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PRELIMINARY HEARINGS IN HOMICIDE CASES: A HEARING DELAYED IS A HEARING DENIED†

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Although statutory enactments envision a speedy preliminary hearing for the suspect charged with a felony, judges generally deprive the homicide suspect of any such hearing. Courts grant the county prosecutor whatever continuances he desires until he decides to seek an indictment or dismiss the police charges. The unfortunate consequence of this practice is that the average homicide suspect, ineligible for bond, waits in jail until an official determination is made that there is probable cause to hold him for further prosecution. This practice imposes on the public the expense of long incarceration for those who will never come to trial. In addition, it imposes great personal expense upon individuals eventually cleared and released as well as upon those who must anxiously wait for the finding that there is some basis for further prosecution.[1] Thus, the preliminary hearing area is ripe for beneficial change.

To that end, this comment examines the Illinois law of preliminary hearings with special attention to the prosecutor's power to avoid them. It further presents the results of a field study of the preliminary hearing in homicide cases, which indicates that the prosecutor does in fact, at great expense to defendants, freely exercise his power to avoid them. With this background, possible legal theories to change the present practice will be explored; and legislation that might serve as an alternative to judicial action will be suggested.[2]

LAW OF PRELIMINARY HEARINGS

If the prosecutor holds great power to control pre-indictment judicial proceedings, he does so because the law on this segment of the judicial process is undeveloped.[3] For example, section 109–1 of the Illinois Code of Criminal Procedure requires the judge to hold a preliminary hearing for any defendant whom the police present on a felony charge.[4] At this hearing the judge decides whether there is probable cause to hold the suspect for indictment and prosecution. Although other states specifically require the taking of testimony on the issue of probable cause within a short time after arrest,[5] the current Illinois statute, unlike previ-

† The focus of this article concerns proceedings in Cook County, Illinois. Cook County, however, is not unlike other large metropolitan areas in its procedures and problems. The author is grateful for the assistance of Professor James B. Haddad of the Northwestern University School of Law.

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[1] This practice also forecloses one avenue of pretrial discovery of the prosecutor's case. On the other hand, whether a preliminary hearing should allow pretrial discovery remains open to serious question. *See, e.g.*, United States v. Amabile, 395 F.2d 47, 53–54 (7th Cir. 1968). Accordingly, this comment will focus on the preliminary hearing's obvious, widely acknowledged goal—the quick investigation of whether the state has probable cause to detain a man for further prosecution. *See, e.g.*, 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE §80, at 135 (1969); Greenberg, *The President's Page*, 51 CHI. BAR REC. 106, 109–10 (1969).

[2] It should be noted at the outset that Congress has already enacted legislation which attempts to deal with problems concerning the preliminary hearing. See note 112 *infra* and accompanying text. The Federal Magistrates Act was passed because many congressmen felt that the preliminary hearing rights of persons accused of crimes were being violated. In 113 *Cong. Rec.* at 3244, Senator Tydings is quoted as saying that in some districts

> "small preliminary hearings are not held even though the grand jury backlog is such that the delay between presentment and indictment is a month or more. This is done in at least one important district by routinely granting continuances to the prosecution, often *ex parte*, without any opportunity for the defendant to object."

The abuses which engendered the federal legislation exist to some extent in many state court systems. Illinois is not exempt from, nor is it unique in, the problems attendant upon delays in granting preliminary hearings. Justice White has suggested that these problems may become more acute. Coleman v. Alabama, 399 U.S. 1, 17–18 (1970).

[3] *See generally* McIntyre, *A Study of Judicial Dominance of the Charging Process*, 59 J. CRIM. L.C. & P.S. 463, 466 & n.1 (1968).

Prosecutorial control of the judicial machinery at this stage of the proceedings also exists because relatively few defendants have counsel at this stage. In the 219 homicide cases studied in this comment, only 93 defendants had counsel appear for them at some time before indictment.

[4] ILL. REV. STAT. ch. 38, §109–1 (1969). The Illinois Appellate Court has rejected the argument that the misdemeanor defendant has a statutory right to a preliminary hearing. People v. Miner, 85 Ill.App. 2d 360, 229 N.E.2d 4 (1967).

[5] *E.g.*, CAL. PENAL CODE §860 (West 1956); N.Y. CODE CRIM. PRO. §191 (McKinney 1958); NEV. REV. STAT. §171.196 (1967); ORE. REV. STAT. §133.610 (1953); WASH. REV. CODE ANN. §10.16.040 (1961).

Some of these statutes arguably speak to adjournments once the taking of testimony has begun and do

ous versions,[6] fails to specify when the judge should hold the required hearing. One would expect that, in the absence of specific direction as to time, authorities would be compelled to proceed within a reasonable period after the suspect's first appearance before the court.[7] Yet this gap in the statute makes it possible for the prosecutor to secure unlimited continuances of the probable cause hearing,[8] subject only to the requirement that trial on an indictment begin within 120 days after arrest.[9]

Despite section 109-1's requirement of a hearing, the Illinois Supreme Court has held that when a prosecutor obtains an indictment from the grand jury during a continuance of the preliminary hearing,[10] the defendant's right to such hearing and discovery of the prosecutor's case is lost.[11] Once the grand jury has undertaken its secret determination of probable cause, the preliminary hearing judge need not make a second finding on that issue.[12] Should a judge refuse to grant all the continuances a prosecutor may desire, the latter can still avoid a preliminary hearing by dismissing the police charges, freeing the defendant, and seeking an indictment at his convenience.[13] A prosecutor intent upon denying a defendant his right to a preliminary hearing can easily accomplish his objective. The motivation for doing so arises from a desire to deny a defendant discovery opportunities inherent in the hearing procedure.

The preliminary hearing is designed to insure a suspect the right to an immediate legal opinion on the validity of his arrest.[14] The prosecutor's power to foreclose a hearing as long as he moves either to dismiss or to seek the opinion of the grand jury threatens that right. In cases where police have made a valid arrest, the prosecutor should be able to make his decision within a few days. He holds no inherent power to incarcerate a suspect for an indefinite period of time while he builds a case.[15] If, for any reason, the prosecutor is unable or unwilling to reach a decision, the judicial branch should make a determination of the suspect's right to freedom.[16] Recently enacted federal law recognizes this approach to the problem. Federal magistrates are required to conduct a probable cause hearing within ten days after the arrest of a jailed suspect unless the prosecutor obtains an indictment within that time.[17] Illinois, however

not cover continuances of the hearing before it has begun. The statutes' judicial gloss, however, rules out this reading. *See* Odell v. Burke, 281 F.2d 782 (7th Cir. 1960) (Wisconsin); United States *ex rel.* Wheeler v. Flood, 269 F. Supp. 194 (E.D.N.Y. 1967); State v. Enriquez, 102 Ariz. 402, 430 P.2d 422 (1967); *Ex parte* Schefstad, 49 Cal. App. 2d 306, 121 P.2d 755 (1942).

[6] Until the revised Illinois Code of Criminal Procedure appeared in 1963, Illinois, like the states in note 5 *supra*, required that the probable cause hearing take place within ten days after the suspect's first court appearance. ILL. REV. STAT. ch. 38, §§674, 679 (1963). Section 45-3 (a) of the tentative draft of the new Code required the hearing "within a reasonable time," but even this language was omitted from the final version. It is unclear why the new Code left this point so ambiguous.

[7] *See, e.g., Ex parte* Chambers, 32 Cal.App. 476, 163 P. 223 (1917).

[8] *See, e.g.*, United States v. Delman, 253 F. Supp. 383 (S.D.N.Y. 1966) (four-year delay of preliminary hearing); Whalen v. Cristell, 161 Kan. 747, 173 P.2d 252 (1946) (six months); People v. Den Uyl, 320 Mich. 477, 31 N.W.2d 699 (1949) (eighteen months); State v. Caffey, 438 S.W.2d 167 (Mo. 1969) (eleven months); Greenberg, note 1 *supra*, at 109; Younger, *Hearings on the U.S. Commissioner System Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess., pt. 3, at 220–22 (1966).

[9] ILL. REV. STAT. ch. 38, §103-5 (1969).

[10] People v. Petruso, 35 Ill.2d 578, 221 N.E.2d 276 (1966); *accord*, People v. Vleck, 68 Ill.App.2d 178, 215 N.E. 2d 673 (1966).

[11] Theoretically, when the defendant receives a preliminary hearing, he might not gain much information about the prosecution's case nor gather many statements for later use as impeachment of trial testimony. *See* People v. Jones, 75 Ill. App. 2d 332, 221 N.E.2d 29 (1966); O'Shea, *The Preliminary Hearing in Illinois—Nature and Practice*, 57 Ill. B.J. 556, 558–59 (1969). And the judge may stop the hearing whenever the state establishes probable cause. *See* People v. Bonner, 37 Ill. 2d 553, 560, 229 N.E.2d 527, 531 (1967). Nevertheless, if a preliminary hearing does take place, many judges give the defendant more of a full-blown trial than the appellate decisions allow. *See* McIntyre, note 3 *supra*, at 466 n.1. Interviews with judges in Chicago revealed the reason for this liberality. By holding the prosecutor to higher standards, the judge assures that he will not be wasting a brother judge's time in requiring the latter to try an indictment that the state cannot approve under those more rigorous standards. This far-sighted view of judicial administration should be compared with the view held by deputy coroners, which is discussed in notes 50–52 *infra* and accompanying text.

[12] *E.g.*, People v. Jones, 9 Ill.2d 481, 138 N.E.2d 522 (1956); People v. Jones, 408 Ill. 89, 96 N.E.2d 515 (1951).

[13] People v. Rinks, 80 Ill. App. 2d 152, 224 N.E. 2d 29 (1967).

[14] *See, e.g.*, State v. Kanistanaux, 68 Wash. 2d 652, 414 P.2d 784 (1966) as well as discussion in note 1 *supra*.

[15] *See* United States v. Worms, 25 Fed. Cas. 773 (No. 16,765) (C.C.S.D.N.Y. 1859); *Ex parte* Chambers, 32 Cal. App. 476, 163 P. 223 (1917); Weinreb, *Hearings on S. 3475 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 105 (1966).

[16] *See generally* Greenberg, note 1 *supra*, at 109.

[17] 18 U.S.C.A. §3060 (b)(1), (e)(1969). *See* United States v. Meyers, 303 F. Supp. 1383 (D.D.C. 1969); H.R. REP. No. 1629, 90th Cong., 2d Sess. 22 (1968).

appears to leave open the possibility of unbridled prosecutorial discretion, thereby allowing the State's Attorney to exploit his potential power.

Field Study: Preliminary Hearings In Homicide Cases

This study focused on the operation of preliminary hearings in homicide cases, since defendants suspected of such crimes seldom gain freedom on bond.[18] Furthermore, pre-trial discovery in these cases poses the greatest threat to the prosecutor.[19] Indeed, if any inequities result from the murky state of the Illinois law on preliminary hearings, they would surely affect the homicide suspect.

The compilation of the data[20] regarding preliminary hearings in homicide cases evoked a striking pattern. The data revealed that the State's Attorney has been extremely successful in denying homicide defendants preliminary hearings. He has effectively protected himself from pre-trial discovery in these cases.[21] In a sample of 219 cases, only two defendants realized a judicial finding of probable cause.[22] All other defendants were either indicted before a hearing could take place (133) or saw their cases dropped by the prosecutor without a judicial hearing (83).[23]

This wholesale denial of preliminary hearings would not be alarming if defendants were spending short periods of time in jail while the State's Attorney considered his strategy. However, these defendants spent considerable time in the Cook County jail before it was determined whether there was probable cause to detain them for prosecution. In sum, the defendants experienced an average 63-day delay between first court appearance and indictment or release. Those with counsel (93) waited an average of 70 days; those without counsel (126)[24] spent an average of 58 days in the county jail. Those released under either a judicial finding of no probable cause,[25] return of no bill by the grand jury, or dismissal by the prosecutor experienced an average 77-day delay if they had counsel and a 62-day delay if they had no lawyer. By contrast, those indicted waited 57 or 58 days respectively until indictments were returned.

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[18] See the discussion in note 36 *infra*.

[19] By contrast, prosecutors in Cook County appear to favor preliminary hearings in most rape cases because they often have substantial doubts about the credibility of their complaining witnesses.

[20] The docket books of the Clerk of the Circuit Court of Cook County, Municipal Division, were searched for the file numbers of all cases involving homicide charges filed between January 1, 1969, and August 31, 1969. After discarding those files with incomplete entries, 219 files remained available for inspection. Careful note was made of each court appearance by each defendant. The time between first court appearance and indictment, release on bond, or eventual release without indictment for those not given bond was computed for each defendant.

It must be remembered, of course, that those released without indictments were not necessarily "cleared" in the sense that the prosecutor dropped the charges because he became convinced of their innocence. For example, if a defendant claims self-defense in a killing that had no witnesses, he is likely to be freed by the prosecutor who has little chance of proving the suspect's guilt.

[21] Able attorneys make up for these lost discovery opportunities by conducting hearings on motions to suppress every conceivable sort of evidence. On balance, the prosecutor may not protect himself as much as he thinks.

[22] These "hearings" probably involved the judge's reading of the transcript of the coroner's inquest, and an intuitive disagreement with his recommendation. See text following note 38 *infra*.

The prosecutor later entered a *nolle prosequi* in one of these two cases.

[23] Thirty seven individuals were released on a finding of no probable cause. It would be a mistake, however, to say that these individuals had a hearing in the sense that they had the opportunity to engage in the discovery of a case that might be presented against them on the trial of an indictment. Generally, the finding of no probable cause is suggested to the judge by the prosecutor before hearing or is automatic upon the finding of justifiable homicide by the coroner. The judge studies the coroner's verdict and transcript of the proceedings. The prosecutor makes no attempt to argue against the finding of no probable cause that almost inevitably follows this study of the coroner's record. This practice leads one to wonder how much of a hand the prosecutor's office has in the inquest verdict.

There were, in all, 85 cases that the prosecutor did not prosecute. One of these was the case mentioned in note 22 *supra*, in which the prosecutor had a finding of probable cause and later dropped the charges. In another case, the defendant waived a preliminary hearing (the only one to do so), but later received the benefit of a *nolle prosequi*. It must be noted that he waived his hearing after two continuances, for the state had kept him in jail for more than a month.

[24] When this comment was initially prepared, the Illinois court did not require the appointment of counsel at the preliminary hearing unless the indigent entered a plea at that time. People v. Bonner, 37 Ill. 2d 553, 229 N.E.2d 527 (1967). Other jurisdictions had taken the same position. *E.g.*, Wilson v. Harris, 351 F.2d 840 (9th Cir. 1965).

After the period of time studied in this comment and even after the writing of this comment, the Supreme Court handed down *Coleman v. Alabama*, 399 U.S. 1 (1970), requiring the appointment of counsel for a preliminary hearing. *Accord*, People v. Adams, 46 Ill.2d 200, 263 N.E.2d 490 (1970) (refusing retroactive application of *Coleman*). Nevertheless, the author observed in September, 1970, that in homicide cases appointment of counsel was being made only after arraignment to the indictment. If one studies the Court's rationale, he can understand Illinois's disregard for *Coleman*—at least in murder cases, where the prisoner receives no preliminary hearing, anyway. *See* 399 U.S. at 9, 17–18.

[25] As pointed out in note 23 *supra*, this characterization may be a misnomer.

Thus, those suspects not indicted waited longer to obtain release than those who waited only to receive news of their indictment. Moreover, these averages mask the extreme delays apparent in a number of cases. One suspect waited 182 days before the grand jury indicted him.[26] Two other defendants were indicted 134 and 154 days after their arrests, although neither had asked for a continuance. In light of the "120-day rule," both indictments seem fruitless exercises unless perhaps the prosecutor used them to pressure the defendants to testify against others.

In absolute terms, a two-month delay should be unacceptable;[27] for most murders occur between family and friends[28] and admit of quick solution with easy marshalling of evidence once an arrest has been made.[29] Moreover, a recent sample of similar delays in cases involving a cross-section of substantive charges revealed that the lag-period in each case averaged only 27 days.[30] Even the 27-day delay far exceeds a Presidential task force recommendation of *three days* between first appearance and actual hearing.[31]

Follow-up interviews revealed the local customs that produced the data compiled in this study.[32] When the homicide suspect first appears in felony court,[33] the judge automatically continues the case three to six weeks at the prosecutor's request.[34] The prosecutor is afforded broad discretion to make a request of this sort.[35] To justify the practice, it is said that the continuance enables the county coroner to conduct an inquest. If the coroner's jury recommends grand jury action and the prosecutor agrees with the finding, he will seek more continuances until an indictment is returned. These continuances are freely granted.[36] Judges refuse to hold

[26] Since he had asked for a continuance during this period, he could not avail himself of the "120 day" rule and its dismissal-of-the-charges sanction. ILL. REV. STAT. ch. 38, §103-5 (1969).

[27] *See* United States v. Worms, 25 Fed. Cas. 773 (No. 16, 765) (C.C.S.D.N.Y. 1859). Authorities who testified on bills that later became enacted as 18 U.S.C.A. §3060 (1969) objected to its requirement that a hearing or indictment occur within ten days after first appearance before the magistrate. They felt that even ten days was too oppressive on the defendant. *E.g.*, Weinreb, note 15 *supra*, at 105.

[28] A memorandum prepared by the commander of the homicide detectives, Chicago Police Department, showed that in 1967 only 145 murder victims out of a total of 552 did not know their slayer through some relationship, either personal or business-related.

[29] One prosecutor who presents cases before the grand jury said in an interview that once he knows the pathologist's finding on cause of death, he can seek an indictment within, at most, a few days after arrest. An experienced homicide detective confirmed this opinion.

Interviews with deputy coroners revealed that the coroner's pathologists perform autopsies on the same day that bodies are brought to the coroner. The pathologist makes his report into a dictaphone while he performs the autopsy. However, a few weeks elapse before the pathologist's report (the protocol) is typed by the coroner's secretaries. Nevertheless, it would be possible for the prosecutor to obtain this information without waiting for the protocol to be typed.

Delay in the indictment process also sets in when a witness does not appear as scheduled to testify before the grand jury. Rather than introduce that person's testimony as hearsay and take the chance of being forced to try an indictment without a key witness (which might alter the State's Attorney's official won-loss statistics), the prosecutor will schedule the case for some time in the next calendar month and issue a second subpoena. Obviously, this solicitude for the defendant, which is how this practice was explained, cuts both ways, as the findings in the text fully demonstrate.

[30] Banfield & Anderson, *Continuances in the Cook County Criminal Courts*, 35 U. CHI. L. REV. 259, 314 (1968) (Table 35).

[31] *See* United States *ex rel.* Wheeler v. Flood, 269 F. Supp. 194, 198 (E.D.N.Y. 1967). The common law also seems to have settled on a three-day rule. *See* note 85 *infra*.

[32] Interviews were conducted with judges, prosecutors, and public defenders who were working or had worked in the Cook County Felony Court, where all pre-indictment court appearances for homicide defendants occur.

[33] Until some time in April, 1969, homicide suspects made their first court appearances in Branches 42, 43, and 49 (Boys Court) as well as in felony court.

[34] *See generally* McIntyre, note 3 *supra*, at 483. This view has prevailed in other jurisdictions. *See* United States v. Gray, 87 F. Supp. 436 (D.D.C. 1949). Reform in the federal courts has come about, as noted in the text accompanying note 17 *supra*.

[35] McIntyre, note 3 *supra*, at 472. Some jurisdictions are remarkably strict in allowing continuances of the preliminary hearing. *See* Hill v. Sheriff of Clark County, 85 Nev. 234, 452 P.2d 918 (1969).

[36] Even if the grand jury refuses to indict, the defendant may spend considerable time in jail because of administrative delays. The Chicago *Daily News* of July 30, 1970, reported on page 4 that a street gang member was released from Cook County jail more than a month after the grand jury refused to indict. Once again, earlier appointment of counsel would remedy this deficiency.

The homicide defendant can ask for a hearing to set bond at any time he can demonstrate that the proof is not "evident" or that the presumption is not "great." ILL. REV. STAT. ch. 38, §110-4 (1969). He will receive this hearing within a few days after his request. The hearing may help the defendant discover the state's case; but the state can foreclose discovery as well as keep the defendant in jail by agreeing, without a hearing, to bail in a sum that he cannot meet. In the sample of cases, bail was requested by 23 suspects. The court rejected the motion in only five of these cases (four of these persons were later indicted). In one case bail was granted on the day of indictment; in another, a *nolle prosequi* was entered on the same day. In eleven cases the defendant was unable to post the cash required and had to wait in jail for further

the hearing required by section 109-1. They seem to feel that the inquest grants the suspect a *de facto* probable cause hearing. They feel that a second hearing would cover the same ground and not help the defendant, unless he convincingly argues that he has access to evidence not presented at the inquest. Rarely does a defendant make such a representation. Hence, after an inquest verdict that recommends grand jury action, the defendant can expect to spend considerable time in jail unless the prosecutor refrains from following the coroner's advice and dismisses the case.[37]

If the coroner does not recommend grand jury action, the judge, after examining the transcript of the coroner's inquest and receiving some evidence from the arresting officer, will usually find that probable cause is lacking.[38] In rare instances, the judge will bind the defendant over to a grand jury without the coroner's recommendation. One judge remembered only two cases in which he had done so.

These interviews laid to rest any notion that the long delays were caused by defendants. In fact, there were fewer than forty cases in which the defendant asked for a continuance or joined in the state's motion for one. However, the interviews did indicate that the occasional request by a defendant for a continuance was probably unnecessary since, had the defendant not made the request, the state would have done so.[39]

The study indicated that the coroner system is the justification for, if not the cause of, the automatic continuances at the prosecutor's disposal. One prosecutor, who formerly worked in the felony court, pointed out that, when he had disposed of some cases before the coroner had an opportunity to hold inquests, the latter resented what he considered encroachment on his domain. One judge observed that the office of coroner is constitutional[40] and thus reasoned that any continuance policy involving the coroner was beyond reproach. Consequently, an examination of the coroner system is necessary to comprehend the problem at hand.

The office of county coroner dates back to medieval times.[41] In Illinois the coroner is charged with the task of inquiry into all violent, accidental, and suspicious deaths.[42] At one time the coroner was an investigative officer.[43] At present, he functions more as a judicial officer, waiting for the police and prosecution to bring him evidence against suspected criminals. There is neither statutory nor case authority for the practice of holding a coroner's inquest prior to a hearing on probable cause. To allow the inquest to foreclose a preliminary examination, then, is inexcusable.[44] However, if the magistrate were to hold his hearing first and free or detain the suspect, the coroner, having no such power,[45] would witness the reduction of his proceedings to the status of mere statutory formality. The prestige of his office would indeed be threatened.

Continued regard for the coroner's political well-being operates at the expense of individual defendants. An examination of the coroner's records[46] indicated that 436 cases were recommended for grand jury action. Only 89 cases were termed instances of justifiable homicide, which amounts to a finding of no probable cause. If these figures are adjusted downward to compensate for the smaller number of felony court cases studied, it appears that he recommended no grand jury action in only 41 cases. On the other hand, the prosecutor dismissed, one way or another, 85 cases—almost twice as many "washouts" as the coroner recommended.[47]

It is easy to understand why the coroner is more

proceedings. In only five cases did the defendant post bond and gain his freedom before a decision on probable cause was made. In two of these cases, the defendant had to wait a month before he could raise the money for bail.

[37] Alternatively, the prosecutor may enter a *nolle prosequi* or move to strike the case from the docket. It is unclear how the prosecutor chooses between his options since each leaves open further action should he change his mind. *But see* Oaks & Lehman, *The Criminal Process of Cook County and the Indigent Defendant*, 1966 U. ILL. L. F. 584, 620–22.

[38] See note 23 *supra*.

[39] Were the defendant to have experienced counsel before indictment, this unnecessary and harmful request might not be made.

[40] ILL. CON. art. 10, §8 (1870).

[41] Comment, *The Wisconsin Coroner System*, 1951 WIS. L. REV. 529.

[42] ILL. REV. STAT. ch. 31, §10 (1969).

[43] Adler, *Coroners' Inquests: The Impact of Walts*, 15 U.C.L.A. L. REV. 97, 99 (1967).

[44] *Compare* ILL. REV. STAT. ch 38, § 109–1 (1969), *with* ch. 31, §10.

[45] *See* note 56 *infra*.

[46] The period between February 1, 1969, and September 30, 1969, was examined to obtain a better comparison with the period in which defendants made their first court appearances (January 1 to August 31), since the inquest usually takes place one month after first court appearance.

[47] A prosecutor who handles cases before the grand jury emphasized that he feels in no way bound by the coroner's findings and gives a "fresh look" to each case. One wonders how many additional washouts would result if the judge were to take as active a role in screening the coroner's findings as the prosecutor does.

likely to recommend further action. The procedures of his inquest are so restricted that it would be unwise to free a suspected murderer based on the coroner's finding. The coroner is likely to protect himself by erring on the side of caution and by recommending indictment in all but the most obvious cases. In instances of suspected murder, the coroner conducts an autopsy on the body of the deceased and holds an inquest at which his autopsy report, along with other evidence, is introduced.[48] A deputy coroner presides over the inquest with a six-man jury present to hear the testimony. Generally, a policeman serves as chief witness and "prosecutor" at the hearing.[49] He recounts most of the evidence that the police care to divulge.[50] The deputy coroner neither permits extensive questioning by interested parties,[51] nor allows these parties the opportunity to introduce their own evidence.[52] Yet the suspect, typically unrepresented[53] but warned of his "rights," is generally asked to testify. After this hearing, the jury exits to a deliberation room. The deputy enters the jury room from another entrance and presents it with a prepared verdict for its signature.[54] The jury's presence often represents a statutory formality,[55] with the criteria used by the deputy coroner in preparing his verdicts for the jurors being entirely unclear. For these reasons the coroner can only recommend action. He can neither free nor detain the suspect.[56] His verdict has no legal effect except that it effectively denies the defendant a preliminary hearing.[57]

[48] The taking of testimony at an inquest generally occupies five to twenty minutes.

[49] One interviewee thought this was an advantage for the defendant since the defendant might obtain better discovery if a lawyer were not representing the state. Even if the defendant has a lawyer representing him, he may have little advantage, as the text at notes 50–52 *infra* suggests.

[50] Most of the evidence proferred is classic hearsay. Deputy coroners who were interviewed had no doubts that hearsay could be introduced, because the coroner's findings are not binding on anyone (a correct view from a strict legal viewpoint, but one unaware of the practices reported in the text accompanying notes 32–38 *supra*). Prosecutors and judges, however, although they acknowledged that hearsay was admissible in preliminary hearings, were reluctant to admit it except on a trivial issue or on an issue which could most assuredly be proven with admissible evidence if the case ever came to trial. Unlike the deputy coroners, they took an extremely farsighted view of the evidence problem and did not want to send a reject farther down the judicial production line. Even though their motivations may not be entirely altruistic (a desire to ease the court backlog or a desire that the prosecutor not lose cases after indictment), their views do benefit the defendant who can secure a preliminary hearing.

[51] Deputy coroners emphasized that they allow a lawyer to "ask questions" as a matter of "courtesy" or "privilege," but do not allow a lawyer to "cross-examine." They felt they have absolute discretion to control the examination of a witness and may cut a lawyer off at any time. One reason for this aversion to lengthy proceedings was explained as follows: The county has to pay for a typed transcript of every inquest that takes place. If a lawyer can conduct a lengthy examination of witnesses, he is reaping discovery benefits for which the county must pay. A deputy coroner will allow a lawyer to ask enough questions that he will appear, in his client's eyes, to be earning his fee. Since there is no way to appeal a deputy coroner's rulings, the lawyer must be satisfied with his restricted role.

[52] Once again, by contrast, prosecutors and judges, with regard to preliminary hearings took the liberal view outlined in note 50 *supra*.

[53] See text accompanying note 24 *supra*. Presumably, this practice has not changed since the writing of this paper. See note 24 *supra* as well as People v. Murdock, 39 Ill.2d 553, 237 N.E.2d 442 (1968).

[54] *See* Comment, *The Office of Coroner vs. The Medical Examiner System*, 46 J. CRIM. L.C. & P.S. 232, 233 & n. 8 (1955).

[55] ILL. REV. STAT. ch. 31, §15 (1969).

[56] *See* ILL. REV. STAT. ANN. ch. 31, §24 (1970 Supp); Devine v. Brunswick-Balke-Collender Co., 270 Ill. 504, 110 N.E. 780 (1915); Inbau, *Preliminary Actions and Proceedings in Criminal Cases*, 1953 U. ILL. L.F. 313, 321.

[57] In taking the view outlined in the text accompanying notes 34–37 *supra*, the interviewees appeared to rest on custom, although not one seemed to know when, how, or why the custom originated. No interviewee pointed to any statute or case that would validate present practice.

At common law, the coroner's verdict operated as a grand jury indictment and cut off the defendant's right to a preliminary hearing. The defendant was actually tried on the coroner's verdict. *Ex Parte* Anderson, 55 Ark. 527, 18 S.W. 856 (1892); State v. Mason, 115 S.C. 214, 103 S.E. 286 (1920). However, the common law can hardly be said to have survived in the face of the Illinois constitutional right to indictment by grand jury, ILL. CON. art. 2, §8 (1870), and ILL. REV. STAT. ch. 38, §109–1 (1969), which without qualification gives a preliminary hearing to all persons arrested. *See also In re* Sly, 9 Ida. 779, 76 P. 766 (1904); Devine v. Brunswick-Balke-Collender Co., 270 Ill. 504, 110 N.E. 780 (1915); State v. Elfer, 115 La. 964, 40 So. 370 (1905).

[58] ILL. REV. STAT. ch. 38, §109–1 (1969).

LEGAL THEORIES TO CHANGE PRESENT PRACTICE

The Illinois Code of Criminal Procedure envisions a speedy preliminary hearing for the felony suspect.[58] If the state deprives him of this hearing by securing many continuances, the defendant may well wonder what remedies the law provides him for this denial of a hearing and attendant, often lengthy, incarceration. First, he may seek a writ of habeas corpus at any time before indictment. Second, once he stands under indictment, dismissal of the charge may be sought before trial. After trial, reversal of any conviction may possibly be obtained if the earlier motion to dismiss was

improperly denied.[59] In establishing his right to any of these remedies, the defendant may base his claim on any one of four theories: (1) denial of a statutory right; (2) denial of due process; (3) denial of the constitutional right to a speedy trial; or (4) denial of equal protection of law.[60]

Denial of a Substantial Statutory Right

If the defendant seeks relief on the ground that he has been deprived of his statutory right to a preliminary hearing, the argument is compelling, although Illinois law is unsettled. Those who insist upon allowing much to the discretion of the prosecutor win sympathy in the trial courts.[61] Nevertheless, it would be inaccurate to assert that the Illinois Supreme Court has explicitly sanctioned practices that effectively deny suspects an expedient preliminary hearing. Section 109-1 authorizes the right to a hearing without exception.[62] Some deference ought to be paid to that statute.

The leading cases in which the court has upheld indictment without preliminary hearing[63] were decided when Illinois required such a hearing to be held within ten days after initial appearance before a magistrate.[64] None of those cases suggests that the indictment in question was secured pursuant to a violation of the ten-day statute. The court's most recent pronouncement in this area, *People v. Petruso*,[65] was decided under the present Code of Criminal Procedure. An intervening indictment was allowed to cut off the defendant's right to a preliminary hearing since the defendant had, in the meantime, obtained a continuance in order to hire a lawyer.

> [I]t is apparent that the reason no preliminary hearing was conducted was because the defendant was seeking a lawyer of his own choosing.[66]

Indeed, if a defendant seeks a continuance in order to delay proceedings, or if the state seeks an indictment within a reasonably short time, indictment without hearing does not violate the spirit of the preliminary hearing statute. *Petruso*, however, does not go so far as to sanction the emasculation of the statute effected in Cook County with regard to homicide cases.

Courts in other states with statutes specifically requiring a hearing within a certain number of days have given defendants relief for delay or denial of preliminary hearings. They have either dismissed the indictment before trial or reversed any subsequent conviction.[67] In all instances, the state was given the opportunity to refile charges if it wished. These courts have not required a showing of prejudice to the outcome of the trial resulting from delay.[68] If they were to have made such a requirement, no grounds for enforcement of the statutes would have remained since the interest protected by them—a defendant's right to be detained only upon speedy judicial finding of probable cause—has little[69] impact on the outcome of a trial.[70] Indeed, for the will of the legislature to be given effect, courts must fashion remedies that take into account the peculiar nature of the interest protected by the statute.[71]

[59] If the denial of a preliminary hearing constitutes an evil because it denies the defendant valuable discovery opportunities, then there would be a third procedural device; the defendant would seek a preliminary hearing to be held immediately before indictment or at any time after indictment. *See* Wilson v. Anderson, 335 F.2d 687, 691 n. 9 (D.C. Cir. 1964) (Bazelon, Ch.J., dissenting). Congress appears to have rejected this suggestion when it enacted 18 U.S.C.A. §3060 (1969). *But see* 8 J. MOORE, MOORE'S FEDERAL PRACTICE, 5.04 [3] (Cipes ed. 1969 Supp.).

[60] The Supreme Court long ago pronounced in oftencited dictum that failure to hold a preliminary hearing does not violate the defendant's constitutional right to confront his accusers. Goldsby v. United States, 160 U.S. 70, 73 (1895); *accord*, People v. Petruso, 35 Ill.2d 578, 221 N.E.2d 276 (1966).

[61] See text accompanying notes 3–13 *supra*.

[62] See also ILL. REV. STAT. ch. 38, §109–3 (1969).

[63] See the cases cited in note 12 *supra*.

[64] See note 6 *supra*.

[65] 35 Ill.2d 578, 221 N.E.2d 276 (1966).

[66] *Id.* at 581, 221 N.E.2d at 278. The continuance postponed the hearing date less than a month.

[67] State v. Juarez, 5 Ariz. App. 431, 427 P.2d 565 (1967); People v. Bucher, 175 Cal.App.2d 343, 346 P.2d 202 (1959); State *ex rel.* Klinkiewicz v. Duffy, 35 Wis.2d 369, 151 N.W.2d 63 (1967); *cf.* Manor v. State, 221 Ga. 866, 148 S.E.2d 305 (1966). *But see* State *ex rel.* Haynes v. Powers, 20 Ohio St. 2d 46, 254 N.E.2d 19 (1969).

[68] *But see* United States v. Delman, 253 F. Supp. 383 (S.D.N.Y. 1966); United States v. Cowan, 37 F.R.D. 215, 217 (S.D.N.Y. 1965), *aff'd*, 396 F.2d 83, 88 (2d Cir. 1968); People v. Wickham, 13 Mich. App. 650, 164 N.E.2d 681 (1968). *But see generally* People v. Tetter, 42 Ill.2d 569, 250 N.E.2d 433 (1969). Moreover, these cases imply that prejudice results only if the delay causes the defendant to lose evidence, not if it helps the prosecution obtain evidence.

[69] Perhaps the defendant may lose evidence by being held in jail and not being able to find witnesses. Proving a negative proposition of this sort seems impossible in all but a small number of cases.

[70] The right to a public trial is another interest that may have almost no impact on the trial's outcome. Thus, courts require only a showing of the violation, not prejudicial effects as well. Thompson v. People, 156 Colo. 416, 425–26, 399 P.2d 776, 781 (1965); State v. Schmit, 273 Minn. 78, 88, 139 N.W.2d 800, 807 (1966).

[71] *See* People v. Bucher, 175 Cal.App.2d 343, 347,

The remedy of dismissal of an indictment without prejudice is preferable to the alternative of release upon *habeas corpus*. *Habeas corpus* is available only before indictment,[72] which makes it an extremely impractical remedy for the defendant on two grounds. Many defendants lack the assistance of counsel until arraignment to the indictment[73] and would not recognize the availability of this remedy. Second, even if the defendant were experienced enough to seek a writ of habeas corpus or had a lawyer willing to seek this remedy, the judge would likely grant a continuance of the habeas corpus hearing.[74] The prosecutor in the meantime can obtain an indictment and "moot" the application for habeas corpus,[75] often at the expense of a defendant against whom he might not normally proceed if he were allowed to take his time.[76] The potential for habeas corpus relief does little to penalize a prosecutor and may penalize the defendant, already deprived of his rights.

Due Process

The defendant might also raise the constitutional argument that judicial practices delaying the preliminary hearing deprive him of liberty without due process of law, as guaranteed by the fourteenth amendment.[77] In opposition to that argument, broad language has been forwarded in case law to the effect that a defendant holds no constitutional right to a preliminary hearing.[78] Nevertheless, an examination of additional cases that have offered more than mere invocation of that language reveals that it holds little, if any, relation to the facts of the problem at hand. The leading case in the field, *Lem Woon v. Oregon*,[79] held that a state may establish a prosecution-by-information system and dispense with the necessity of a preliminary hearing. Put another way, no state need enact a preliminary hearing statute in order to afford its citizens due process. Obviously, *Lem Woon* does not speak to the case in which a state enacts a preliminary hearing statute and then ignores it.[80] From *Lem Woon* it follows that a state may refrain from providing for a preliminary hearing if a grand jury is in session when the defendant is taken into custody.[81] In such cases official determination that probable cause existed for keeping the defendant in custody would have followed shortly.

At most, then, the Supreme Court has implied that a state may, consistent with due process, deprive a person of a preliminary hearing if it makes a showing of probable cause through some other means within a reasonably short time.[82]

346 P.2d 202, 204–05 (1959). *But see generally* People v. Petruso, 35 Ill.2d 578, 580, 221 N.E.2d 276, 277 (1966).

[72] *E.g.*, United States v. Green, 305 F. Supp. 125 (S.D.N.Y. 1969); United States *ex rel.* Wheeler v. Flood, 269 F.Supp. 194 (E.D.N.Y. 1967); United States v. Brace, 192 F. Supp. 714 (D.Md. 1961) (dictum); *Ex parte* Schefstad, 49 Cal.App.2d 306, 121 P.2d 755 (1942); Whalen v. Cristell, 161 Kan. 747, 173 P.2d 252 (1946); *Ex parte* Ah Kee, 22 Nev. 374, 40 P. 879 (1895); State *ex rel.* Haynes v. Powers, 20 Ohio St. 2d 46, 254 N.E.2d 19 (1969); State v. Foster, 14 N.D. 561, 105 N.W. 938 (1905); Hill v. Smith, 107 Va. 848, 59 S.E. 475 (1907); *contra*, Blue v. United States, 342 F.2d 894 (D.C. Cir. 1964).

[73] See text accompanying note 24 *supra*.

[74] The state is usually given thirty days to respond to a habeas corpus petition of a convicted prisoner.

[75] It is likely that the prosecutor could obtain an indictment if he pressed for it. Oaks & Lehman, note 37 *supra*, at 623, report that in Cook County the prosecutor obtains a true bill in more than 90% of the cases he presents to the grand jury. For the effect this true bill would have on the habeas corpus petition, *see* United States v. Universita, 192 F. Supp. 154 (S.D.N.Y. 1961).

[76] Ordinarily, the prosecutor waits until his witnesses come in. He does not usually obtain an indictment on hearsay. See note 29 *supra*. If he eventually discovers that the witnesses are persons on whom he cannot depend to testify before the grand jury, he will not bother to indict, since he feels that they will be difficult to obtain for trial. If pressed for an indictment, though, he might proceed before the grand jury with hearsay and later drop the indictment when the witnesses fail to appear for trial as well. In the meantime, of course, the defendant remains in jail.

[77] The Supreme Court, although moving toward a view that "due process" under the fourteenth amendment is shorthand for the Bill of Rights, as Mr. Justice Black suggested in *Adamson v. California*, 332 U.S. 46, 71–72 (1947), also currently uses the concept as an independent device (ensuring "fundamental fairness") for protecting the defendant. *See, e.g., In re* Winship, 396 U.S. 885 (1970); Stovall v. Denno, 388 U.S. 293 (1967). This approach follows the remarks of Mr. Justice Murphy in *Adamson*, 332 U.S. at 124.

[78] *E.g.*, United States *ex rel.* Hughes v. Gault, 271 U.S. 142, 149 (1926); United States v. Luxenberg, 374 F.2d 241, 248 (6th Cir. 1968); United States *ex rel.* Ali v. Deegan, 298 F. Supp. 1045, 1047 (E.D. Wis. 1969); Note, *The Preliminary Hearing—An Interest Analysis*, 51 IOWA L. REV. 164, 174 (1965); Comment, *The Preliminary Hearing in the Federal System: A Proposal for a Rule Change*, 116 U. PA. L. REV. 1416 & n. 3 (1968). *But see* Goodwin v. Page, 296 F. Supp. 1205 (E.D. Okla. 1969).

[79] 229 U.S. 586 (1913); *accord*, Ocampo v. United States, 234 U.S. 91 (1914); Rivera v. Virgin Islands, 375 F.2d 988 (3d Cir. 1967); State v. Hayes, 127 Conn. 543, 18 A.2d 895 (1941); Anderson v. State, 212 So.2d 56 (Fla. App. 1968); Jones v. Commonwealth, 86 Va. 661, 10 S.E. 1005 (1890); State v. Sureties of Krohne, 4 Wyo. 347, 34 P. 3 (1893).

[80] *Cf.* Griffin v. Illinois, 351 U.S. 12 (1956).

[81] Dillard v. Bomar, 342 F.2d 789 (6th Cir. 1965).

[82] One might even take the strict view that, having established the preliminary hearing by statute, a state may not deprive the defendant of his statutory

Careful attention to the facts of leading state cases bears out this observation. In *Webb v. Commonwealth*,[83] the court found no deprivation of due process when the grand jury indicted the defendant before arrest and precluded a preliminary hearing. The defendant had not been taken into custody until the grand jury made a finding of probable cause through its indictment. Likewise, the return of an indictment two days after the defendant's arrest was quite properly held to foreclose a preliminary hearing in *Bailey v. State*.[84] Courts have countenanced similar delays for three days,[85] four days,[86] and up to a week.[87] In short, the grand jury indictment "moots" the preliminary hearing only if it is handed down soon after a person is taken into custody.[88] This is not the situation in Cook County homicide cases.

Speedy Trial

In seeking dismissal of the indictment, a defendant invoking the protection of the sixth amendment right to speedy trial stands upon weak ground.[89] The amendment clearly speaks to trial delays; delay in the holding of a preliminary hearing does not, by itself, violate this constitutional provision. Only when a delay of this sort postpones actual trial on the merits can the amendment's protection possibly be invoked.[90]

Moreover, the majority of courts passing on the question have held that the period of time to be considered in computing a denial of speedy trial begins to run only with the return of an indictment.[91] By statute, however, speedy trial protection attaches to Illinois defendants upon arrest. Absent any delays caused by the defendant, he must receive trial within 120 days after arrest if he is held in jail pending trial, or 160 days after a demand for trial if he remains free on bond.[92]

These statutory provisions grant defendants a more liberal right to speedy trial than does the common law.[93] It is unlikely that a court would strike down these statutory definitions of speedy trial.[94] The defendant holds no specific constitutional guarantee of a speedy preliminary hearing; he possesses a constitutional right to a speedy trial on the merits.[95] The rationale behind requiring speedy trial—preventing a man presumed innocent from languishing in jail—ought to be sufficient justification for a speedy preliminary hearing.[96] Considering that the state need only meet a lower burden of proof at such hearings, the argument for imposing on the state temporal requirements in

right for any reason. *See* Hopt v. Utah, 110 U.S. 574 (1884). *But see* Burbey v. Burke, 295 F.Supp. 1045 (E.D. Wis. 1969).

[83] 204 Va. 24, 129 S.E.2d 22 (1963); *accord*, Walker v. Rodgers, 389 F.2d 961 (D.C. Cir. 1968).

[84] 215 Ark. 53, 219 S.W.2d 424 (1949).

[85] State v. Jackson, 43 N.J. 148, 203 A.2d 1 (1964). There is some suggestion that at common law the probable cause hearing had to take place within three days of the suspect's initial appearance before the magistrate. *See* 2 W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN ch. 16, §12 (6th ed. 1788).

[86] Commonwealth v. Johnson, 368 Pa. 139, 81 A.2d 569 (1951). *See* State v. Foster, 14 N.D. 561, 105 N.W. 938 (1905).

[87] Smith v. O'Brien, —N.H.—, 251 A.2d 323 (1969); State v. Ollison, 68 Wash.2d 65, 411 P.2d 419 (1966).

[88] *See* United States v. Meyers, 303 F. Supp. 1383 (D.D.C. 1969); Kardy v. Shook, 237 Md. 524, 207 A.2d 83 (1965); State v. Mastrian, 285 Minn. 51, 171 N.W.2d 695 (1969); *In re* Wiggins, 425 P.2d 1004 (Okla. Crim. 1967).

The new Illinois constitution enacted December 15, 1970, appears to recognize an even stricter due process standard. "No person shall be held . . . for a crime . . . unless either the *initial* charge has been brought by indictment . . . or the person has been given a prompt preliminary hearing to establish probable cause." ILL. CON. art. I, §7, cl. 2 (1970) (emphasis added). Unless the defendant is arrested after indictment, as in note 83 *supra*, he has an absolute right to a hearing, which post-arrest indictment may not cut off.

[89] U.S. CON. amend. 6: "In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial. . . ." The Illinois constitution makes substantially the same provision in art. II, §9.

[90] *See* United States v. Brace, 192 F. Supp. 714 (D.Md. 1961).

[91] Harlow v. United States, 301 F.2d 361 (5th Cir. 1962); State v. Maldonado, 92 Ariz. 70, 373 P.2d 583 (1962); Inverarity v. Zumwalt, 97 Okla. Crim. 294, 262 P.2d 725 (1953); State v. Caffey 438 S.W.2d 167 (Mo. 1969); *contra*, D'Aguino v. United States, 192 F.2d 338 (9th Cir. 1951); People v. Den Uyl, 320 Mich. 477, 31 N.W.2d 699 (1948); State *ex rel.* Fredenberg v. Byrne, 20 Wis.2d 504, 123 N.W.2d 305 (1963).

The ambiguous history of the common law on this subject apparently supports the theory that the right to speedy trial attaches upon arrest. *See* United States v. Fox, 3 Mont. 512, 515–16 (1880); 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 270 (Jones ed. 1916); English Habeas Corpus Act of 1679, 31 Car. II, ch. 2.

[92] ILL. REV. STAT. ch. 38, §103–5(a), (b) (1969).

[93] The authorities cited in note 91 *supra* speak of a six-month period within which the defendant might expect trial.

[94] On at least one occasion, the Illinois court has spoken approvingly of the speedy trial statute cited in note 92 *supra*. People v. House, 10 Ill.2d 556, 558, 141 N.E.2d 12, 13 (1957). The leading case on which the defendant might rely granted relief after an eighteen-month delay. People v. Den Uyl, 320 Mich. 477, 31 N.W.2d 699 (1948). One commentator has doubted that denial of speedy trial sets in until at least a year has elapsed. Note, *The Right to a Speedy Criminal Trial*, 57 COLUM. L. REV. 846, 852 & n. 38 (1957).

[95] *See, e.g.*, United States v. Ewell, 383 U.S. 116, 120 (1966); State v. Maldonado, 92 Ariz. 70, 74, 373 P.2d 583, 585 (1962).

[96] *See generally* United States v. Ewell, 383 U.S. 116, 120 (1966).

going forward with a probable cause hearing becomes more persuasive. The language of the amendment, however, does not support the right to a speedy preliminary hearing.[97]

Equal Protection

The other possible argument—that the defendant has been irrationally subjected to treatment not received by another group of defendants, in violation of the equal protection clause[98]—is also likely to be unsuccessful.[99] The fourteenth amendment has, to date, aided the defendant in only a narrow class of cases.[100] The amendment's amorphous character has made it an uncertain weapon for constitutional attack. It is extremely difficult to determine those bases of discrimination other than race or economic status[101] that amount to invidious discrimination in the field of criminal procedure.[102] Nevertheless, an accused choosing to claim a denial of equal protection could contend that an irrational classification exists where a homicide suspect[103] must wait longer than individuals accused of other crimes[104] for a statutorily sanctioned[105] preliminary hearing.[106]

The argument outlined above is hardly immune from attack. In considering denial of equal protection, courts assess "the relative importance of the subject with respect to which equality is sought" as well as the "relative invidiousness of the particular differentiation." [107] Because of the reason given in the discussion for the right to a speedy trial,[108] a quick preliminary hearing is a matter of great importance. On the other hand, the black jury cases,[109] for instance, have raised the spector of judicial acceptance of unequal final verdicts, a matter of such great importance that denial of preliminary hearings might pale by comparison.

Moreover, defenders of the present system will contend that the difference in treatment between homicide and non-homicide cases rests upon a rational basis. Magistrates grant delays in homicide preliminary hearings, so that the coroner may hold inquests and make findings roughly equivalent to those of the magistrate regarding probable cause in non-homicide cases.[110] If courts do not choose to probe the merits and demerits of the coroner system, they would probably hold that the difference in treatment has a rational basis.[111] Without close examination, the coroner system has a certain plausibility for equal-protection purposes.

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[97] *But cf.* Sheffield v. Reece, 201 Miss. 133, 28 So.2d 745 (1947) (dictum) (delay in bringing prisoner for initial appearance before the magistrate).

[98] U.S. CON. amend. XIV, §1 provides,

> No state shall . . . deny to any person within its jurisdiction the equal protection of laws.

The federal statute that confers upon the district courts jurisdiction to consider civil cases alleging violations of this constitutional right as well as of others amplifies the meaning of the constitutional term "law":

> The district courts shall have original jurisdiction of any civil action . . . to be commenced by any person:
> . . .
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, *custom or usage*, of any right, privilege, or immunity secured by the Constitution of the United States. . . . 28 U.S.C. §1343 (1964) (emphasis added).

[99] Mr. Justice Holmes once referred to this section of the amendment as the "usual last resort of constitutional arguments." Buck v. Bell, 274 U.S. 200, 208 (1927).

[100] *See* Kurland, *Egalitarianism and the Warren Court*, 68 MICH. L. REV. 629, 677–78 (1970).

[101] *E.g.*, Virginia v. Rives, 100 U.S. 313 (1879).

[102] *Compare* North Carolina v. Pearce, 395 U.S. 711, 722–23 (1969), *with* Oyler v. Boles, 368 U.S. 448, 454–56 (1962). *But compare* Griffin v. Illinois, 351 U.S. 12 (1956) *with* Williams v. Oklahoma City, 395 U.S. 458 (1969), arguably using an equal-protection argument to invalidate rules of criminal procedure that required affluence for their full utilization.

[103] In homicide cases, defendants move slowly between arrest and finding of probable cause or indictment. See text accompanying notes 24–25 *supra*.

[104] In non-homicide cases, the lapse between arrest and indictment is much shorter than in homicide cases. See note 30 *supra*.

[105] ILL. REV. STAT. ch. 38, §109-1 (1969). A reasonable inference that can be drawn from the statute is that a person should receive the preliminary hearing within a reasonably short period of time.

[106] Once the defendant establishes that the classification is irrational, or "suspect," he throws the burden of justification on the state. *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1099 (1969).

[107] Cox, *The Supreme Court, 1965 Term, Forward: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 95 (1966).

[108] See note 93 *supra*.

[109] *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303 (1879). The issue involved concerns the opportunity to have one's case considered by jurors with a background similar to that of the defendant. *See generally* Note, *The Defendant's Challenge to a Racial Criterion in Jury Selection: A Study in Standing, Due Process, and Equal Protection*, 74 YALE L.J. 919 (1965).

[110] *See* Nivitsky v. Knickerbocker Ice Co., 276 Ill. 102, 114 N.E. 545 (1917).

[111] Only one court has mentioned an equal protection approach to this sort of problem, and that court dismissed it without comment. State v. Mastrian, 285 Minn. 51, 171 N.W.2d 695 (1969).

If one of the defendants in the sample of cases studied should have wanted to argue that defendants in other parts of the state received preliminary hearings sooner, he would have had an even more difficult time establishing that he was denied equal protection. *See generally* New York State Association of Trial Lawyers v. Rockefeller, 267 F. Supp. 148 (S.D.N.Y. 1967), *noted in* 1967 UTAH L. REV. 566.

STATUTORY REMEDY

States with statutes that insufficiently administer expedient preliminary hearings could solve their problem by introducing legislation similar to the recently enacted federal statute.[112] Legislation of this sort establishes clear standards on permissible delays in scheduling preliminary hearings. It avoids the uncertainties that would attend a case-by-case formulation of what constitutes unreasonable delay in the scheduling of hearings, and is, thus, a more desirable approach to the problem.

Perhaps the standards of the federal statute would impose too great a burden on a local state's attorney's office lacking manpower to meet these requirements in all felony cases. If that should be so, similar legislation should be passed to benefit only those held in custody on capital offenses or, in the alternative, those held in custody for failure to make bond regardless of the charge. The need for this legislation is most clearly felt by those held on capital charges; and they, at least, should have the relief granted by this statute.

If this statute were enacted, it would solve the problem for which it was passed only as long as certain guidelines of administration were adhered to or written into the statute. First and most important, the time limits contained in subsection (b)[113] should be viewed as the outermost limits of delay. Delay for shorter periods should be considered the normal procedure.

Secondly, the language "only . . . after a finding that extraordinary circumstances exist, and that the delay of the preliminary hearing is indispensable to the interests of justice" should be interpreted as strictly as possible to benefit the defendant. His freedom is a good deal more important than the convenience of prosecutor, policeman, or complaining witness. If the prosecutor wants to deprive the defendant of freedom for a longer period of time than contemplated by the statute, he should be held to a clear showing by detailed affidavits that delay is necessary. Necessary delay should be limited to the unavoidable absence of a specific witness who is vital to the case and whose attendance the prosecutor has made every effort to procure.[114] The judge should assume that a prosecutor will be ready to present a case for probable cause

[112] 18 U.S.C.A. §3060(a)-(e) (1969);

(a) Except as otherwise provided by this section, a preliminary examination shall be held within the time set by the judge or magistrate pursuant to subsection (b) of this section, to determine whether there is probable cause to believe that an offense has been committed and that the arrested person has committed it.

(b) The date for the preliminary examination shall be fixed by the judge or magistrate at the initial appearance of the arrested person. Except as provided by subsection (c) of this section, or unless the arrested person waives the preliminary examination, such examination shall be held within a reasonable time following initial appearance, but in any event not later than—

(1) the tenth day following the date of the initial appearance of the arrested person before such officer if the arrested person is held in custody without any provision for release, or is held in custody for failure to meet the conditions of release imposed, or is released from custody only during specified hours of the day; or

(2) the twentieth day following the date of the initial appearance if the arrested person is released from custody under any condition other than a condition described in paragraph (1) of this subsection.

(c) With the consent of the arrested person, the date fixed by the judge or magistrate for the preliminary examination may be a date later than that prescribed by subsection (b), or may be continued one or more times to a date subsequent to the date initially fixed therefor. In the absence of such consent of the accused, the date fixed for the preliminary hearing may be a date later than that prescribed by subsection (b), or may be continued to a date subsequent to the date initially fixed therefor, only upon the order of a judge of the appropriate United States district court after a finding that extraordinary circumstances exist, and that the delay of the preliminary hearing is indispensable to the interests of justice.

(d) Except as provided by subsection (e) of this section, an arrested person who has not been accorded the preliminary examination required by subsection (a) within the period of time fixed by the judge or magistrate in compliance with subsections (b) and (c), shall be discharged from custody or from the requirement of bail or any other condition of release, without prejudice, however, to the institution of further criminal proceedings against him upon the charge upon which he was arrested.

(e) No preliminary examination in compliance with subsection (a) of this section shall be required to be accorded an arrested person, nor shall such arrested person be discharged from custody or from the requirement of bail or any other condition of release pursuant to subsection (d), if at any time subsequent to the initial appearance of such person before a judge or magistrate and prior to the date fixed for the preliminary examination pursuant to subsections (b) and (c) an indictment is returned or, in appropriate cases, an information is filed against such person in a court of the United States.

[113] *Id.*

[114] *See* Hill v. Sheriff of Clark County, 85 Nev. 234, 452 P.2d 918 (1969), based on the philosophy espoused in *Ex parte* Ah Kee, 22 Nev. 374, 376, 40 P.2d 879, 879-80 (1895):

> A prisoner's rights are to be considered and respected. He is not presumed to be guilty because he is under arrest. The presumptions are the other way. The examination should not be delayed to suit the convenience or personal accommodation of the officers of the law.

within a few days after arrest and, working from this assumption, resolve all requests for continuances accordingly.

Thirdly, any delay granted beyond the ten-day period should be limited to two or three days at a time.[115] In addition, a delay should never be granted to enable the coroner to hold an inquest. Further, release as required in subsection (d)[116] should be considered as automatic; the defendant should not be required to ask for his release in order to obtain it.[117] A contrary requirement would make little sense in a system in which more than half of the defendants lack counsel.[118] Finally, for the aforementioned reasons, the defendant should not be required to object to a prosecution request for delay in order to obtain his rights under the statute.[119] If judges refuse to follow the statute and the appropriate guidelines for applying it, then the legislature may wish to sanction dismissal of any later indictment with prejudice. Hopefully, no sanction so drastic will be required.

[115] *See, e.g.*, ARK. STAT. §43-608 (1964).
[116] See note 112 *supra*.
[117] *But cf.* People v. Tetter, 42 Ill.2d 569, 250 N.E.2d 433 (1969). *But see* State ex rel. Haynes v. Powers, 20 Ohio St.2d 46, 254 N.E. 2d 19 (1969).
[118] See text accompanying note 24 *supra*.

CONCLUSION

State legislatures have given defendants a right to a preliminary hearing. However, statutory draftings have proven so vague that this right has been stripped from a significant class of defendants, much to their detriment. Hopefully, courts will correct this deplorable situation. They have a strong position from which to work. However, if the courts do not so act, the legislatures should alter their statutes in order to make their will clearer.

[119] *But see* United States v. Cowan, 37 F.R.D. 215 (S.D.N.Y. 1965), *aff'd*, 396 F.2d 83 (2nd Cir. 1968); People v. Collins, 117 Cal.App.2d 175, 255 P.2d 59 (1953); People v. Wickham, 13 Mich.App. 650, 164 N.W.2d 681 (1968).