larceny to steal cow or animal of the cow kind, proof of larceny of steer; conviction reversed).



defendant enough information to enable him to prepare his defense.<sup>38</sup> It is rather obvious from looking at the two forms of murder indictment quoted at the beginning of this article that giving proper notice is not a mere matter of the number of words used.

### *Stating the Elements of the Crime*

It is quite commonly asserted that the accusation, to be sufficient, must allege all the essential elements of the crime charged.<sup>39</sup> In a larceny accusation it is not enough to allege that *A* "stole" *B*'s hog. It must be stated that *A* "wrongfully took and carried away *B*'s hog against *B*'s will and without *B*'s consent, with a felonious intent to convert the hog to his own use, and to permanently deprive *B* of the hog."<sup>40</sup> A perjury accusation, to be sufficient, cannot allege simply that defendant committed perjury (setting forth his words), but rather that the defendant, having duly taken an oath before a competent tribunal, wilfully made a false statement (setting forth the statement) as to a fact material to the hearing.<sup>41</sup> Where statutory rape is defined "if a male person over 16 carnally knows a female person of previous chaste character, not his wife, under 16", the accusation cannot charge simply that John Smith committed statutory rape on Mary Jones, but must allege that John was over 16, that Mary was not John's wife, that Mary was of previous chaste character,<sup>42</sup> and

38. See heading *Function of the Accusation p. supra*. It was there seen that another function of the accusation is to enable defendant to prove double jeopardy if he should be later prosecuted for the same crime. Obviously allegations that *A* stole *B*'s "old grey mare named Mary" would require less resort to the record of the trial than if the charge alleged that *A* stole *B*'s "horse", but we saw that there is no harm in a rule requiring defendant to use the record to prove that the later prosecution is for the "same offense."

39. *E.g.*, *United States v. Debrow*, 346 U.S. 374 (1953), *Slusher v. Commonwealth*, 267 Ky. 140, 101 S.W.2d 663 (1937), *State v. Navarro*, 131 Me. 345, 163 Atl. 103 (1932), *State v. Greer*, 238 N.C. 325, 77 S.E.2d 917 (1953), *State v. Davis*, 39 R.I. 276, 97 Atl. 818, 1918C Ann. Cas. 563 (1916), *State v. Ray*, 122 W Va. 39, 7 S.E.2d 654 (1940). See Millar, *The Function of Criminal Pleading*, 12 J. Crim. L., C. & P.S. 500 (1922), as to "the rule of judicial law that the accusation shall express all the constituent elements of the offense charged."

40. *Slusher v. Commonwealth*, note 39 *supra*.

41. *United States v. Debrow*, 346 U.S. 374 (1953), holding, however, that the perjury accusation need not give the name of the person administering the oath or his authority to administer the oath, as these are not elements of the offense.

42. *State v. Ray*, 122 W Va. 39, 7 S.E.2d 654 (1940) One judge dissented as to the requirement that the charge must allege the defendant to be over 16, on the ground the defendant need not be informed of his own age to prepare his defense. It would seem that he need not be told he is a male person, and it would seem that if he is charged with rape of Mary Jones, he is informed that his victim is a female!

perhaps even that John was a male person and Mary a female person.

The requirement that all the elements must be stated is generally met, in the usual case of an accusation for a crime defined by statute, by stating the allegations literally or substantially in the language of the statute. Thus if the statute provides that "whoever offers money or other consideration to a public official of the executive, legislative or judicial branch of government, with intent to influence him in the performance of his official duties, is guilty of bribery", an accusation of bribery worded along these lines will do. But if a statute should simply provide that "whoever commits bribery is punishable" by a stated punishment, an accusation that *A* "bribed" *B*, though in the language of the statute, is insufficient, as it does not state the elements of the crime of bribery<sup>43</sup>

A number of states have statutes providing that criminal accusations shall state the facts constituting the crime in ordinary and concise language.<sup>44</sup> Such statutes, however, have not generally been construed to do away with the requirement that the accusation must state the elements of the offense.<sup>45</sup> Indeed, by emphasizing *facts* they seem to imply that conclusions of *law* will not do, and doubtless a statement that defendant "stole" or "robbed" is a conclusion of law. A number of states, however, have more specific statutes doing away with the elements requirement; and several states have legislation setting forth specific forms for indictment, some of which forms are worded according to the name of the crime without setting forth the elements of the crime, such as "*A* stole from *B* one horse" or "*A* robbed *B*" or "*A* raped *B*" or "*A* committed perjury by testifying as follows"<sup>46</sup>

Is an accusation unfair to the accused which names the crime but does not state all the material elements of the crime? Is *A* really less able to defend himself if he is charged with "stealing" *B*'s hog

43. *State v. Greer*, 238 N.C. 325, 77 S.E.2d 917 (1953).

44. A.L.I. Code (1930), commentaries on §§ 154-55.

45. *E.g.*, *State v. Greer*, 238 N.C. 325, 77 S.E.2d 917 (1953).

46. A.L.I. Code § 154 (1930) provides in effect that the elements of the crime need not be alleged, and § 188 sets forth various short forms which do not set forth the elements. The commentaries on § 188 state that Alabama, Kentucky, Louisiana, Massachusetts, Michigan, New York, Ohio, Oregon, and West Virginia have adopted schedules of forms. Of these states the forms in Louisiana, Michigan, and Ohio are practically identical with the A.L.I. Code § 188 forms, the others are longer. A.L.I., Code of Criminal Procedure: Legislative Recognition (1948) lists the following states as adopting § 154 or § 188 or both: Arizona (§§ 154, 188), Connecticut (§ 154, § 188 in part), Iowa (§ 154), New Mexico (§§ 154, 188 by court rules), North Dakota (§ 154), Rhode Island (§§ 154, 188), Utah (§ 154, § 188 in substance).

than if he is charged with "wrongfully taking and carrying away" *B's* hog "against *B's* will and without his consent, with a felonious intent to convert the hog to his own use and to permanently deprive *B* of said hog"? It would seem that the usual defendant will be as well informed in one case as in the other. If he has the name of the crime but does not know its elements, he or his counsel can look up its definition in the statute. Frequently crimes are defined in statutes in a peculiar manner. It would seem that a defendant is better informed of the charge if he is accused of "murder" than if he is accused of an "unlawful and felonious killing of another with malice aforethought, express or implied." The short form accusation has been upheld by the courts of several of the states which have adopted it,<sup>47</sup> and surely the fairness requirements of due process are not violated by such an accusation. But assuming that it is conceivable that in some situations a defendant may be prejudiced in his defense at the trial by a short-form accusation which does not spell out the material elements, the defendant should not be entitled to a new trial after conviction without a showing that he did not know what the prosecution involved or was otherwise prejudiced.<sup>48</sup>

A common practice in drafting a criminal accusation is to set forth (1) the name of the crime and then (2) the facts, stated in terms of the elements of the crime. Sometimes the crime named and the crime whose elements are spelled out do not jibe, as where the accusation charges defendant with "burglary, in that he did " and then the accusation proceeds to set forth facts constituting lar-

47 *State v. Henderson*, 215 Iowa 276, 243 N.W. 289 (1932), *State v. Nichols*, 216 La. 622, 44 So.2d 318 (1950), *State v. Roy*, 40 N.M. 397, 60 P.2d 646, 110 A.L.R. 1 (1936), *People v. Bogdanoff*, 254 N.Y. 16, 171 N.E. 890, 69 A.L.R. 1378 (1930).

Short form accusations depart from the traditional forms in two respects (1) they omit the elements of the crime (discussed here), and (2) they omit many details (discussed p. 529 *infra*).

48. In *People v. Bogdanoff*, 254 N.Y. 16, 171 N.E. 890, 69 A.L.R. 1378 (1930), the indictment charged simply that defendants committed murder, without naming the victim, but at the trial the evidence showed defendants murdered Fechter. Defendants on appeal claimed they were not properly informed of the charge. But as defendants well understood all along that Fechter was meant, and never claimed otherwise, they can "point to no substantial right, guaranteed to them by the Constitution, which has been prejudiced by failure to state in the indictment all the essential elements of the crime charged." A proper appellate court attitude toward short accusations is expressed in *State v. Ramsauer*, 140 Mo. App. 401, 124 S.W. 67 (1910), where the indictment was not specific as to time or place; the court affirmed the conviction against defendant's claim that the indictment failed to notify him of the charge, saying: "There is no pretense in this case that he did not as a matter of fact know what the charge against him was. The record shows that he did make his defense. The jury has found against him as the result of a trial which, as shown by the record, was fair and impartial."

ceny, not burglary. It is generally held in such cases that the accusation is good; it is the crime contained in the statement of facts which controls.<sup>49</sup> It would seem that the situation is at least as apt to be confusing to the defendant as where the crime is simply named and the elements not set forth.

### *Negating defenses*

Assuming, however, that an accusation must set forth all the essential elements of the crime charged, there is the problem of what are the essential elements. In particular, is the lack of a defense which the substantive criminal law may allow for the particular crime charged an element of the crime which must be alleged in the first instance (and proved at the trial in the second instance)? Or is such a defense a sort of "affirmative defense" which the defendant must raise, just as a civil defendant must raise defenses like contributory negligence, duress and fraud? Thus with a murder charge must the accusation allege not only that *A* murdered *B* but also that *A* was sane and did not act in self-defense against *B*?

It may be well to note that defenses to crime come in different forms. There are those great substantive law defenses, recognized in appropriate situations by all Anglo-American jurisdictions, applicable to more than one crime, and which are not generally set forth in the statutes defining particular crimes—insanity, intoxication, infancy, compulsion, self-defense, accident, mistake of fact or law, and perhaps entrapment. A statute defining criminal battery may say that "battery is the unlawful beating of another person", it does not go on to state ". . . by one who is sane, over the age of seven, who was not compelled by threat of death or serious bodily injury, who was not acting in self-defense", etc. Then there are those defenses which are applicable to a particular crime and which are set forth in more or less close connection with the statute defining the crime. A statute may define rape as a male person's forcible sexual intercourse with a female person "not his wife", it is a defense if the female is his wife. An abortion statute may define abortion as the use of drugs or instruments on a woman "quick with child" with intent to procure a miscarriage; "provided, however", that if done on a doctor's advice to save the woman's life, it is not a crime. Under such a statute it is a defense if she is not pregnant, or if the act is done on a doctor's advice in order to save her life. A statute may make it a crime for any person "except a physician" to possess a hypodermic syringe. The typical bigamy

49. See annot., 121 A.L.R. 1088 (1939).

statute defines the crime as the marrying again by one who has a living spouse, excepting, however, a remarriage after seven years' absence of the spouse or after a divorce from such spouse. Must the indictment charging *A* with raping *B* allege that *B* was not *A*'s wife? Must the indictment charging *A* with possessing a hypodermic syringe allege that *A* is not a physician? Must the bigamy charge allege not only that *A*, with a spouse *B*, married *C*, but also that *A* did not wait seven years and was not divorced?<sup>50</sup>

The various jurisdictions have adopted two rules to solve such questions (1) the rule of location if the exception appears in the enacting clause of the statute, the absence of such an exception must be pleaded in the accusation, while if it appears in a subsequent clause or section or statute, the absence need not be pleaded;<sup>51</sup> (2) the "necessarily descriptive" rule if the exception is so incorporated in the language of the statute defining the crime that the elements of the offense cannot be accurately described if the exception is omitted, the accusation must negative the exception, otherwise it need not.<sup>52</sup> The two rules tend to come together; thus, if an exception is found in the enacting clause, it tends to be considered a necessary description of the offense, though "necessarily descriptive" is a vague expression. Applying these rules, all jurisdictions would agree that a murder accusation need not allege that defendant is sane and that he did not kill in self-defense. On the other hand, it would seem that the accusation for *A*'s rape of *B* must allege that *B* is not *A*'s wife,<sup>53</sup> though a statement that *A* raped *B*, "an unmarried

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50. An analogous problem, but not within the scope of this article, is as to the proof at the trial—the burden of going forward with some evidence and the burden of persuasion. It seems clear that if the prosecution must allege the fact that the rape victim is not defendant's wife, it has the burden at the trial of going forward and of proving beyond a reasonable doubt that she is not his wife. If the sanity of the defendant need not be alleged, neither at the trial need it be proved by the prosecution, unless the defendant comes forward by introducing some proof of insanity; the prosecution must then prove him sane, though the courts are quite evenly split on the measure of the burden of persuasion on the prosecution, whether beyond a reasonable doubt or by a preponderance of the evidence. *State v. Clark*, 34 Wash. 485, 76 Pac. 98 (1904).

51. The leading case for this view is *Commonwealth v. Hart*, 11 Cush. 130 (Mass. 1853), pointing out a difficult middle class of cases, where the enacting clause says "except as hereafter provided" and a later clause or statute sets out the exceptions.

52. The leading case for this view is *United States v. Cook*, 84 U.S. 168 (1872).

For an exhaustive discussion of the rules and their application, see annot., 153 A.L.R. 1218 (1944). The location rule is generally preferred because of its simplicity. See *Commonwealth v. Meeks*, 192 Ky. 690, 234 S.W. 292 (1921).

53. *People v. Miles*, 9 Cal. App. 312, 101 Pac. 525 (1908), *Young v. Territory*, 8 Okla. 525, 58 Pac. 724 (1899) ("necessarily descriptive" test)

woman", ought to do as well. It is generally agreed that with an accusation of abortion, the fact that there was no necessity to save life must be alleged.<sup>54</sup> But in bigamy prosecutions the seven years' absence and lack of divorce need not be alleged.<sup>55</sup>

What does fairness require of an accusation in respect to possible defenses? Specifically, if an accusation fails to allege the absence of a defense, which is provided for in the enacting clause or which is necessarily descriptive of the crime, is the defendant entitled to have the accusation dismissed before trial? Or, is he entitled to a new trial after conviction on the merits? The answer on principle is the same as with the answer to the question concerning accusations which name the crime but do not spell out the elements if the defendant is not misled by the absence of the allegation, he is entitled to no more relief than the amendment of the accusation when he asks for it. So if John Jones is accused of raping Mary Smith, it is almost inconceivable that he can be helped in his defense by an allegation that Mary is not his wife. If anyone knows that fact, it is surely the defendant himself. This is the theory of the Institute Code of Criminal Procedure,<sup>56</sup> which seems eminently sound.

#### *Details*

A criminal accusation may be worded so as to spell out a great many details, or it may be pretty sparse as to details. The first murder indictment set forth at the beginning of this article tells the defendant that he is a laborer, that he shot his victim with a \$10.00 rifle loaded with two bullets, that the bullets were made of lead, that he not only struck her with the bullets but also penetrated and wounded her on a particularly described part of her body, that the wound was of a certain depth and width, and then it goes on to describe her living for a time, languishing and finally dying of the wound. Another count of the same indictment, even longer than the first, mentions all these matters in connection with the shooting of the second bullet, adding this time that he did not have the fear

54. *State v. McIntyre*, 19 Minn. 93 (1872) (location test). *State v. Stokes*, 54 Vt. 179 (1881) ("necessarily descriptive" test).

55. *Stanglein v. State*, 17 Ohio St. 453 (1867) (location test), *State v. Reilly*, 88 N.J.L. 104, 95 Atl. 1005 (1915) ("necessarily descriptive" test), *Corvin v. Commonwealth*, 131 Va. 649, 108 S.E. 651, 39 A.L.R. 592 (1921) (under either test).

56. A.L.I. Code § 175 (1930), a rule followed by statute or court rules in a few states. In addition several jurisdictions have specific statutes, creating crimes with exceptions, providing that as to the particular crime the absence of exceptional circumstances need not be alleged. See annot., 153 A.L.R. 1218, 1221 (1944).

of God before his eyes but was instead seduced by the devil! Surely all these details need not be stated. Surely, too, there is no need for two counts, one for each wound. The second indictment above names the crime but does not spell out the details, other than the date and the victim. There is nothing of the defendant's occupation, or the weapon, or the wound.

What does fairness demand of the accusation so far as details are concerned? It is commonly asserted that a detailed recital of the evidence by which the accused's guilt will be established at the trial is not required.<sup>57</sup> On the other hand, he must be informed of enough to make his defense (and, it is often added, to be able to plead double jeopardy if tried later for the same crime).<sup>58</sup> The common statute or rule of court providing that the accusation shall be a simple and concise statement of the facts<sup>59</sup> constitutes perhaps an invitation to cut out some details, but it is so vaguely expressed as to give little guidance. A clearer invitation is involved in those few statutes relating to homicide which provide that it is not necessary to allege the means of producing death, or those statutes relating to crimes generally, which provide that the means of committing crimes need not be alleged unless necessary to charge the offense, such as in the case of the crime of assault with a deadly weapon.<sup>60</sup> The theory of the Institute Code is to avoid questions of specificity of detail by providing in effect that details may, but need not, be alleged,<sup>61</sup> and that if the defendant wants more details to prepare his defense, he can have them by asking for them in a demand for a bill of particulars.<sup>62</sup> It may be said that little is accomplished by providing that details need not be furnished in the accusation as long as they are expressed in a bill of particulars. Why not require such an expression in one place rather than in either one of two

57. *E.g.*, *People v. Quider*, 172 Mich. 280, 137 N.W. 546 (1912).

58. *Ibid.*

59. See note 44 *supra*.

60. See A.L.I. Code § 160 (1930), and commentaries thereon. Fed. R. Crim. P. 7(c) does not go so far; it provides that alternative means may be joined in a single count. But the forms appended thereto do not require a statement of means in homicide cases. The statutes eliminating means from homicide cases do not unfairly deprive the defendant of information necessary for his defense. *Goersen v. Commonwealth*, 99 Pa. 388 (1882).

61. A.L.I. Code § 154 (1930), providing that the accusation is sufficient if it gives the common law or statutory name of the crime, § 188, setting forth specific forms. See note 46 *supra* for states with similar provisions.

62. A.L.I. Code § 155 (1930), providing that the court may of its own motion, and *shall* at defendant's request, order the prosecution to furnish the defendant with a bill of particulars as to details necessary to prepare a defense. Unlike the above provision, the common law did not give the defendant the right to demand particulars, the furnishing of particulars was within the court's discretion if it existed at all. *Orfield, Criminal Procedure from Arrest to Appeal* 240 (1947).

places?<sup>63</sup> The answer is that under the Institute plan the defendant cannot have the accusation dismissed before trial or have his conviction reversed after trial because of a lack of detail which he may already know or at least may learn of by asking for it. Even under the Institute plan a backward-looking court might very well undo the good which the plan aims to accomplish. Such a court may hold that details are necessary under the constitutional requirements of an indictment or information or under the constitutional provision requiring that the defendant be informed of the charge, and that a bill of particulars cannot supply any matter which the accusation itself must contain.<sup>64</sup> But short-form accusations provided for by legislation which also provides for the right to demand a bill of particulars have been upheld.<sup>65</sup> As far as fairness is concerned, such a plan presupposes giving to the defendant all the information and time he needs to prepare his defense, which is of course all that fairness requires. All he loses is the opportunity to raise technical objections before or, what is worse, after trial, with the object, not of defending himself on the merits, but of delaying or escaping altogether his deserved punishment. Fairness to the accused requires no such result, and fairness to the people of the state positively revolts at the idea. A recent Texas case indicates the absurdities which courts may perpetrate in requiring details unless they bear in mind that fairness is concerned with furnishing information for the purpose of making a defense. *A* was charged with murder of *B* by drowning *B*, and the proof showed that he drowned her in the deep waters of a bar pit. His conviction was reversed because the accusation failed to tell him that he drowned her in water; it might have been alcohol or milk or some other liquid!<sup>66</sup>

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63. *Ibid.*

64. *E.g.*, *State v. Greer*, 238 N.C. 325, 77 S.E.2d 917 (1953), where the statute provided that it is a crime to bribe, and the indictment alleged that the defendant bribed a named official, without setting forth the elements of the crime. See note 43 *supra* and text thereto. This "fatal defect in an indictment is not cured by the statute which enables the defendant to call for a bill of particulars", nor by a statute providing for expressing the charge in a plain, intelligible and explicit manner. The court ended on a lofty note, speaking of its rule as "the last hope and only asylum of persecuted innocence." Very likely, however, if the accusation charges crime A, and a bill of particulars sets forth crime B, a conviction of crime A or B would be properly reversed. See *Wright v. People*, 104 Colo. 335, 91 P.2d 499, 123 A.L.R. 474 (1939).

65. See note 47 *supra*.

66. On rehearing, the court backed down a little, stating that perhaps "drowning" ordinarily does imply the use of water, but the indictment was still bad because it did not allege that *A* pushed *B* into the water from the bank, or from a boat, or held her head under; or, if the exact details were unknown, so alleging. *Gragg v. State*, 148 Tex. Crim. 267, 186 S.W.2d 243 (1945).



*Details of Time and Place*

Many cases have dealt with questions concerning what is required of an accusation in respect to allegations of time and place. Must the date of the crime be mentioned at all? If so, will "on or about" a certain date do, or must it allege a specific date? Must the hour of the day be given, or even the minute? What is the result of alleging the wrong time? Similar questions arise as to place. Must the place be named, if so, the county, or the town, or the street address?

Strangely enough, the common law, although it required the accusation to mention some date,<sup>67</sup> did not require that the prosecution stick to that date, proof of any other date within the period of the statute of limitations would suffice to convict.<sup>68</sup> The rule apparently applied without regard to whether the defendant was misled in his defense. It would seem that if he is so misled, fairness requires at least that the defendant be able to obtain a postponement until he can reprepare his defenses.<sup>69</sup> However, fairness does not require reversal of a conviction of a defendant who is not misled by a clerical error in the accusation charging him with committing the crime on a date subsequent to the date of the accusation.<sup>70</sup> The dangers of misleading are greater, it would seem, if the allegation is an incorrect but plausible date than if it is an impossible or future date or if no date at all is given. The heights of absurdity were reached in a case which arrested a judgment of conviction charging the commission of an offense on July 15, 1855, because the letters "A.D." were omitted.<sup>71</sup> The defendant might have been misled into working up his defense on the theory that he was charged with committing the offense in 1855 B.C. The complete absence of

67. *State v. Beaton*, 79 Me. 314, 9 Atl. 728 (1887) (indictment alleged an offense on sundry days between September 23 and September 30, 1855).

68. Applied in *Chandler v. State*, 25 Fla. 728, 6 So. 768 (1889) (accusation charged offense in September, proof showed offense in February), *State v. Morin*, 149 Me. 279, 100 A.2d 657 (1953) (accusation charged June 8 offense, proof showed April 15 offense). Allegations of a future date or an impossible date, however, like absence of allegations of any date, render the accusation bad, *People v. Van Every*, 222 N.Y. 74, 118 N.E. 244, 7 A.L.R. 1507 (1917), though a specific statute may cure such defects. *State v. Crawford*, 99 Mo. 74, 12 S.W. 354 (1889).

69. A.L.I. Code § 184(3) (1930) so provides.

70. Compare *People v. Van Every*, 222 N.Y. 74, 118 N.E. 244, 7 A.L.R. 1507 (1917), *Elmore v. State*, 126 Tex. Crim. 519, 73 S.W.2d 107 (1934) *State v. Runyon*, 100 W.Va. 647, 131 S.E. 466 (1926), all holding such an indictment defective, with *Lucas v. United States*, 188 F.2d 627 (D.C. Cir. 1951), *People v. Myers*, 1 Cal. App.2d 620, 37 P.2d 191 (1934), holding the indictment sufficient.

71. *Commonwealth v. McLoon*, 71 Mass. 91, 66 Am. Dec. 354 (1855).

any allegation of time should not necessarily be fatal;<sup>72</sup> in effect such an accusation is that the defendant committed the crime some time before the finding of the accusation and within the period of the statute of limitations;<sup>73</sup> if the defendant needs the date to prepare his defense he can ask for it;<sup>74</sup> and if its omission prejudices the defendant he may obtain a continuance.<sup>75</sup> That is all that fair play to the defendant necessitates.

One troublesome date problem arises in murder prosecutions in those states which rule that for murder, death must occur within a year and a day of the mortal blow.<sup>76</sup> Must the accusation set forth dates to show that death did occur within such time? It would seem that absence of death within a year and a day is a matter of defense, so that the accusation need not set forth the fact that the victim died within the time.<sup>77</sup> But some courts have held that the accusation must do so.<sup>78</sup> Fairness, however, surely does not require it. A defendant will rarely be misled if it is not alleged, but if in some conceivable situation he is misled by the lack of information, he should be given a postponement. He should not get a new trial after a conviction on the merits without a showing that he was prejudiced.

As to allegations of place, it is generally held that it is enough to state that the offense took place in a certain county, without naming the town or the street address.<sup>79</sup> The Institute Code sensibly provides that even if the county is not alleged, the accusation is sufficient;<sup>80</sup> it will be assumed that the allegation of crime refers to a crime committed within the territorial jurisdiction (generally the county) of the court if not otherwise expressed.<sup>81</sup> It has been

72. Compare *People v. Wagner*, 172 Ill. App. 84 (1912) (conviction reversed where information alleged crime committed on April 30, 19..).

73. A.L.I. Code § 158 (1930) so provides.

74. *Id.* § 155 (1930), provides for bills of particulars.

75. *Id.* § 184(3) (1930), so provides.

76. This archaic rule, created at a time when medical knowledge was almost nonexistent, is still the rule, at common law or by statute, in a majority of states. Some even extend the rule to manslaughter.

77. See heading *Negating Defenses* p. 527 *supra*.

78. *E.g.*, *State v. Kennedy*, 8 Rob. 590 (La. 1845), where the indictment alleged a mortal blow, "and a few hours after [the victim] did die of the said mortal wound;" the court reversed the conviction.

79. *E.g.*, *Bennett v. State*, 169 Miss. 864, 154 So. 276 (1934) (indictment alleged driving while intoxicated on a named highway in a particular county). *State v. Ramsauer*, 140 Mo. App. 401, 124 S.W. 67 (1910) (indictment alleged gambling in a building at Jasper County, Missouri).

80. Compare the usual rule, which holds such an accusation to be bad. *Poulsom v. State*, 113 Neb. 767, 205 N.W. 252 (1925) (demurrer should have been sustained, conviction reversed).

81. A.L.I. Code § 159 (1930). This section together with § 158 (as to time) also eliminates the necessity of alleging "then and there" (see the Freeman indictment, note 1 *supra*, every time a new fact is alleged).

held that if an accusation is more specific as to place than it has to be, as by naming a town, the proof need not be confined to that town but may extend to any town within the county,<sup>82</sup> although it would seem that if the defendant is actually misled by the variance he ought to get a postponement.<sup>83</sup> With crimes like criminal homicide which consist of (1) conduct and (2) results of conduct (as with murder, requiring a mortal blow with resulting death), must the place where the result occurs be alleged as well as the place of the conduct even though it is the place of the conduct which determines the situs of the crime? Some cases have held that it is necessary to allege the place where the result occurs,<sup>84</sup> but it would seem that fairness does not require it,<sup>85</sup> and a conviction should not be reversed in the absence of a showing that the defendant was prejudiced by not knowing the fact.

### *Indirect Allegations*

Courts have often stated that whatever must be alleged (usually meaning the elements of the crime, as we have seen) must be alleged directly and positively, not indirectly and by implication. Some absurd results have been achieved in the name of this rule.<sup>86</sup> It has even been seriously argued that a murder accusation charging that defendant murdered Viola Hughes is insufficient because it does not directly state that Viola was a human being.<sup>87</sup> Fairness requires that the accusation inform the accused so he can make his defense, and if the meaning of the accusation is plain enough, it can make no difference whether the defendant receives this information in a direct or indirect manner.<sup>88</sup>

82. *Commonwealth v. Tolliver*, 8 Gray 386 (Mass. 1857) (charge of assault in Boston, proof of assault in Chelsea, both are in Suffolk County)

83. A.L.I. Code § 184(3) so provides.

84. *Brockway v. State*, 192 Ind. 656, 138 N.E. 88, 26 A.L.R. 1338 (1923) ("One of the most important things for the defendant to know, in order to prepare his defense, is the place of death" in murder prosecution).

85. *State v. Borders*, 199 S.W. 180 (Mo. 1917).

86. See Perkins, *Short Indictments and Informations*, 15 A.B.A.J. 292 n. 24 (1929), citing *Fleming v. State*, 62 Tex. Crim. 653, 139 S.W. 598 (1911) (indictment, charging that defendant banker received a deposit "after the bank was insolvent", held bad because it did not directly state that the bank was insolvent at the time defendant received the deposit), *Prichard v. People*, 149 Ill. 50, 36 N.E. 103 (1894) (bigamy indictment, charging that defendant "well knew his first wife was then alive" when he married again, held bad because it did not directly state the wife was alive at the time he remarried). In both cases, convictions obtained after trials on the merits, at which the defendant could not possibly have been misled, were reversed.

87. *People v. Gilbert*, 199 N.Y. 10, 92 N.E. 85 (1910), rejected the argument, on the ground that a charge of "murder" implies that the victim is a human being.

88. See A.L.I. Code § 177 (1930), adopting this view.

*Alternative Allegations*

Criminal statutes not infrequently provide that a crime may be committed by the doing of one of several alternative acts,<sup>89</sup> or by one of several alternative means,<sup>90</sup> or with one of several alternative intents,<sup>91</sup> or with one of several alternative results.<sup>92</sup> Where the statute provides such alternatives, may the accusation accuse the defendant in the same alternatives? May it, for instance, allege that *A* broke and entered a "dwelling-house or shop" belonging to *B*? Many cases have held such accusations bad, as not properly informing the defendant of the charge<sup>93</sup> or as improperly alleging two different offenses in one count.<sup>94</sup> But more recent cases have allowed such disjunctive pleading,<sup>95</sup> sometimes stating that the alternatives may be rejected as surplusage.<sup>96</sup> It would seem that fairness to the accused is not violated by a rule permitting allegations in the alternative of different acts, means, intents or results involved in the definition of a single crime.<sup>97</sup> Of course to allege

89. *E.g.*, a burglary statute beginning: "Every person who shall forcibly break and enter, or without force, enter" Colo. Rev. Stat. Ann. § 40-3-6 (1953).

90. *E.g.*, "any dwelling house, whether then occupied or not, kitchen, office, shop, storehouse, warehouse hotel, saloon, restaurant factory, water craft, railroad car, church or schoolhouse." *Ibid.*

91. *E.g.*, "with intent to commit murder, robbery, rape, mayhem, larceny, or other felony or misdemeanor." *Ibid.*

92. *E.g.*, an aggravated robbery statute with increased punishment for a robber who "wounds or strikes the person robbed or any other person with a dangerous weapon." *Id.* § 40-5-1.

93. *E.g.*, Horton v. State, 60 Ala. 72 (1877) (arson of a "barn or stable" belonging to *B*), Henderson v. State, 113 Ga. 1148, 39 S.E. 446 (1901) (defendant struck victim "with a knife, or some other like instrument"), Shreveport v. Bryson, 212 La. 534, 33 So.2d 60 (1947) (reckless driving by driving under the influence of "intoxicating liquor or drugs"). If the words used in the statute are synonymous, however, they may be alleged in the disjunctive. *E.g.*, Cobb v. State, 45 Ga. 11 (1872) (allegation that defendant permitted minor "to play or roll billiards" held good, playing billiards and rolling billiards meaning the same thing).

94. See heading *Duplicity* p. 531 *infra*.

95. *E.g.*, People v. Holmes, 129 Colo. 180, 268 P.2d 406 (1954) (involving the statute note 89 *supra* and an accusation charging that defendant did forcibly break and enter and without force did enter a dwelling house), Commonwealth v. Schuler, 157 Pa. Super. 442, 43 A.2d 646 (1945) (driving under the influence of "intoxicating liquor or a narcotic or habit-forming drug").

96. Thus in Wright v. People, 116 Colo. 306, 181 P.2d 447 (1947), one count in a forgery accusation alleged that the defendant "did falsely make, alter, counterfeit, and forge" a certain instrument, another count that he did unlawfully "utter, publish and pass" the instrument as genuine. The accusation was held good, these being simply different ways of committing the crime of forgery. "There can be no prejudice resulting to the defendant by reciting in the information several ways the crime may be committed. If defendant violated the statute in only one way, the fact that other ways were alleged is mere surplusage." *Id.* at 310, 181 P.2d at 450.

97. A.L.I. Code § 176 (1930) so provides.

separate crimes in the alternative, *e.g.*, that *A* committed murder of *B* or robbery of *C*, rather than alternative ways of committing one crime, would doubtless be bad. Fairness does require something in the way of allegations of a specific crime.

### *Duplicity*

It is not good pleading for an accusation to be duplicitous, *i.e.*, to allege two distinct crimes in one count—as, for instance, that *A* kidnapped *B* and robbed *B*—although if the two crimes arose out of a single transaction they could be alleged in two counts of a single accusation.<sup>98</sup> The reason generally given for the rule against duplicity is that it may “subject the accused to confusion and embarrassment in his defense.”<sup>99</sup> Sometimes it is difficult to say whether the defendant has committed one crime or two, as where *A* throws a bomb into the street, killing *B* and *C*, or where *A*, holding a gun on both *B* and *C*, robs them both together.<sup>100</sup> Even if two separate crimes should be alleged in a single count, the defendant may be held to have waived the defect if he does not raise the point before trial.<sup>101</sup> Fairness does not entitle him to an arrest of judgment or a new trial on appeal after conviction at a trial on the merits, unless he can show how he was misled by the duplicity.<sup>102</sup>

### *Clerical Errors, Mistakes in Names*

Clerical errors, misspellings, bad grammar and the like crop up in the wording of criminal accusations as they do in other forms of writing. What if the accusation for aggravated battery alleges that the defendant did “shoow” the victim with a pistol with intent to

98. See heading *Joinder of Offenses* p. 541 *infra*.

99. *Commonwealth v. Holmes*, 119 Mass. 195, 198 (1875), *Sprouse v. Commonwealth*, 81 Va. 374 (1886) (“tends to confusion”).

100. *E.g.*, *People v. Alibez*, 49 Cal. 452 (1875) (allegations in one count that *A* murdered *B*, *C* and *D* by poison held bad for duplicity; conviction reversed because demurrer and motion in arrest of judgment should have been granted), *In re Allison*, 13 Colo. 525, 22 Pac. 820, 10 L.R.A. 790 (1889) (robbery by *A* of *B*, *C* and *D* at same time and place constitutes three separate crimes for purposes of double jeopardy), *Kenney v. State*, 5 R.I. 385 (1858) (allegations that *A* assaulted *B* and *C* together held valid) *Sprouse v. Commonwealth*, 81 Va. 374 (1886) (allegations that defendant committed forgery by forging a check and then an indorsement thereon held not duplicitous).

101. *Warren v. People*, 121 Colo. 118, 213 P.2d 381 (1949), *Commonwealth v. Holmes*, 119 Mass. 195 (1875) (motion to quash or motion to have prosecution elect one offense is appropriate remedy for duplicity)

102. A.L.I. Code § 185 (1930) provides that no accusation shall be bad because duplicity exists therein, the court may order the prosecution to sever the two crimes alleged into separate counts or separate accusations, but if the defendant can show he was actually prejudiced because of duplicity he may have a new trial after conviction.

kill?<sup>103</sup> Or suppose the accusation states that the grand jury accuses *A* of the rape of *B* in that *B* raped *B*.<sup>104</sup> Or suppose the word "did" is omitted, so that a burglary charge states that *A* "break and enter" the dwelling house of *B*.<sup>105</sup> Many such errors have resulted in reversed convictions. Misspelled names of the defendant or of the victim have also caused many a well deserved conviction to be reversed, as where the defendant was charged with raping Seanda Acosta, and at the trial it turned out the lady's name was Senaida Acosta.<sup>106</sup>

Of course, if the defendant wants the clerical or grammatical error or misspelling corrected on the accusation, he should be able to ask for it and have it done. But fairness does not require a new trial after a conviction on the merits unless he can show affirmatively that he was prejudiced by the mistake. It is hardly conceivable that an accusation, charging that the defendant did "shoow" the victim with a pistol with intent to kill, can have failed to inform him that he did "shoot" the victim. Surely no new trial should be given him as long as he understood that he was charged with a shooting. And so, too, of misspelling the name of the victim<sup>107</sup> or of the defendant.<sup>108</sup>

#### *Reference to Statutes*

It has long been common to conclude the accusation, after charging the defendant with a particular crime, "against the form of the statute in such case made and provided." A modern notion is that it would be much more helpful to the defendant in prepar-

103. *State v. Atkins*, 142 La. 862, 77 So. 771 (1918), held the defendant, convicted of the battery for shooting the victim with a pistol, should be discharged, although he had made no demurrer or motion to quash before trial.

104. *State v. Stephens*, 199 Mo. 261, 97 S.W. 860 (1906), held that *A*, convicted of rape of *B*, was entitled to have his conviction reversed.

105. *McCearley v. State*, 97 Miss. 556, 52 So. 796 (1910), gave *A* a new trial after conviction. Compare *State v. Edwards*, 19 Mo. 674 (1854) (allegation that *A* with force and violence "assault" *B* held good, the omission of "did" being purely clerical).

106. *Pedrosa v. State*, 155 Tex. Crim. 155, 232 S.W.2d 733 (1950). If the names have the same sound, however, there will be no new trial for the variance in spelling. *Garlington v. State*, 141 Tex. Crim. 595, 150 S.W.2d 253 (1941) ("Foely" and "Folley").

107. *People v. Caponetto*, 359 Ill. 41, 194 N.E. 231 (1934).

108. *United States v. Denny*, 165 F.2d 668 (7th Cir. 1947) (defendant's name spelled Kenny in the second of three counts; the trial court amended the indictment to read "Denny", conviction affirmed on appeal). Though it is conceivable defendant might in some circumstances be misled by misspelling the name of the victim, it is impossible to mislead him by misspelling his own name.

A.L.I. Code § 184 (1930) provides that misspellings and miswritings or bad grammar, etc., do not make the accusation insufficient. It may be amended, and the defendant if actually misled thereby may have a postponement of his trial.

ing his defense if the precise statute were referred to. The Institute Code provides that the accusation "may" refer to the statute creating the offense charged.<sup>109</sup> The federal rules go further and provide that the accusation "shall" state the statute, but that its omission or error in the citation shall not be a ground for dismissing the accusation or reversing a conviction if the defendant is not actually prejudiced.<sup>110</sup> It has been recently held in a state where the statute need not be cited at all that to cite the wrong statute will result in a reversal of the conviction (apparently without the slightest regard to whether the defendant was prejudiced).<sup>111</sup> Fairness, however, requires no reversal without a showing that the defendant was actually misled.

### *Vagueness*

Just as, in the substantive criminal law, a criminal statute may be unconstitutionally "void for vagueness"<sup>112</sup> because it fails to inform prospective defendants as to what conduct is criminal, so also a vague accusation may be unconstitutional in failing to inform the defendant of the charge. Thus, a perjury indictment alleging that the defendant lied when he testified on oath that he was not a "communist sympathizer" was held to be void for vagueness.<sup>113</sup> So, too, a scattergun indictment charging conspiracy "to violate title 2 of the National Prohibition Act" was held bad, where title 2 contained 39 sections setting forth as many different ways of violating the act.<sup>114</sup> Surely fairness to the accused requires a certain amount of definiteness as to the crime charged.

On principle, however, the prosecution should be allowed to amend the accusation to inform the defendant more specifically of the crime,<sup>115</sup> or to file a bill of particulars setting forth the details of the offense which defendant may need to defend himself so long as the defendant is given time thereafter to prepare his defense.

109. *Id.* § 154(2) (1930).

110. Fed. R. Crim. P. 7(c).

111. *Casadas v. People*, 304 P.2d 626 (Colo. 1956), where the information alleged conspiracy to violate the fictitious check statute, Colo. Rev. Stat. Ann. § 40-6-7 (1953), whereas the proper statute is § 40-6-8.

112. *United States v. Cohen Grocery Co.*, 255 U.S. 81 (1921) (vague federal statute unconstitutional, for failure to inform defendant of the accusation), *Winters v. New York*, 333 U.S. 507 (1948) (vague state statute violates fourteenth amendment due process). See note, *Due Process Requirements of Definiteness in Statutes*, 62 Harv. L. Rev. 77 (1948).

113. *United States v. Lattimore*, 215 F.2d 847 (D.C. Cir. 1954). See also *O'Connor v. United States*, 240 F.2 404 (D.C. Cir. 1956) ("member of the Communist conspiracy").

114. *United States v. Dowling*, 278 Fed. 630 (S.D. Fla. 1922).

115. Not, however, in the case of indictment, to charge him with a new crime which the grand jury did not have in mind. See *infra* note 127

## VARIANCE BETWEEN ACCUSATION AND PROOF

In many of the situations considered above the deficiencies or mistakes in the contents of the accusation have become apparent during the trial, when the proof showed a variance between what was alleged and what was proved. Thus, as to time and place we considered an accusation of crime committed on June 8 where the proof showed it was committed April 15,<sup>116</sup> and an accusation of crime committed in Boston where the proof showed it was committed in Chelsea in the same county.<sup>117</sup> The cases on clerical errors and misspellings really involve variances, as where defendant is charged with "shooing" the victim and the proof shows he "shot" the victim,<sup>118</sup> or defendant is accused of raping "Seanda" and the proof is that he raped "Senaida."<sup>119</sup> We have seen that the more detail an accusation contains, the greater chance of a variance between allegations and proof.<sup>120</sup> Different jurisdictions require allegations of more or less detail, as we have seen.<sup>121</sup> What happens if a certain detail is alleged which need not have been alleged, and then the proof at the trial discloses a variance between the superfluous detail and the proof thereof? If might, of course, be argued that variances as to details which need not have been alleged at all are not as bad as variances as to details which must be alleged.

A defendant charged with stealing a flannel sheet secured a reversal because the proof showed the sheet was made of cotton and wool.<sup>122</sup> A defendant, charged with aiding and abetting the principal by pushing, striking, and threatening the victim (the details of how he aided not being required to be alleged), cannot properly be convicted on proof that he aided in some other way.<sup>123</sup> A defendant might properly be simply charged with stealing "one mule", but if he is actually charged with stealing "one bay mare mule" the proof must conform as to the sex and color of the animal.<sup>124</sup>

The cases point out that the reason for reversing convictions because of variances as to details (whether the details be those required to be alleged or superfluous details) is that the defendant may be misled in preparing his defense.<sup>125</sup> The trouble is that the

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116. See note 70 *supra*.

117. See note 82 *supra*.

118. See note 103 *supra*.

119. See note 106 *supra*.

120. See note 37 *supra* and text.

121. See heading *Details* p. 529 *supra*.

122. *Alkenbrack v. People*, 1 Denio 80 (N.Y. 1845).

123. *Fulford v. State*, 50 Ga. 591 (1874).

124. See *Turner v. State*, 3 Heisk. 452, 456 (Tenn. 1872).

125. See cases cited notes 122-24 *supra*; *Guilbeau v. United States*, 288 Fed. 731 (5th Cir. 1923), where the court said in reversing a conviction on an in-



mere possibility of misleading the defendant should not be the ground for reversing a conviction. There should be a showing that the defendant was actually misled, rather than a speculation that he might possibly have been misled. That is all which fairness to the accused requires.<sup>126</sup>

#### AMENDMENT TO THE ACCUSATION

Where defects of various sorts in the contents of the accusation come to light before or during trial—whether it be the omission of something that ought to be alleged, the inclusion of something unnecessary to be alleged, inaccuracies which will lead to a variance, or misspellings or clerical errors—the sensible thing which the prosecution will usually want to do when the defect becomes known is to move the court to be allowed to amend the accusation and then get on with the business at hand, namely the prosecution (postponing the trial if the accused has been misled in preparing his defense) Can the situation be saved from dismissal of the accusation or reversal of a well-founded conviction by the simple remedy of allowing an amendment? If the accusation is in the form of an information, there is usually not much difficulty as to amendment. The prosecuting attorney prepared the accusation in the first place, so he may be allowed to amend it now. But with an indictment the argument may be made that the grand jury originated it, and only the grand jury can amend it. Of course, as a practical matter, the prosecuting attorney actually drafted it, and the grand jury relied on him for the technicalities in wording it, but still it is theoretically the wording of the grand jury.

No doubt an amendment to an indictment which will change the charge from crime A to another crime B cannot be allowed.<sup>127</sup> As to indictment defects of a less serious nature, one view is that

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dictment for selling derivatives of opium, to wit, four grains of morphine sulphate, when the evidence showed the sale of four grains of morphine hydrochloride. "If the rule against a material variance be considered technical, yet it is sound, and only by adhering to it can the danger of misleading a defendant be avoided." *Id.* at 732.

126. A.L.I. Code § 184(2) (1930) provides that no variance shall be a ground to acquit the defendant, but that if the defendant is actually prejudiced he should be given a postponement of the trial, before the same or another jury; no variance shall result in arrest of judgment or reversal on appeal unless it is affirmatively shown the defendant was in fact prejudiced in his defense on the merits.

127. *E.g.*, *State v. Goodrich*, 46 N.H. 186 (1865) (amendment changing indictment from petit larceny to grand larceny not allowed). See *People v. Bogdanoff*, 254 N.Y. 16, 171 N.E. 890, 69 A.L.R. 1378 (1930) (indictment may not be amended to permit trial upon a crime not charged by the grand jury). See heading *Conviction of Crime Charged on Proof of Crime Charged* p. 519 *supra*.

no such amendment can be made, only the grand jury can ever make the amendment.<sup>128</sup> The better view is that mistakes of form can be corrected.<sup>129</sup> Notions of fairness are not violated by the sensible view that an accusation may be amended as to formal matters before trial or during trial, so as to prevent a variance, as long as the defendant is given time to prepare his defense as to anything which has really misled him.

#### JOINDER OF OFFENSES AND DEFENDANTS

##### *Joinder of Offenses*

A criminal accusation frequently contains separate counts, each being a complete accusation of a crime committed by the defendant. It may be that the accusation recognizes that the defendant committed only one crime, but the various counts cover different theories of what crime he committed or how he committed it.<sup>130</sup> It may be that by one act he committed several crimes,<sup>131</sup> each of which crimes may in most jurisdictions be alleged in a separate count of a single accusation. Or it may be that he engaged in a course of continuous conduct by which he committed several crimes one after another.<sup>132</sup> There is more of a question as to whether

128. *Ex parte Bain*, 121 U.S. 1 (1887), *Patrick v. People*, 132 Ill. 529, 24 N.E. 619 (1890), *State v. McCarthy*, 17 R.I. 370, 22 Atl. 282 (1891).

129. *United States v. Denny*, 165 F.2d 668 (7th Cir. 1947) (allowing correction of spelling of defendant's name), *Hawthorn v. State*, 56 Md. 530 (1881) (striking out surplusage). A.L.I. Code § 184(1) (1930) allows amendments of indictments or informations as to any defect or omission of form, including misspellings, miswriting, bad English, abbreviations, etc. *Id.* § 186 allows amendments after verdict so as to make the accusation self-sufficient for later protection of the defendant against double jeopardy.

130. Thus it may be that the defendant's one crime was on the borderline between false pretenses and larceny by trick, so the accusation contains a count for each in order to meet the proof. Where the defendant inflicted two wounds on the victim, either one of which might be found to be the fatal wound, there may be a count for each. See the indictment at note 1 *supra*. And where defendant stabbed the victim and then choked him, it being somewhat uncertain which act caused the death, there may be a count for each theory. A sensible rule is provided for in Fed. R. Crim. P. 7(c) "It may be alleged in a single count that [defendant] committed [the offense] by one or more specified means."

131. Thus if *A* throws a bomb into the street, killing *B* and *C* in the explosion, one view is that *A* has committed two separate crimes. See note 100 *supra*. Perhaps it is easier to view crimes as separate where one follows the other by a moment of time, as where *A* rapidly pulls the trigger twice, first killing *B* and then *C*.

132. *State v. Thompson*, 139 Kan. 59, 29 P.2d 1101 (1934) (defendants surprised a young couple out for a drive, raping the girl and robbing the boy of his clothing and car). The court in that case gave this hypothetical example: *A* breaks into and enters *B*'s house with intent to steal, steals *B*'s property, rapes Mrs. *B*, kills *C* who discovers him, and burns down the house to hide his crimes. The court stated that in the hypothetical situation it would be proper to join burglary, larceny, rape, murder and arson in several counts of one accusation. *Id.* at 62, 29 P.2d at 1102.

similar but unconnected crimes may be joined in a single accusation.<sup>133</sup> It is clear everywhere, however, that unconnected crimes of a dissimilar nature cannot be joined<sup>134</sup>—as where *A* robs *B* one day and rapes *C* the next—it being unfair to impose on the defendant the burden of defending himself simultaneously against different unrelated charges. Doubtless also it is unfair thus to present the defendant to the jury in the role of an habitual violator by joining unrelated crimes.<sup>135</sup>

Where there is a misjoinder of dissimilar and unrelated crimes, the defendant is not necessarily entitled to have the accusation dismissed before trial, much less automatically to have his conviction reversed after trial. A proper remedy is to make the prosecution elect between the various offenses and then proceed with the trial.<sup>136</sup> Even if the motion to elect is improperly denied and the defendant is made to defend against all charges, probably fairness requires that he be entitled to a new trial only if it is affirmatively shown that he was actually embarrassed in his defense,<sup>137</sup> a not unlikely situation in case of misjoinder, but not necessarily the case.

A common law rule still persisting to some extent today<sup>138</sup> is that, though otherwise joinable, a felony and misdemeanor cannot be joined (unless perhaps the misdemeanor is a lesser included offense within the felony)<sup>139</sup> The reason is that in England at the time the rule developed, defendants in misdemeanor prosecutions

133. As where *A* rapes *B* one day and rapes *C* a week later in the same county. Fed. R. Crim. P. 8(a) allows joinder of counts for offenses "of the same or similar character."

134. *McElroy v. United States*, 164 U.S. 76 (1896) (forbidding joinder of charges that defendants on April 16 assaulted *A* with intent to kill, and on May 1 committed arson of *B*'s dwelling; some of the defendants involved in the assault charge were different from the defendants in the arson charge)

135. *Id.* at 80: "objectionable as tending to confound the accused in his defense, or to prejudice him in the matter of being held out to be habitually criminal, in the distraction of the attention of the jury, or otherwise."

136. *Pointer v. United States*, 151 U.S. 396 (1894) (*A* charged with murder of *B* with an axe in one count, murder of *C* with an axe on same date and in same county in another count). The case pointed out that where the date, place and county were the same, but the indictment itself did not otherwise disclose a connection between the two crimes, the court might properly refuse a motion to dismiss the indictment or to make the prosecution elect before trial, waiting to see whether the evidence at the trial would develop a connection between the two crimes. Here at the trial it appeared that *A* slew *B* and *C* together, one right after the other, with the same axe.

In the absence of a motion by the defendant to quash or to elect, the defendant cannot after conviction raise the question of misjoinder of counts. See *Trask v. People*, 35 Colo. 83, 88, 83 Pac. 1010, 1012 (1905).

137. So provided in A.L.I. Code § 185(4) (1930) There is no provision in the Code setting forth when joinder of offenses is proper or improper.

138. See *e.g.*, *Hunter v. Commonwealth*, 79 Pa. St. 503, 506 (1875) *Eckhardt v. People*, 126 Colo. 18, 247 P.2d 673 (1952) (improper to join assault and battery with voluntary manslaughter).

139. See *Eckhardt v. People*, note 138 *supra* (proper to join murder with involuntary manslaughter)

were entitled to certain advantages—such as the right to counsel, and to have a copy of the accusation—which were not available to felony defendants. Since the reason for the rule has long since disappeared—felony defendants today have at least as many rights as misdemeanor defendants—the rule itself has been abolished in many jurisdictions.<sup>140</sup> Fairness does not, of course, require the retention of a rule when the reason for its existence has long since disappeared.

Habitual criminal statutes commonly provide for increased punishment for the present offense in case of a certain number of prior convictions. If the defendant is being charged as an habitual criminal, he is of course entitled to be informed of that fact.<sup>141</sup> On the other hand, fairness requires that, although he be informed of it, the jury be kept uninformed of it until after they return a verdict as to the present crime, lest the jury be influenced by his past bad record in determining his present guilt.

### *Joinder of Defendants*

Where two or more defendants jointly participate in a crime they may be prosecuted together by the joinder of defendants in one accusation, such as an indictment accusing *A* and *B* of robbery of *C*.<sup>142</sup> In the absence of joint participation they cannot be joined.<sup>143</sup> The appropriate remedy in the case of misjoinder of defendants is for a defendant to move to sever in order to have a separate trial.<sup>144</sup>

140. See *Hunter v. Commonwealth*, 79 Pa. St. 503, 505 (1875), *State v. Fitzsimon*, 18 R.I. 236, 237, 27 Atl. 446, 447 (1893), *annot.*, 9 L.R.A. 182 (1890). Fed. R. Crim. P. 8(a) allows joinder of misdemeanors and felonies.

141. *State v. Reiley*, 94 Conn. 698, 110 Atl. 550 (1920), *annot.*, 58 A.L.R. 20, 64 (1929). *Cf.* *Chandler v. Freitag*, 348 U.S. 3 (1954), where the procedure of informing defendant orally at his arraignment for the principal crime that he will be tried as an habitual criminal was held to violate fourteenth amendment due process, at least if the defendant were not granted a continuance to secure counsel to fight the habitual criminal charge.

142. Orfield, *Criminal Procedure from Arrest to Appeal* 262 (1947). Fed. R. Crim. P. 8(b) authorizes joinder of jointly participating defendants. For one answer to the question of what happens when the combined conduct of two defendants causes a crime, but there is no "concert of action" between them, see *State v. Blackley*, 191 Wash. 23, 70 P.2d 799 (1937) (one defendant *A* recklessly parked his bus in a dangerous spot; the other defendant *B* recklessly drove into the bus, bounced off and killed an oncoming motorist *C*, held, *A* and *B* could properly be joined).

143. Orfield, *op. cit. supra* note 142, at 263, *United States v. Interstate Properties, Inc.*, 153 F.2d 469 (D.C. Cir. 1946) (defendants jointly charged with manslaughter for omission to act, where each had a different duty to act), see *State v. Herrera*, 28 N.M. 155, 207 Pac. 1085, 24 A.L.R. 1134 (1922) (*A*, *B* and *C* were witnesses at *D*'s trial and testified falsely one after the other; misjoinder of *A*, *B* and *C*, but defendant failed to raise the point until the appeal).

144. A severance may properly be granted, even where the defendants jointly participated in a crime, if there is some evidence admissible against *A* but not against *B* if *B* is tried alone; in such case *B* may be prejudiced by a joint trial with *A*.

If no such motion is made, a joint defendant can hardly complain of misjoinder after conviction at a trial on the merits.<sup>146</sup> Even if such a motion is made but improperly denied, a convicted defendant is not automatically entitled to a new trial without a showing that he was prejudiced by the misjoinder<sup>149</sup> if essential fairness is to be the guide.

#### COPY OF ACCUSATION FURNISHED TO ACCUSED

A number of state constitutions provide that the accused in a criminal case has the right to demand a copy of the accusation. These and many other states provide that he is entitled to a copy either at his request or as a matter of right without a request.<sup>147</sup> It seems clear that fairness requires that the defendant be allowed to read and study the accusation for a period of time before the arraignment long enough to decide how to plead.

#### NAMES OF WITNESSES

A number of states provide that the names of witnesses who testified before the grand jury must be indorsed on the indictment while a number of others provide that the prosecuting attorney shall endorse on the accusation the names of the witnesses he plans to call at the trial.<sup>148</sup> Some states provide that failure to endorse shall be a ground for a motion to quash. Others provide that such failure cannot be made on the basis of such a motion, at least if the prosecution promptly comes forward with the names.<sup>149</sup> The requirement of endorsing the names of witnesses is, of course, for the benefit of the defendant, by informing him in a general way of the testimony he will have to meet at the trial. Though the minimum standards imposed by due process probably do not require such endorsement, the rule seems eminently fair,<sup>150</sup> although failure to endorse a wit-

145. *State v. Herrera*, 28 N.M. 155, 207 Pac. 1085, 24 A.L.R. 1134 (1922).

146. A.L.I. Code § 185(4) (1930) so provides.

147. *Id.* § 193 and commentaries thereon. The Code provides for furnishing defendant with a copy 24 hours before being called on to plead, but if he is not so furnished and yet does plead, the subsequent proceedings are not invalidated.

148. *Id.* § 194 and commentaries thereon.

149. *Ibid.*

150. A.L.I. Code § 194 (1930) provides for indorsing the names of witnesses on whose evidence the accusation is based, plus such other witnesses as the prosecution plans to call. Names may be added later. No continuance will be granted because of new names unless the interests of justice require it.

ness' name should entitle defendant to no more than a continuance if the new witness' appearance in the case necessitates that the defendant have more time to prepare his defense.

#### DISCOVERY AND INSPECTION

A defendant who wishes information before trial for the purposes of preparing his defense may be able to obtain some information from the prosecution besides what is set forth in the accusation, or in a bill of particulars spelling out some of the details of the accusation. He may have a right to inspect and copy items (usually documents) obtained by the prosecution from the defendant or from others by seizure or by process if such information be necessary for his defense.<sup>151</sup> He may also subpoena evidentiary matter, in the possession of the prosecution, for use at the trial.<sup>152</sup> These matters are analogous to accusation problems in the sense that they all have to do with obtaining information from the prosecution in order to prepare the defense, but insofar as they are not related to the accusation they are beyond the scope of this article.

#### CONCLUSION

We have seen that many an absurd result has followed from quite unimportant defects in criminal accusations—omissions, superfluities, miswordings, misspellings, and variances—the results being especially unfortunate where the court orders a reversal of the defendant's conviction secured at a trial upon evidence disclosing his guilt.<sup>153</sup> But fairness both to the accused and to the state requires that the courts bear in mind the basic function of the accusation, to give notice to the accused so that he can make his defense. Some courts have asked themselves whether the defendant could possibly by some conceivable chance have been misled by the alleged defect? Others have not even asked this broad question. The real question which courts should ask is, was the defendant actually misled? Or perhaps, if the situation is such that it is difficult for him to show that he was actually prejudiced, is there a substantial possibility that he was misled? If the answer is no, the defendant is entitled to no relief except perhaps to have the accusa-

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151. *E.g.*, Fed. R. Crim. P. 16 (discovery and inspection).

152. *Id.* 17(c), note, 38 J. Crim. L., C. & P.S. 249 (1947).

153. Besides the cases listed in the footnotes to this article, see Perkins, *Absurdities in Criminal Procedure*, 11 Iowa L. Rev. 297 (1926), where a great many such absurdities are brought to light, especially in the area of the accusation part of criminal procedure.

tion amended.<sup>154</sup> If the answer is yes, he may be entitled to a new trial after conviction (by the granting of a motion in arrest of judgment or by reversing the conviction on appeal), although even here the appropriate relief may be the granting of extra time to the defendant to reprepare his defense when the defect comes to light.

There is some question as to whether the rules relating to fairness in the accusation procedure, even when properly administered, do not give too great an advantage to the accused. Does not fairness require some reciprocal duty on the defendant to inform the prosecution before trial as to his defense, so that the prosecuting attorney can properly prepare his case? The defendant can put in evidence a great many possible defenses on a plea of not guilty such as compulsion, self-defense, alibi (in most states), insanity (in most states), intoxication, mistake of fact or law, the statute of limitations, and entrapment, without giving any information to the prosecution before trial as to the theory of his defense.<sup>155</sup> He need not furnish the prosecution with a list of his witnesses, as in most states the prosecution must do for him.<sup>156</sup> There is much merit in a scheme of criminal procedure that calls for equality in the sense of advance notice to the prosecution as well as to the accused.

Advances in criminal procedure, including accusatory procedure, have been slow. Courts tend to look too much to precedents from a past age which faced different problems from those existing today. Prosecuting attorneys have, perhaps, not unnaturally, copied old accusation forms without trying out newer and better ones. Legislatures have helped to produce more sensible rules, though their invitations to change are often so vague as to give little guidance. On the whole, progress has been slow, but under the impetus of the federal rules and the Institute Code some recent progress has been made. The American Bar Association study of the administration of criminal justice, presently under way, indicates an enheartening interest of the bar in matters of criminal procedure. The trend of modern thinking is surely in the direction of fair rules of procedure, fair to the accused but also fair to the people of the state.

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154. If he is not misled, he should not get a retrial after conviction, not only where he first raises the issue of the defect after conviction, but also where he raised the issue before trial (by demurrer or motion to quash) or during trial (perhaps by a motion for directed verdict of acquittal because of a variance).

155. National Commission on Law Observance and Enforcement, Report on Criminal Procedure 34 (1931), recommended that defendant give the prosecution notice of such defenses before trial. See also Millar, *supra* note 16, at 503.

156. See Millar, *supra* note 16, at 503-05, arguing for a requirement that defendant furnish such a list.