

Michigan Law Review

Volume 78 | Issue 4

1980

Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication

Peter Arenella
Rutgers School of Law, Camden

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Constitutional Law Commons](#), [Criminal Procedure Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463 (1980).

Available at: <https://repository.law.umich.edu/mlr/vol78/iss4/2>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

REFORMING THE FEDERAL GRAND JURY AND THE STATE PRELIMINARY HEARING TO PREVENT CONVICTION WITHOUT ADJUDICATION

*Peter Arenella**

INTRODUCTION	465
I. PRETRIAL SCREENING	476
A. <i>Standards for Screening</i>	476
1. <i>Screening Factual Guilt</i>	478
2. <i>Screening Legal Guilt</i>	479
B. <i>Steps in Pretrial Review</i>	481
1. <i>Initial Appearance Before a Federal Magistrate</i> ..	481
2. <i>Preliminary Examination</i>	482
3. <i>Screening by the Federal Grand Jury</i>	484
a. <i>Judicial instructions</i>	485
b. <i>Judicial supervision of evidence presented to the grand jury</i>	487
(1) <i>Costello's antecedents</i>	487
(2) <i>Costello and its progeny</i>	489
(3) <i>Costello's legacy for pretrial screening</i> ..	496
II. THE PROSECUTOR	499
A. <i>Preliminary Standards</i>	499
B. <i>The Decision To Seek an Indictment</i>	500
1. <i>Prosecutorial Screening of Factual Guilt</i>	500
2. <i>Prosecutorial Screening of Legal Guilt</i>	501
a. <i>The directed-verdict standard</i>	501
b. <i>The likelihood-of-conviction standard</i>	503
III. THE DEFENDANT'S PLEA-BARGAINING POSTURE	507
A. <i>The Defense Attorney</i>	507
B. <i>Judicial Review of the Plea</i>	512
1. <i>Voluntariness</i>	512
2. <i>Intelligence</i>	514
3. <i>Factual Basis</i>	515

* Professor of Law, Rutgers School of Law, Camden. B.A. 1969, Wesleyan University; J.D. 1972, Harvard University. — Ed. I wish to thank my research assistants, Barbara Dupre and Pat McAndrew, for their considerable assistance. Special thanks must also go to my colleagues, Professors George Wallace, Jay Feinman, and Rand Rosenblatt, and to Professor Peter Goldberger, for their invaluable critiques of earlier drafts of this Article.

SUMMARY OF SECTIONS I, II, AND III.....	521
IV. EXISTING REFORM PROPOSALS	523
A. <i>Radical Proposals for Systemic Reform</i>	523
1. <i>Abolish Plea-Bargaining</i>	523
2. <i>Inquisitorial Reforms — The Investigatory Magistrate and the Non-Adversarial Trial</i>	524
B. <i>Reforming Pretrial Procedures To Prevent Conviction Without Adjudication</i>	529
1. <i>State Reform — Remodeling the Preliminary Hearing</i>	532
2. <i>Federal Reform</i>	535
V. REFORMING THE FEDERAL GRAND JURY'S ACCUSATORY FUNCTION.....	539
A. <i>Prosecutorial Misconduct Doctrine</i>	539
1. <i>Excessive Use of Hearsay Evidence</i>	541
2. <i>Indictments Based in Part on Perjured Testimony</i>	545
3. <i>The Duty To Disclose Exculpatory Evidence</i>	549
4. <i>Resubmission of Cases to Subsequent Grand Juries</i>	554
B. <i>Reform Proposals</i>	558
1. <i>Hearsay Evidence</i>	562
2. <i>Illegally Seized Evidence</i>	563
3. <i>Exculpatory Evidence</i>	565
4. <i>Bifurcating the Grand Jury's Accusatorial and Inquisitorial Functions</i>	570
5. <i>Redrafting Judicial Charges</i>	571
6. <i>Transcripts for Defendants</i>	572
CONCLUSION	575
APPENDIX — MODEL GRAND JURY REFORM STATUTES	580

INTRODUCTION

[U]nder our system of criminal justice even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar.¹

[I]nformal . . . practices have been used to induce conviction by "consent" in a significant number of cases in which the protections of the formal system would have precluded condemnation.²

The critical questions, which have not yet been honestly faced by [either the accusatorial or the inquisitorial] systems, are how cases that will receive less than the full process should be chosen, and what combination of adversarial procedures and judicial initiative should constitute that summary process.³

Although our criminal justice system has many inquisitorial⁴ features, it remains in theory an accusatorial process⁵ because of its constitutional commitment to protect fundamental values, such as the presumption of innocence, proof beyond a reasonable doubt, lay adjudication, and the privilege against self-incrimination. These principles, which I shall refer to as our system's "legal guilt"⁶

1. *Jackson v. Virginia*, 443 U.S. 307, 323-24 (1979).

2. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293, 311 (1975).

3. Goldstein & Marcus, *The Myth of Judicial Supervision in Three Inquisitorial Systems: France, Italy and Germany*, 87 YALE L.J. 240, 283 (1977).

4. Inquisitorial systems view the criminal process as an official inquiry where state officials take primary responsibility for determining whether the defendant has committed a crime.

[T]he dominant mode is state control of the case, usually through the judiciary, rather than party control. The judge, whether as investigating magistrate or at trial, regards himself as more than an umpire. He is expected to take the initiative in amassing evidence and in assuring that the merits of guilt and penalty are correctly assessed.

Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1019 (1974). To ensure that the inquiry advances both substantive and procedural state policies, state officials direct the official investigation, determine the appropriate charges, and conduct the course of a nonadversarial trial that offers a public recapitulation of the official investigation. All relevant sources of information may be used, including non-coercive questioning of the accused during either the investigatory or trial stages.

5. Our accusatorial system structures criminal proceedings not as an official inquiry but as a dispute between two parties, the state and the accused. However, accusatorial procedure encompasses not only an adversarial trial procedure but other fundamental norms taken from constitutional law that regulate the balance of advantage between the state and the accused throughout the criminal process. Thus, accusatorial norms like the privilege against self-incrimination reflect the system's requirement that the state bear the burden of developing evidence of guilt through its independent efforts. The presumption of innocence lies "at the heart of an accusatorial system" because it requires the accuser to present compelling proof of the accused's guilt to an independent adjudicator. "Until certain procedures and proofs are satisfied, the accused is to be treated by the legal system *as if* he is innocent and need lend no aid to those who would convict him." Goldstein, *supra* note 4, at 1017 (emphasis in original). The parties control the course of both the investigation and trial. Unlike its inquisitorial counterpart, the court plays a fairly passive role at the trial as an umpire who ensures that the parties abide by the technical evidentiary rules that are necessary to regulate an adversarial proceeding before a lay adjudicator.

6. See H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 166-67 (1968). Professor

requirements, are designed in part to ensure that the state will only apply its most coercive and stigmatizing sanction to those defendants who have in all probability committed a substantive offense, the factually guilty.⁷ However, most of these legal guilt requirements are equally concerned with the investigatory and adjudicatory processes by which these reliable final judgments are reached. Indeed, our system's legal guilt requirements are most distinctive for their attempt to maintain a fair accusatorial process before conviction (a fair balance of advantage between the state and the accused) by safeguarding the individual's rights during the investigatory process and by requiring a reliable and independent adjudication of guilt before application of the criminal sanction. For example, the Supreme Court has repeatedly found coercive state interrogation practices to violate the defendant's privilege against self-incrimination (or the right to due process⁸) in cases where the resulting confession was trustworthy.⁹ In explaining those decisions, the Court has emphasized that the privilege fosters "a fair state-individual balance"¹⁰ before conviction by requiring the government to honor its accusatorial burden of

Packer used the term legal guilt to refer to those procedural requirements which have nothing "to do with the factual question of whether the person did or did not engage in the conduct that is charged as the offense against him" which Packer defined as factual guilt. *Id.* at 166.

I believe that Packer's distinction between factual and legal guilt is a useful analytical device but I define the terms quite differently. I equate factual guilt with the substantive criminal law's definition of criminal conduct. Therefore, an affirmative defense which justifies or excuses the defendant's conduct negates his factual guilt. I use the term "legal guilt requirements" to encompass all those procedural requirements that the state must satisfy in an accusatorial system of justice before it can apply the criminal sanction. While many of these legal guilt requirements have nothing to do with the question of factual guilt (*e.g.*, venue, statute of limitations, double jeopardy), others, such as the trial's formal proof requirements, dictate the procedural norms by which factual guilt is reliably adjudicated. The term "legal guilt" refers to the final outcome of that procedural process. While I believe that the substantive-procedural distinction between factual and legal guilt is useful in distinguishing different screening standards, the reader should remember that factual guilt is an artificial construct that cannot be empirically verified. The question of whether the accused violated the substantive criminal law cannot ultimately be separated from the procedural mechanism used to adjudicate it. *See* text at notes 64-84 *infra*.

7. For example, the trial's proof-beyond-a-reasonable-doubt requirement protects the factually innocent by requiring that the state provide compelling proof of factual guilt to an independent adjudicator. *See In re Winship*, 397 U.S. 358, 372 (1970).

8. *See Lisenba v. California*, 314 U.S. 219, 236-37 (1941) ("The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false. Such unfairness exists when a coerced confession is used as a means of obtaining a verdict of guilt."). *See also Rogers v. Richmond*, 365 U.S. 534, 543-44 (1961).

9. *See Miranda v. Arizona*, 384 U.S. 436, 464 n.33 (1966):

The decisions of this Court have guaranteed the same procedural protection for the defendant whether his confession was used in a federal or state court. It is now axiomatic that the defendant's constitutional rights have been violated if his conviction is based, in whole or in part, on an involuntary confession, regardless of its truth or falsity.

10. *Miranda v. Arizona*, 384 U.S. 436, 460 (1966). The Court emphasized that the privilege against self-incrimination is "the essential mainstay of our adversary system," 384 U.S. at

developing reliable evidence of the defendant's guilt through its independent efforts.

While the accusatorial values protected by the system's legal guilt

460, because it vindicates essential accusatorial norms that apply directly to the investigatory process.

Some commentators have criticized *Miranda's* broad view of the interests protected by the fifth amendment privilege. See Grano, *Voluntariness, Free Will and the Law of Confessions*, 65 VA. L. REV. 859, 926-37 (1979) [hereinafter cited as *Voluntariness*]. Professor Grano argues that the Court's suggestion that the privilege against self-incrimination protects accusatorial norms like "a fair state-individual balance" is "neither valid nor helpful to analysis" of the investigatory stage, which Grano characterizes as essentially inquisitorial in function. "To posit a system that is completely accusatorial is to beg the question and to do so inaccurately" because "we have in fact a mixed system of criminal justice — one primarily accusatorial, especially at the judicial stages, but also partly inquisitorial." *Id.* at 934. For example, police interrogation is essentially inquisitorial because "police, with society's approval, seek to obtain the truth from a suspect, who, if guilty, has nothing to gain and much to lose from giving the police what they want." *Id.* at 913. To perform this inquisitorial function, "police interrogation cannot assume the attributes of the adversary trial and still be police interrogation." *Id.* Grano argues that judicial approval of police interrogation and other inquisitorial aspects of the investigatory process (e.g., the grand jury) demonstrates that the government need not shoulder the entire load of proving guilt because these inquisitorial bodies permit the government to use the accused as a source of evidence.

Grano's perception of police interrogation and the rest of the investigatory stage as essentially inquisitorial leads him to conclude that the fifth amendment privilege merely protects the accused's right not to be compelled to answer police questions. *Id.* at 937. Instead of giving the accused a right to remain silent that would force the state to honor its accusatorial burden of developing its own evidence of guilt, the privilege simply protects the accused "from undue impairment of mental freedom in his decision to answer questions put to him." *Id.* at 936.

The most obvious objection to Grano's mixed model of our criminal justice system is that it really posits two different models working at cross-purposes with each other. Indeed, Professor Grano concedes that his description of our criminal justice system "may seem schizophrenic in its rigid insistence on accusatorial protections during the judicial process and its complacent tolerance of inquisitorial procedures, which frequently assure conviction, before the judicial process begins." Grano, *Rhode Island v. Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 AM. CRIM. L. REV. 1, 27 (1979). Grano insists, however, that this dichotomy "is a product not of [systemic] schizophrenia but of historical compromise," *id.*, between the competing tensions of inquisitorial and adversarial models. Since police interrogation is essentially inquisitorial, its legitimacy cannot be evaluated by adversarial standards that would preclude police from performing this valuable function. Therefore, Grano concludes no purpose is served by describing our system as "adversarial" or "accusatorial" because to "start with such an assertion is to conclude in advance that police interrogation, at least as we have known it, should not exist." *Voluntariness, supra*, at 913.

I believe that the dichotomy Grano posits between norms applicable to the investigatory and adjudicatory stages of our criminal process stems not from "historical compromise" but from Grano's mistaken use of the terms "accusatorial" and "adversarial" interchangeably in his analysis. As I have pointed out, accusatorial criminal procedure encompasses not only adversarial trial procedure but other fundamental values that regulate the balance of advantage between the state and the accused throughout the criminal process. See note 5 *supra*. One may concede Grano's point that it is inappropriate to apply *adversarial* procedures to police practices without accepting his conclusion that *accusatorial* norms do not apply to the investigatory process. Indeed, the Supreme Court's observation that the privilege helps maintain a fair state-individual balance before conviction is an example of an accusatorial norm that places some limit on the police's inquisitorial powers by requiring law enforcement officials to develop independent evidence against the accused. The fact that the government need not shoulder the *entire* load does not negate its accusatorial obligation to carry most of it. If one views the privilege as protecting accusatorial norms directly applicable to the investigatory process, Grano's dichotomy of a two-stage criminal process working at cross-purposes disappears.

requirements are designed to prevent conviction without adjudication and to safeguard individual rights throughout the accusatory process, our criminal justice system relies primarily on the trial as the appropriate occasion to vindicate these principles.¹¹ The trial gives them concrete substance because its stringent formal proof requirements force the state to develop its own evidence and then convince an independent lay adjudicator of the accused's guilt beyond a reasonable doubt. Our system's heavy reliance on the trial to vindicate accusatorial values may have made sense in an earlier day when trials were fairly simple affairs and most defendants had their day in court. But the modern adversarial jury trial is far too expensive, complex, and time-consuming to be used as the system's routine method for dispute resolution. Since our present system "can offer a trial to all only if few accept the offer,"¹² it places considerable pressure on criminal defendants to convict themselves by pleading guilty in return for some expected concession from the state.¹³ Consequently, most criminal defendants never reach trial because the system convinces them to forgo its protections.¹⁴

It is this Article's thesis that the substitution of plea-bargaining for the criminal trial as our primary method for determining legal guilt requires a fundamental reassessment of our pretrial screening processes. In a system where the prosecutor's decision to file charges

11. The trial lends "concrete substance" to the accused's presumption of innocence and privilege against self-incrimination by forcing the state to shoulder the burden of proving the defendant's factual guilt through its independent efforts. See *In re Winship*, 397 U.S. 358, 362-63 (1970). The trial's proof-beyond-a-reasonable-doubt standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself by impressing upon the fact-finder the "necessity of reaching a subjective state of certitude" of the guilt of the accused. 397 U.S. at 372. The trial's adversarial procedures promote a more reliable determination of factual guilt than that by the police and the prosecutor because they give defendants an opportunity to confront their accusers, expose flaws in the prosecution's case, and raise defenses that might negate their guilt. The trial also protects the accusatorial principle that the disposition of society's most serious sanction should not be left exclusively in the hands of professionals by offering the community an opportunity to participate in its adjudication. See *Duncan v. Louisiana*, 391 U.S. 145, 154-56 (1968). Finally, the trial guarantees that criminal sanctions will only be applied after the state has shown a neutral judicial official before or during trial that it has respected the defendant's rights in securing its evidence, making its charges, and proving its case. See H. PACKER, *supra* note 6, at 166-69.

12. L. WEINREB, *DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES* 82 (1977). Commentators have cited such factors as the expansion of the substantive criminal law, increased crime rates, the professionalization of the police, prosecution, and defense functions and the growing complexity of adversarial trial procedures, to explain why the modern American jury trial cannot be used as the routine procedural mechanism for adjudicating guilt. See, e.g., Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 20-21 (1978).

13. See Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 42 (1979).

14. During fiscal year 1976, 51,612 criminal defendants passed through federal district courts. Of the 40,112 convicted and sentenced, 34,041, or 85%, had entered a plea of guilty or nolo contendere. U.S. DEPT. OF JUSTICE, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS* 551 (1977).

is usually followed by a negotiated guilty plea, we can no longer pretend that the pretrial process does not adjudicate the defendant's guilt. Accordingly, this Article argues that it no longer makes sense to rely primarily on the trial to safeguard essential accusatorial principles when pretrial screening devices like the preliminary hearing and the grand jury perform the only independent adjudication of the defendant's guilt before conviction in most cases.

Plea-bargaining's transformation of the pretrial process into our major adjudicatory mechanism raises three critical questions for criminal justice reform efforts:

- (1) Should the preliminary determination of guilt during the pretrial process provide *some* protection of the accusatorial values that the trial was designed to vindicate?
- (2) If so, does our present pretrial process adequately protect those principles?
- (3) If not, how can those accusatorial principles be safeguarded during the pretrial process without unduly burdening an already over-taxed criminal system?

This Article assumes that our Constitution has answered the first question affirmatively.¹⁵ Since our system's legal guilt requirements protect not only the reliability of the final outcome but also the fairness of the process which determines that outcome, we cannot simply equate the doctrine of legal guilt with the procedural protections required at trial. Thus, the fact that the defendant waives some of these legal guilt requirements by pleading guilty does not alter the state's obligation to provide a fair accusatorial process *before* conviction. The government's accusatorial burden to develop evidence independently, our system's commitment to apply the criminal sanction only after making a compelling showing of a defendant's factual guilt, the principle of independent fact-finding, our preference for lay participation in adjudicating guilt — all attempt to establish a fair accusatorial process that reliably adjudicates defendants' factual guilt while safeguarding their individual rights. While these dual objectives can be completely vindicated only at

15. Some of these legal guilt requirements apply directly to the investigatory process. *See* notes 5 & 10 *supra*. The defendant's waiver of those requirements by pleading guilty does not affect the state's constitutional obligation to comply with them *before* conviction. Waiver merely affects the defendant's ability to raise their violation to undo a conviction.

Many prosecutors seem to believe that the defendant's guilty plea waives the state's obligation to satisfy legal guilt requirements. To them, the doctrine of legal guilt applies only to defendants who elect to contest their culpability in an adversarial forum. *See* note 213 *infra* and accompanying text. *But see* *Menna v. New York*, 423 U.S. 61, 62-63 n.2 (1975) (*per curiam*), where the Supreme Court emphasized that not all legal guilt requirements, such as the double jeopardy clause, are necessarily waived by a guilty plea.

trial, they merit significant protection¹⁶ in any summary process that provides an alternative¹⁷ model of resolving criminal disputes.

What follows begins to answer the last two questions. Section I evaluates our present pretrial screening process.¹⁸ First, it identifies several screening standards presently used in the pretrial process to evaluate factual guilt (probable cause)¹⁹ and legal guilt (directed verdict²⁰ and likelihood of conviction at trial²¹). It then examines whether the formal stages of pretrial review (initial appearance, preliminary hearing, and grand jury) screen out cases where there is substantial doubt concerning a defendant's factual guilt or where the government's evidence will probably not satisfy the trial's formal proof requirements. Using the federal pretrial process as its model, this Section demonstrates that both Congress and the courts have assumed that the trial will ensure reliable prosecutorial screening of legal guilt and provide the appropriate forum for its adjudication.²² Acting on that assumption, both institutions have limited the formal pretrial inquiry to whether the government's evidence presents a factual basis (probable cause) for believing that the defendant committed the crime. As a result, the prosecutor is the primary pretrial official responsible for screening out cases where the system's legal guilt requirements would preclude conviction at trial.

16. For example, judicial review procedures at the plea hearing are designed to protect some of these accusatorial principles. Judicial inquiry into the factual basis for the plea protects the factually innocent defendant by insuring that an independent fact-finder will examine the evidence before accepting the plea. See text at notes 272-86 *infra*. The constitutional requirement that the plea be voluntary protects a fair state-individual balance by invalidating guilty pleas produced by state coercion. See text at notes 250-56 *infra*. Section III suggests, however, that those judicial safeguards insufficiently protect these accusatorial principles. See text at notes 298-307 *infra*.

17. Our system's legal guilt requirements reflect its commitment to limit the state's ability to convict in order to protect individual rights. Accordingly, they undermine the view that the sole objective of accusatorial criminal procedure is to detect the truth (*i.e.*, factual guilt). Viewed from this perspective, plea-bargaining represents a summary process for resolving disputes whose legitimacy depends in part on the plea's reflection of the trial's probable outcome. See generally Uviller, *Pleading Guilty: A Critique of Four Models*, LAW & CONTEMP. PROB., Winter 1977, at 102, 118-26. See also *North Carolina v. Alford*, 400 U.S. 25 (1970) (holding that a court has the discretion to accept a guilty plea from a defendant who refuses to admit culpability as long as the state's evidence demonstrates that a conviction at trial is likely). *Alford* is discussed in text at notes 287-97 *infra*.

18. Most commentators agree that the primary function of the pretrial process is to screen out cases that should not go to trial. See Graham & Letwin, *The Preliminary Hearing in Los Angeles: Some Field Findings and Legal-Policy Observations* (pt. 1), 18 UCLA L. REV. 635, 639-40 (1971).

19. See text at notes 72-76 *infra*.

20. See text at notes 79-80 *infra*.

21. See text at notes 81-83 *infra*.

22. See *United States v. Calandra*, 414 U.S. 338, 344-45 (1974); *Costello v. United States*, 350 U.S. 359 (1956).

Section II therefore examines whether the possibility of facing the system's legal guilt requirements at trial guarantees reliable prosecutorial screening of legal guilt before trial. There is reason to be skeptical. Several circumstances, including the seriousness of the crime,²³ the reputation of the accused,²⁴ and the possibility of conviction through plea-bargaining,²⁵ may lead the prosecutor to indict a defendant when the government's proof of legal guilt is marginal at best.²⁶ Since the pretrial process does not require the government to present compelling evidence of factual guilt to an independent fact-finder²⁷ or demonstrate that its evidence could satisfy the trial's formal proof requirements, prosecutors can and sometimes do get indictments despite insufficient evidence to support a conviction at the time of indictment.²⁸

Section III continues the examination of the pretrial system by exploring the balance of advantage between the state and the accused during plea-bargaining. It evaluates whether the parties negotiate on an equal footing and whether their bargains approximate the trial's probable outcome.²⁹ This Section rejects the Supreme Court's assumption that the participation of competent defense counsel will ensure that the defendant has intelligently decided to plead guilty³⁰ by demonstrating how several institutional factors impair defense counsel's ability to prepare a defense or to accurately gauge the strength of the government's case.³¹ Nor does judicial review of the

23. See, e.g., Kaplan, *The Prosecutorial Discretion — A Comment*, 60 NW. U. L. REV. 174, 181-83 (1965).

24. *Id.*

25. See text at notes 210-17 *infra*. See also Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968).

26. See H. MILLER, W. McDONALD & J. CRAMER, PLEA-BARGAINING IN THE UNITED STATES 97-114 (1978) [hereinafter cited as L.E.A.A. STUDY].

27. See text at notes 170-77 *infra*.

28. See note 469 *infra*.

29. See note 17 *supra*. While neither the prosecutor, defense counsel, nor the court can predict the likely outcome at trial with scientific precision, the state should not be permitted to convict a defendant through plea-bargaining where its independent evidence of factual guilt is so weak that the defendant would have won a directed judgment of acquittal at trial. See note 71 *infra*. To permit such a result would dilute the defendant's privilege against self-incrimination and the state's concomitant obligation to prove guilt through its independent efforts. The state could indict an individual without making any reliable showing that its evidence would warrant a conviction at trial and then pressure the defendant to plead guilty in return for some expected sentencing concession from the state.

Conversely, those observers who believe that the criminal process's sole objective is to discern the truth (factual guilt) would not require the bargain to approximate the trial's probable outcome because "all matters affecting the persuasiveness of the prosecution case [would] be irrelevant," Uviller, *supra* note 17, at 114, as long as the defendant's admission of culpability reliably demonstrates factual guilt.

30. See text at notes 228-29 *infra*.

31. See text at notes 227-49 *infra*.

case at the plea hearing provide adequate safeguards. Under the Supreme Court's present standards, judicial inquiry into the voluntariness, intelligence, and factual basis³² of the plea cannot ensure that guilty pleas will be accepted only when the system's legal guilt requirements could probably be satisfied at trial.³³ Thus, Section III concludes that the pretrial process seriously dilutes our system's capacity to protect accusatorial values by confining most legal guilt requirements to a stage of the process that few defendants reach. Instead of a presumption of innocence, the pretrial process operates on a presumption of guilt.³⁴ Instead of providing a neutral forum to adjudicate a defendant's guilt reliably, the pretrial process relies on the *ex parte* determination of factual guilt made by the police and the prosecutor. Lay participation in the adjudication of guilt is limited to a grand jury that is dominated by the prosecutor.³⁵ While the state is supposed to develop its case against the accused independently, the prosecutor need only make a minimal showing of probable cause before using the state's panoply of permissible pressures to induce the defendant to admit guilt "voluntarily"³⁶ and plead guilty.

One's prescription for reform depends upon one's diagnosis of the disease. Some observers³⁷ suggest that plea-bargaining is the problem and therefore recommend its abolition. Others conclude that the adversarial trial itself is the problem and accordingly urge adoption of the best features of inquisitorial systems.³⁸ Section IV briefly examines and rejects these proposals. Returning to an adversarial trial system, which has not been used to adjudicate guilt for most cases in this century,³⁹ would cost far more than we can afford.

32. Federal Rule of Criminal Procedure 11, which governs the acceptance of pleas, reads in part: "(f) Determining accuracy of plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea." FED. R. CRIM. P. 11(f).

33. See L.E.A.A. STUDY, *supra* note 26, at 280-83; W. RHODES, PLEA-BARGAINING: WHO GAINS? WHO LOSES? 47 (Pub. No. 14, Promis Research Project, Washington D.C., Inst. for Law & Soc. Research) (1978) [hereinafter cited as PROMIS STUDY]; Finkelstein, *supra* note 2, at 310-11.

34. See H. PACKER, *supra* note 6, at 160.

35. See text at notes 170-77 *infra*.

36. Indeed, our system's informal methods for determining guilt closely resemble Herbert Packer's "Crime Control" model of the criminal process. See H. PACKER, *supra* note 6, at 158-63.

37. See note 309 *infra*.

38. See note 310 *infra*. See, e.g., L. WEINREB, *supra* note 12; Langbein & Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L.J. 1549 (1978).

39. See Alschuler, *supra* note 13, at 5.

The debate over the adequacy of inquisitorial safeguards⁴⁰ and the severe institutional remodeling required by such proposals suggest the need for more "intermediate prescriptive steps"⁴¹ that use our present institutional framework to effect change.

Accordingly, Section IV proposes that the pretrial process be used to provide greater protection of the accusatorial values embodied in our legal guilt requirements. The pretrial process must be reformed to ensure that

(1) the government shoulders its accusatorial burden of developing independent evidence of a defendant's factual guilt *before* it encourages the defendant to plead;

(2) a neutral adjudicator evaluates the government's evidence before or soon after formal accusation to determine whether that evidence can satisfy the trial's formal proof requirements;

(3) where possible, the community is given an opportunity to participate in that preliminary adjudication of legal guilt, so that the disposition of society's most serious sanction is not left exclusively in the hands of professionals;

(4) the defense attorney has sufficient access to the prosecution's case to make an informed prediction about the likely outcome at trial before advising the client to plead.

At the state level, a reformed preliminary hearing seems most likely to meet those goals. Because it is an adversary proceeding, the defendant has an opportunity to rebut the prosecution's case by cross-examination or by presenting a defense. By applying the rules of evidence and requiring the prosecutor to present a *prima facie* case of legal guilt (measured by a modified directed-verdict standard),⁴² such a proceeding would prevent conviction without adjudication while safeguarding individual rights.

However, the preliminary hearing cannot be an effective vehicle for federal reform. Unlike most states,⁴³ the federal system only conducts preliminary examinations in approximately twenty percent

40. See notes 335-37 *infra* and accompanying text.

41. See Morris, Book Review, 91 HARV. L. REV. 1367, 1370 (1978).

42. See note 342 *infra*.

43. After the Supreme Court ruled in *Hurtado v. California*, 110 U.S. 516 (1884), that indictment by a grand jury is not mandated by the due process clause of the fourteenth amendment, many states abolished their mandatory indictment requirements and permitted prosecutors to initiate prosecution either by indictment or by filing an information. See *Federal Grand Jury: Hearings on H.J. Res. 46, H.R. 1277 and Related Bills Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 716-17, 716 n.3 (1976) [hereinafter cited as *1976 Hearings*]. In those jurisdictions, most prosecutions commence by information. See Y. KAMISAR, W. LAFAYE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 868 (4th ed. 1974). Most information jurisdictions require a preliminary hearing, however. *Id.* at 977. In some jurisdictions, the accused has a right to indictment by grand jury for serious crimes, see *1976 Hearings, supra*, at 717 n.4, and a few states require grand jury indictments for capital offenses. See *id.* at 717 n.9.

of all prosecutions.⁴⁴ Thus, mandating preliminary hearings for all federal prosecutions would generate significant pretrial delay and require up to five times the resources presently committed to such hearings. Moreover, mandatory preliminary hearings would duplicate the grand jury's screening function since the fifth amendment requires most federal prosecutions to proceed by indictment.⁴⁵

Admittedly, a constitutional amendment abolishing the accusatory function of the federal grand jury would remedy the problem of duplicated screening. Some observers would apparently welcome that development.⁴⁶ While the grand jury was enshrined in our Constitution because of its reputed ability to protect the innocent from unfounded prosecution,⁴⁷ few scholars or practitioners take its screening function seriously today.⁴⁸ Most argue that an inexperienced and untrained body of citizens cannot possibly screen out unwarranted prosecutions in an *ex parte* proceeding where they hear only the government's side of the case and depend on the prosecutor for all legal advice and direction.

Section V takes issue with that explanation of the grand jury's defects. It argues that the grand jury's present tendency to rubber-stamp the prosecutor's decisions stems far more from the limited role the Supreme Court has assigned to it⁴⁹ and the type of evidence it receives⁵⁰ than from any institutional incapacity. By refusing to prescribe the kind or amount of evidence that the prosecutor should present to the grand jury, the Supreme Court in *Costello v. United States*⁵¹ impaired the grand jury's ability to screen factual guilt and precluded it from determining whether the government's evidence, if

44. See note 370 *infra*.

45. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ." U.S. CONST. amend. V. FED. R. CRIM. P. 7(a) invokes the indictment requirement for any offense punishable by imprisonment for a term exceeding one year.

46. See Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174 (1973). However, even some of the grand jury's critics have expressed reluctance about altering the Bill of Rights for fear that once the process is started and legitimized, other guarantees of individual liberties may be jeopardized. See, e.g., Morris, Book Review, 87 YALE L.J. 680, 682 (1978). At the very least, those who favor a constitutional amendment abolishing or revising the fifth amendment's indictment requirement should demonstrate that the grand jury is not capable of performing a valuable accusatorial function. See, e.g., M. FRANKEL & G. NAFTALIS, *THE GRAND JURY* 118-19 (1977). Section V argues that the abolitionists have not met that burden.

47. See *Wood v. Georgia*, 370 U.S. 375, 390 (1962).

48. See, e.g., Antell, *The Modern Grand Jury, Benighted Supergovernment*, 51 A.B.A.J. 153 (1965); Morris, *supra* note 46, at 683.

49. See text at notes 176-77 *infra*.

50. See text at notes 393-505 *infra*.

51. 350 U.S. 359 (1956).

uncontradicted, would warrant a conviction at trial.⁵² I therefore suggest a series of federal reforms that check the prosecutor's charging discretion and strengthen the grand jury's ability to make a preliminary ex parte adjudication of factual guilt. Congress should repudiate *Costello* by requiring the prosecutor to present the *indicting*⁵³ grand jury with a prima facie case of legal guilt. Furthermore, to ensure that the prosecutor has presented the grand jury with sufficient legally admissible evidence to warrant a conviction, the trial court should have the authority to dismiss any indictment where the indicting grand jury's transcript⁵⁴ reveals that the prosecutor has not met that burden. Finally, I propose specific reforms in the use of hearsay testimony,⁵⁵ illegally seized evidence,⁵⁶ and exculpatory evidence⁵⁷ that would enable the grand jury to adjudicate factual guilt reliably and independently without transforming its ex parte inquiry into a prolonged adversarial proceeding. Although these reforms will lengthen the grand jury's review of the prosecution's case and impose a burden on courts reviewing the grand jury's transcript,⁵⁸ they should prove to be far less expensive and time-consuming than those proposals mandating adversarial preliminary hearings for all federal prosecutions.⁵⁹ While any extension of our system's legal guilt requirements to the pretrial process will incur costs, the reforms

52. To demonstrate this point, Section V examines how some courts have attempted to improve the quality of grand jury screening by more actively reviewing the prosecutor's conduct before the grand jury. Those courts have found prosecutorial misconduct justifying dismissal of the indictment when the prosecutor's presentation of evidence precluded the grand jury from screening effectively. However, the prosecutorial misconduct doctrine does not cure all of the accusatory grand jury's present ills because *Costello* prohibits the federal courts from imposing an affirmative obligation on the prosecutor to present the grand jury with a prima facie case of legal guilt. At best, the prosecutorial misconduct doctrine remedies the worst excesses generated by *Costello* without acknowledging that *Costello* is the source of the problem.

53. One of the major objections to reforms that would enhance the grand jury's accusatory function is that such reforms would impair the grand jury's inquisitorial function of investigating criminal activity. Accordingly, Section V proposes that Congress enact a statute that would preclude the same grand jury from performing both functions. This proposal would permit an investigatory grand jury "to pursue its investigation . . . unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial." *United States v. Calandra*, 414 U.S. 338, 349 (1974). Barring the same grand jury from performing the inconsistent functions of investigator and impartial fact-finder should also enhance the accusatory grand jury's capacity to perform an independent screening function. See text at notes 553-571 *infra*.

54. Section V also proposes that the defendant receive a transcript of all recorded proceedings of the indicting grand jury subject to any reasonable conditions or limitations that the court may impose to prevent possible abuses. See text at notes 563-80 *infra*.

55. See text at notes 523-29 *infra*.

56. See text at notes 530-34 *infra*.

57. See text at notes 536-52 *infra*.

58. See text at notes 582-84 *infra*.

59. See text at notes 367-75 *infra*.

suggested in Section V can vindicate essential accusatorial principles at a price our system can bear.

I. PRETRIAL SCREENING

While the pretrial process serves multiple purposes — providing opportunities for discovery,⁶⁰ preserving witnesses' testimony,⁶¹ and protecting defendants' constitutional rights⁶² — most commentators agree that its primary function is to screen out cases that should not go to trial.⁶³ After identifying several screening standards that could perform this function, this Section examines the actual application of these standards at the formal stages of pretrial review in the federal system.

A. *Standards for Screening*

To examine federal pretrial review, I shall distinguish between those screening standards that evaluate factual guilt and those that evaluate legal guilt. Factual guilt refers to the substantive criminal law's definition of criminal conduct. A factually guilty accused is one who voluntarily commits the proscribed act or omission with the requisite intent under circumstances that neither excuse nor justify that conduct. To determine whether the accused is factually guilty, the criminal process must provide a procedural mechanism (theoretically the trial) that will reliably adjudicate the factual and normative questions⁶⁴ raised by the substantive criminal law's definition of

60. See *United States v. King*, 482 F.2d 768, 775 (D.C. Cir. 1973); *Coleman v. Burnett*, 477 F.2d 1187, 1199-200 (D.C. Cir. 1973); Note, *The Function of the Preliminary Hearing in Federal Pretrial Procedure*, 83 YALE L.J. 771, 772 n.5 (1974). For a discussion of how the preliminary hearing permits discovery in California, see Graham & Letwin, *The Preliminary Hearing in Los Angeles: Some Field Findings and Legal-Policy Observations* (pt. 2), 18 UCLA L. REV. 916, 916-31 (1971).

61. See, e.g., *California v. Green*, 399 U.S. 149, 165 (1970); FED. R. EVID. 804(b)(1); Graham & Letwin, *supra* note 60, at 925; Note, *supra* note 60, at 784 n.63.

62. An arraignment or a preliminary hearing that provides a fair and reliable determination of probable cause assures the legality of a defendant's custody under the fourth amendment, thereby affording pretrial protection of some legal guilt requirements. *Gerstein v. Pugh*, 420 U.S. 103, 123-25 (1975). Indictment by a grand jury also satisfies the fourth amendment. See 420 U.S. at 117 n.19. But see Thompson, *The Fourth Amendment Function of the Grand Jury*, 37 OHIO ST. L.J. 727, 743-74 (1976), which argues that the grand jury's dependence on the prosecutor precludes it from making a sufficiently neutral and detached judgment to satisfy the fourth amendment.

63. See note 18 *supra*.

64. Most affirmative defenses require the adjudicator to make normative judgments about the defendant's culpability. For example, a self-defense claim asks the fact-finder to determine whether a reasonable person would have acted like the defendant under similar circumstances. See W. LAFAVE & A. SCOTT, CRIMINAL LAW 393-94 (1972). Criminal responsibility doctrines implicitly require the fact-finder to judge whether it is fair to hold a mentally disabled defendant accountable for his actions. See generally Arenella, Book Review, 80 COLUM. L. REV. 420 (1980).

criminal conduct. Legal guilt refers to the final outcome⁶⁵ of that procedural process. However, the reliable adjudication of a defendant's factual guilt is not the only objective of an accusatorial process. Concern over the gravity of the criminal sanction, respect for individual rights, and the felt need for community participation in guilt adjudication have all fostered legal guilt requirements that limit the state's ability to detect and convict the factually guilty. For example, the state might have reliable evidence of a defendant's factual guilt that it cannot use at trial because of the rules of evidence⁶⁶ or because police violated the defendant's constitutional rights when seizing the evidence.⁶⁷ Even if the state has some legally admissible evidence, it may not have enough to avoid a directed acquittal at trial. Or the government might have enough legally admissible evidence to reach the jury but not enough to convince it of the defendant's factual guilt beyond a reasonable doubt. Finally, the jury may temper the literal requirements of the substantive criminal law with community notions of justice by acquitting a defendant despite compelling proof of factual guilt.⁶⁸ In all of those examples, our criminal justice system has deliberately⁶⁹ created a discrepancy between perceived⁷⁰ factual and legal guilt to promote policies other than conviction of the factually guilty. Thus, our system should not tolerate the conviction of a defendant who is either factually or legally innocent.⁷¹

65. While the defendant is not legally guilty until guilt has been adjudicated at trial or negotiated by counsel, the accusatorial values underlying the concept (which I refer to as legal guilt requirements) concern the *process* of reaching that outcome as well as the ultimate result. Thus, commentators who equate legal guilt with the trial's actual or predicted outcome devalue the concept by ignoring how many of its requirements embody accusatorial principles that insure a fair state-individual balance before conviction. See, e.g., Church, *In Defense of Bargain Justice*, 13 LAW & SOC. REV. 509, 515-16 (1979).

66. For example, prosecutors sometimes use lie-detectors to evaluate factual guilt. See Kaplan, *supra* note 23, at 178. But such tests are usually not admissible at trial. See, e.g., *United States v. Cardarella*, 570 F.2d 264 (8th Cir.), *cert. denied*, 435 U.S. 997 (1978); *United States v. Flores*, 540 F.2d 432 (9th Cir. 1976); *United States v. Tremont*, 351 F.2d 144 (6th Cir. 1965), *cert. denied*, 383 U.S. 944 (1966); *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). But see *United States v. Ridling*, 350 F. Supp. 90 (E.D. Mich. 1972).

67. See *Mapp v. Ohio*, 367 U.S. 643 (1961).

68. See generally H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966).

69. Unintentional discrepancies may also arise from human error. A factually innocent defendant may be found legally guilty at trial. Indeed, some commentators and practitioners have claimed that plea-bargaining provides a more reliable determination of factual guilt than trial. See L.E.A.A. STUDY, *supra* note 26, at 96-97.

70. As noted earlier, factual guilt is an artificial concept that cannot be empirically verified. Ultimately, the question of whether the accused is factually guilty cannot be separated from the procedural mechanism used to adjudicate it. See note 6 *supra*.

71. I use the term "legal innocence" to refer to those cases where conviction at trial would be impossible because the government lacks sufficient legally admissible evidence to reach the jury. If the state, through plea-bargaining, is permitted to secure the conviction of a defendant

1. *Screening Factual Guilt*

While the pretrial process is not designed to adjudicate a defendant's factual guilt conclusively, it does attempt to protect the factually innocent by weeding out those cases where the government's evidence does not provide adequate reason to believe that the accused committed the crime. The primary pretrial screening standard⁷² for factual guilt used at the formal stages of pretrial review is the probable cause requirement. While disagreement arises over the proper evidentiary standard to measure probable cause to indict,⁷³ the standard for probable cause at the initial appearance and preliminary hearing comes from the fourth amendment's definition of probable cause to arrest. The fact-finder must determine whether the government's evidence would warrant a person of reasonable caution to believe that the accused committed the crime.⁷⁴ The probable-cause-to-arrest standard screens only⁷⁵ factual guilt because it can be satisfied by evidence that is inadmissible at trial (such

who could not possibly be convicted at trial, our system's accusatorial requirement that the state independently develop compelling evidence of factual guilt would lose most of its force. See note 29 *supra*. Nor can we simply assume that the defendant would have no incentive to bargain in such cases. First, several factors influencing a defendant's decision to plead (*e.g.*, pretrial custody, very attractive bargains) have little to do with the strength of the prosecutor's case. More importantly, defense counsel may not have access to sufficient information to assess the government's case, especially when the prosecutor exaggerates its strength or engages in bluffing tactics. See text at notes 217-18 *infra*. Many prosecutors see no ethical problem in such practices even when they result in the conviction of a defendant who could not possibly have been convicted at trial. See PROFESSIONAL RESPONSIBILITY OF THE LAWYER 62 (1976). See also note 218 *infra*.

Some commentators have devalued the concept of legal innocence by suggesting that it refers merely to a prediction of the trial's probable result. See Church, *supra* note 65, at 516 ("Legal innocence is merely an attorney's prediction prior to trial"). Since those predictions cannot be made with scientific precision, these commentators suggest no unfairness results when a legally innocent defendant pleads guilty as long as the defendant was represented by competent counsel because legal innocence is not empirically verifiable. The assumption underlying that argument is that no incentive to bargain would exist if "defendants did not face a very real chance of conviction at trial." *Id.* Many prosecutors rely on this argument to justify the use of plea-bargaining to secure the conviction of a defendant who probably would have been acquitted at trial. See L.E.A.A. STUDY, *supra* note 26, at 109. My difficulty with the argument is that it fails to distinguish between different categories of weak cases. Legal innocence becomes a matter of prediction only when the state has sufficient evidence to warrant a conviction.

72. Some pretrial screener should also determine whether the conduct charged, if proved, would constitute a violation of the penal statute noted in the complaint. Graham and Letwin label this the "demurrer" screening function. Graham & Letwin, *supra* note 18, at 663.

73. See notes 107-13 *infra* and accompanying text for a discussion of the various standards used by courts in their charging instructions to the grand jury.

74. *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949).

75. As Professors Graham and Letwin have observed, some of these screening judgments overlap and some are applied at the same pretrial stage. Graham & Letwin, *supra* note 18, at 622. For example, I have identified the probable cause requirement as a factual guilt screening standard because it considers evidence that cannot be used to prove legal guilt at trial. However, judicial review of the probable cause basis for the arrest also protects the defendant's fourth amendment rights. Consequently, the probable cause requirement could be character-

as hearsay) or that does not prove the defendant's guilt beyond a reasonable doubt.⁷⁶ Moreover, the probable-cause-to-arrest standard is a weak screen for factual guilt because it focuses on whether the defendant committed the proscribed act. Thus, probable cause may exist despite factual innocence if the defendant lacked the requisite criminal intent or acted under circumstances that justified or excused the conduct.

2. Screening Legal Guilt

Since the primary function of the pretrial process is to screen out cases that should not go to trial, it would make little sense for pretrial screeners to look exclusively to the defendant's factual guilt without asking whether the government could satisfy our system's legal guilt requirements.⁷⁷ On the other hand, evaluating the legal

ized as a legal guilt requirement that insures that the state is respecting the individual's constitutional rights before trial. See note 89 *infra*.

76. There is a large difference between the two things to be proved [probable cause and legal guilt], as well as between the tribunals which determine them, and therefore a like difference in the quanta and modes of proof required to establish them.

. . . .
 . . . Guilt in a criminal case must be proved beyond a reasonable doubt and by [legally admissible] evidence

. . . .
 In dealing with probable cause, however, as the very name implies, we deal with probabilities

"The substance of all the definitions" of probable cause "is a reasonable ground for belief of guilt" And this "means less than evidence which would justify condemnation" or conviction. . . .

Brinegar v. United States, 338 U.S. 160, 173-75 (1949) (citations omitted).

77. Normative considerations would seem to dictate the same conclusion. If one views the presumption of innocence as a directive to treat the accused as innocent until legal guilt is adjudicated at trial, the government should not be able to impose the serious economic, moral, and physical sanctions triggered by indictment without making some preliminary showing that legal guilt will probably be established. See H. PACKER, *supra* note 6, at 167. Cf. *McGinnis v. Royster*, 410 U.S. 263, 273 (1973) ("it would hardly be appropriate for the State to undertake in the pretrial detention period programs to rehabilitate a man still clothed with a presumption of innocence"); *Stack v. Boyle*, 342 U.S. 1, 4 (1951) ("Unless the right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning"). But cf. *Bell v. Wolfish*, 441 U.S. 520, 533 (1979) (majority of Court concluded that the presumption of innocence "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun").

Wolfish's limited view that the presumption of innocence applies only to the trial appears to assume that the system's legal guilt requirements refer only to the procedural protections afforded to defendants who elect to contest their culpability at trial. Thus, *Wolfish* could be used to defend the fairness of a pretrial screening process that examined only factual guilt. Society's interest in protecting itself from the accused would take precedence at this stage over the safeguards provided by the legal guilt doctrine. This view of pretrial screening would permit the government to use the indictment's sanctions as a pressure tactic against the accused. Before trial, the government could use the leverage it gained from the indictment to convince the accused to cooperate with the government's search for legally admissible evidence against that defendant or others. If legally innocent, the defendant can insist on a trial. If the defendant resists these pressures to plead or turn state's evidence, the prosecutor would still have time after indictment to develop sufficient evidence of legal guilt to secure the indtee's conviction.

sufficiency of the government's proof before indictment poses some ticklish problems. First, such an evaluation must come late in the pretrial process to give the government time to develop its case. Second, any preindictment evaluation of legal sufficiency will be complicated by the uncertain admissibility of some of the government's evidence, an uncertainty that will be resolved only after indictment.⁷⁸ Finally, any review of legal sufficiency must be performed expeditiously to prevent undue pretrial delay.

Despite these difficulties, one can suggest at least two standards for evaluating legal guilt that the pretrial process could apply before issuing an indictment. First, the pretrial process could eliminate cases with inadequate admissible evidence to support a conviction at trial:⁷⁹ a directed-verdict standard. Establishing a basis for believing in the defendant's factual guilt does not tell us whether the government has sufficient legally admissible evidence to warrant conviction. A directed-verdict screen makes the latter, more stringent judgment. To ensure that the evaluation considers only admissible evidence, a pretrial screener performing this function should generally apply the rules of evidence applicable at trial.⁸⁰

Second, the pretrial process could predict the jury's reaction to the government's case: a probability-of-conviction standard. As all prosecutors know, juries sometimes acquit defendants despite sufficient proof to warrant conviction. Trial juries may acquit because the government's evidence does not dispel their reasonable doubts about the defendant's factual guilt.⁸¹ Moreover, nonevidentiary factors may lead juries to acquit or reduce the defendant's criminal liability. A jury may temper the law with community notions of justice: it may refuse to convict when it sympathizes with the defendant, when the victim was also at fault, or when the defendant violated an unpopular law.⁸² A jury might also reduce the defendant's criminal liability by returning a guilty verdict for a less serious offense when it believes that the penalty for the more serious offense is too harsh for this particular defendant.⁸³ The pretrial process should consider those possibilities to predict intelligently the likelihood of conviction. Having identified several distinct screening standards⁸⁴ that can be

78. For example, the admissibility of evidence seized by the government during its investigation will be determined at a post-indictment suppression hearing. *See* FED. R. CRIM. P. 41.

79. *See* Graham & Letwin, *supra* note 18, at 692.

80. Note, *supra* note 60, at 779-80.

81. *See* Kaplan, *supra* note 23, at 183-84.

82. *See generally* H. KALVEN & H. ZEISEL, *supra* note 68.

83. *See generally id.*

84. By no means is this an exhaustive list of pretrial screening judgments. For example,

used to screen factual and legal guilt, the next Subsection examines how the present pretrial process performs its screening function.

B. *Steps in Pretrial Review*

1. *Initial Appearance Before a Federal Magistrate*

After arrest, the defendant must be taken to the nearest available federal magistrate "without unnecessary delay"⁸⁵ so that judicial supervision of the prosecution may begin. Although judicial screening may begin even earlier when law enforcement officials apply for arrest warrants under rule 4,⁸⁶ only a small minority of federal prosecutions involve arrests on warrants. At the initial appearance, the magistrate must determine that the complaint prepared by the prosecutor or the arresting officer complies "with the requirement of Rule 4(a) with respect to the showing of probable cause."⁸⁷

The magistrate's ex parte finding of probable cause is the first judicial screening of a defendant's factual guilt.⁸⁸ It also satisfies the fourth amendment's requirement that there be a prompt judicial determination of the probable cause basis for detention before the state restrains an arrestee's liberty for any extended time.⁸⁹ Since this ex parte hearing assesses the validity of a defendant's custody pending further action by the grand jury, the magistrate does not determine

the prosecutor and arguably the grand jury may refuse to prosecute despite compelling evidence of factual and legal guilt because the particular case is not sufficiently important to merit the allocation of scarce criminal justice resources. See notes 184-90 *infra* and accompanying text. Graham and Letwin have identified the following different screening judgments: the summary judgment function; the demurrer function; the litigant control function; the abuse-of-process control function; the predictive function; the directed-verdict function; the allocation of resources function; the limitation of jurisdiction function; the sentencing function; and the community judgment function. Graham & Letwin, *supra* note 18, at 662-67.

85. FED. R. CRIM. P. 5(a) provides:

An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before a magistrate, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate, the magistrate shall proceed in accordance with the applicable subdivisions of this rule.

86. FED. R. CRIM. P. (4)a provides in part:

If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it.

87. FED. R. CRIM. P. 5(a).

88. See text at notes 72-76 *supra*. The magistrate also performs the demurrer screening function by determining whether the alleged conduct, if proved, would violate the penal statute noted in the complaint. See note 72 *supra*.

89. See *Gerstein v. Pugh*, 420 U.S. 103, 114, 124-25 (1975).

whether the government's evidence would support a conviction.⁹⁰ Instead, the magistrate applies the same probable cause standard that is required for an arrest warrant.

Few prosecutions are screened out of the process at the initial appearance because the magistrate's *ex parte* review of the complaint is often *pro forma* at best. The reluctance of magistrates to screen out cases at this preliminary stage is understandable. They know that an Assistant United States Attorney has already reviewed the probable cause basis for the arrest,⁹¹ and any doubts concerning its propriety can be aired at the preliminary examination, where the defendant is represented by counsel and has more time to prepare the challenge. Moreover, the primary purpose of the initial appearance is not to eliminate weak cases but to minimize police interrogation of uncounseled defendants by requiring that they be brought promptly before a magistrate.⁹² At this initial appearance, the magistrate informs a defendant of the criminal complaints involved, the right against self-incrimination, the right to counsel (appointed if necessary), the right to a preliminary hearing, and the general circumstances under which a defendant may secure pretrial release.⁹³ After establishing the conditions for a defendant's pretrial release (if any), the magistrate sets a date for the defendant's preliminary examination.

2. Preliminary Examination

Like the initial appearance that precedes it, the preliminary hearing's primary function is to test the legality of a defendant's custody. Notwithstanding the views of many commentators,⁹⁴ who would prefer that federal preliminary examinations screen legal guilt by a

90. Federal Rule of Criminal Procedure 4 provides that the "finding of probable cause may be based upon hearsay evidence in whole or in part." FED. R. CRIM. P. 4(b).

91. See notes 180-83 *infra* and accompanying text.

92. See *Mallory v. United States*, 354 U.S. 449, 454 (1957); *McNabb v. United States*, 318 U.S. 332, 443-44 (1943).

93. Federal Rule of Criminal Procedure 5 provides in part:

Offenses not Triable by the United States Magistrate. If the charge against the defendant is not triable by the United States magistrate, the defendant shall not be called upon to plead. The magistrate shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of the general circumstances under which he may secure pretrial release. He shall inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The magistrate shall also inform the defendant of his right to a preliminary examination. He shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided by statute or in these rules.

FED. R. CRIM. P. 5(c).

94. See, e.g., MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 330.1(1) (1975), which defines the purpose of the preliminary hearing as being "to determine whether there is suffi-

probability-of-conviction standard,⁹⁵ Congress designed the preliminary hearing's timing and evidentiary requirements to assure compliance with the fourth amendment. To prevent investigative arrests,⁹⁶ the hearing must be held shortly after the defendant's arrest. Because the hearing determines only whether a probable cause basis for the defendant's arrest presently exists, the magistrate may consider any evidence, regardless of its admissibility at trial,⁹⁷ that establishes a reliable factual basis for believing that the defendant committed the crime. Given the preliminary nature of that determination, the type of evidence introduced at the hearing, and the possibility that the government may bolster its case after further investigation, a magistrate will rarely dismiss a charge on the ground that the prosecution's evidence would not support a conviction at trial.⁹⁸

While the preliminary hearing performs the same screening function as the initial appearance, it is not a superfluous step. First, it performs valuable collateral functions, permitting the defendant to discover⁹⁹ the prosecution's case, preserving the testimony of wit-

cient evidence to proceed to trial"; Graham & Letwin, *supra* note 18, at 639-40; Note, *supra* note 60, at 779.

95. See notes 60-63 *supra* and accompanying text.

96. One of the most important purposes is to provide protection against arrests for investigation. It is not only a determination of probable cause but a determination of probable cause shortly after the arrest which is significant. The requirement that the defendant be brought before the Commissioner without unnecessary delay and the right of the defendant to have a hearing to determine whether there is probable cause combine to discourage law enforcement officers from arresting on suspicion and then investigating the case at their leisure to determine whether there is probable cause. The elimination of the Commissioner's hearing is an open invitation to arrests for investigation. If a subsequent investigation develops no probable cause, or establishes the defendant's innocence, the grand jury can be requested to return an ignoramus. During the interval, the defendant will have been deprived of his liberty in violation of the Constitution, but will be without redress. The present hearing provision is one of the best devices which we have found to implement the Fourth Amendment's requirement of arrest on probable cause. A motion to suppress at a later time provides protection only if real evidence or a statement has been obtained from the defendant. It provides no protection for either the innocent defendant or the guilty defendant who remained silent and from whom no evidence was seized.

8 MOORE'S FEDERAL PRACTICE ¶ 5.1.02[2], at 5.1-6 n.1 (2d ed. 1976) (quoting *Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary on the United States Commissioner System, Part 3*, 89th Cong., 2d Sess. 266, 270 (1966) (statement of Professor A. Kenneth Pye)). See generally Note, *supra* note 60, at 775-79.

97. Federal Rule of Criminal Procedure 5.1 provides in part:

(a) Probable Cause Finding The finding of probable cause may be based upon hearsay evidence in whole or in part. . . . Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination.

FED. R. CRIM. P. 5.1(a).

98. Thus, the magistrate who disbelieves the government's witnesses or thinks the defendant's defense will prevail at trial is not empowered to dismiss charges. See, e.g., Note, *supra* note 60, at 779 n.33.

99. See note 60 *supra*.

nesses who may not be available later,¹⁰⁰ and offering an opportunity to initiate plea negotiations. Second, the hearing's adversarial procedures promote a more reliable determination of probable cause than the speedy *ex parte* review at the initial appearance.¹⁰¹ Finally, events following the defendant's arrest and initial appearance might undermine the government's justification for detaining the defendant. For all those reasons, a magistrate is apt to apply the probable-cause-to-arrest standard more stringently at the preliminary examination than at the initial appearance.¹⁰²

Although the preliminary hearing is not a superfluous screen, it is a rare one. Since the preliminary hearing assesses only the validity of a defendant's custody pending action by the grand jury, its purpose is vitiated by the grand jury's indictment, which itself establishes probable cause to hold the defendant for trial.¹⁰³ Thus, the prosecutor usually bypasses the preliminary hearing by obtaining an indictment against the defendant before the scheduled date of the hearing.¹⁰⁴

3. *Screening by the Federal Grand Jury*

The prosecutor's power to bypass the preliminary hearing increases the importance of the grand jury's screening function. Except for the prosecutor, the grand jury is the only significant sieve through which most federal prosecutions must pass after the defendant's initial appearance. Moreover, given the high ratio of guilty pleas to trials, the grand jury is usually the only stage in the federal criminal process where the community helps to determine whether to impose criminal sanctions. Because of the grand jury's importance and the considerable confusion that has permeated discussions of its accusatory function, this Subsection presents a detailed analysis of its screening functions.

Judicial references to the grand jury as both a "sword" and a "shield"¹⁰⁵ reflect its somewhat contradictory investigatory and ac-

100. See note 61 *supra*.

101. *Cf.* *Gerstein v. Pugh*, 420 U.S. 103, 121-22 (1975). Although the Court concluded that adversarial procedures are not constitutionally required to make a reliable probable-cause-to-arrest determination, it conceded that adversarial procedures might "enhance the reliability of probable cause determinations in some cases." 420 U.S. at 122.

102. Dismissals remain a rarity, however, because the government usually has enough evidence of defendant's factual guilt to satisfy the probable cause standard.

103. See *Gerstein v. Pugh*, 420 U.S. 103, 117 n.19 (1975).

104. See note 370 *infra*.

105. See, e.g., *United States v. Fein*, 504 F.2d 1170, 1179 (2d Cir. 1974) ("We have no reason to become enmeshed in the long-continuing debate . . . as to whether the grand jury constitutes a sword or a shield."); *United States v. Cox*, 342 F.2d 167, 186 n.1 (5th Cir.) (Wis-

cusatory functions in our federal criminal justice system. As investigator, the grand jury uses subpoena, immunity, and contempt powers to detect criminal activity and identify its perpetrators.¹⁰⁶ As accuser, the grand jury is supposed to check the prosecutor by eliminating charges where the evidence does not establish probable cause for believing in the defendant's guilt. Whether the grand jury screens factual or legal guilt depends upon the type of probable cause standard it applies and what evidence it considers.

a. *Judicial instructions.* Judicial instructions to grand juries¹⁰⁷ exhibit considerable disagreement over the proper evidentiary standard for measuring probable cause to indict. Some courts limit the grand jury to screening factual guilt by equating probable cause to indict with probable cause to arrest:

Your prime function is to decide whether or not sufficient evidence has been produced to indicate that a federal crime probably has been committed by the person accused. If the evidence produced does not meet the standard necessary for an indictment, because you cannot conclude that a crime probably has been committed by the accused, you should have no hesitancy in refusing to vote for an indictment.

You're not a Trial Jury, however. That is, it is not your responsibility to determine the innocence or guilt of an accused defendant, but solely to determine whether or not sufficient evidence has been produced to indicate that a federal crime probably has been committed by the person accused.¹⁰⁸

The Department of Justice shares this limited view of the proba-

dom, J., concurring specially) (quoting ABA FEDERAL GRAND JURY HANDBOOK 8 (1959)) ("The grand jury is both a sword and a shield of justice — a sword because it is the terror of criminals, a shield because it is the protection of the innocent against unjust prosecution."), *cert. denied*, 381 U.S. 935 (1965). See generally Y. KAMISAR, W. LAFAVE & J. ISRAEL, *supra* note 43, at 893-955.

106. It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning. *Blair v. United States*, 250 U.S. 273, 282 (1919). See also *Schwimmer v. United States*, 232 F.2d 855, 862-63 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956).

107. Before receiving the judge's charging instructions, federal grand jurors may be given a copy of the Federal Grand Jury Handbook. Unfortunately, the handbook never defines what type of evidence grand juries may consider or what specific evidentiary standard grand jurors should use in evaluating the government's evidence. Instead, the pamphlet exhorts grand jurors to protect "the innocent against unjust prosecution" and not to "find indictments not warranted by the evidence." A.B.A. FEDERAL GRAND JURY HANDBOOK 8 (1959) (reproduced in *1976 Hearings*, *supra* note 43, at 277-97). In fact, the only specific guideline articulated is an admonition that grand jurors should not let their personal judgment that a particular law is "unduly harsh" influence their judgment in carrying out their duty to enforce the law as it exists. *Id.* at 12. But see *United States v. Asdrubal-Herrera*, 470 F. Supp. 939 (N.D. Ill. 1979).

108. *Grand Jury Reform: Hearings on H.R. 94 Before the Subcomm. on Immigration, Citi-*

ble-cause-to-indict standard. In its instruction prohibiting prosecution without "probable cause to believe that a person has committed a federal offense,"¹⁰⁹ the department explains that probable cause is the same standard for an arrest warrant, "for a magistrate's decision to hold a defendant to answer in the district court, . . . and for indictment by a grand jury."¹¹⁰

On the other hand, some judges have suggested in their charging instructions that the grand jurors should not return an indictment unless the government's evidence would lead them to convict the accused at trial. As one federal judge explained it, "Before returning an indictment, the grand jury should be satisfied from the evidence which is submitted to it that a conviction would be warranted if the evidence were presented to a trial jury where there was no evidence to rebut it."¹¹¹ That type of instruction asks the grand jury to predict the likelihood of a defendant's conviction. Such prediction requires the grand jury to evaluate the quality of the government's evidence, such as the credibility of its witnesses:

One of the most important functions you are to perform is to judge the credibility of the various witnesses who may appear before you. You and you alone are the judges of the credibility of those witnesses, that is, the believability of their statements to you. In reaching your conclu-

zenship, and International Law of House Comm. on the Judiciary, 95th Cong., 1st Sess., pt. 1, at 111 (1977) (Exhibit to A32) [hereinafter cited as 1977 Hearings, pt. 1 or pt. 2].

However, the grand jury's review of factual guilt should be somewhat more structured than that of the magistrate's evaluation of probable cause to arrest. While the magistrate seeks a reasonable factual basis for believing that the defendant committed the crime, the grand jury must consider the crime's material elements. *See Gaither v. United States*, 413 F.2d 1061 (D.C. Cir. 1969), where the D.C. Circuit dismissed an indictment because the grand jury did not have the actual terms of the indictment before it when it considered the government's evidence. After listening to an arresting officer testify about the theft Gaither had allegedly committed, the grand jurors voted to "present" him for grand larceny and recorded their decision on a printed form. The United States Attorney's office then drafted an indictment for grand larceny and submitted it to the grand jury's foreman, who signed it. None of the other grand jurors saw or voted their approval of this indictment. 413 F.2d at 1065. In rejecting the government's contention that the foreman's signature constituted sufficient proof that the indictment reflected the grand jurors' intent, Judge Wright emphasized that the grand jury was designed to do more than simply approve the prosecutor's recommendation. "The content of the charge, as well as the decision to charge at all, is entirely up to the grand jury — subject to its popular veto, as it were." 413 F.2d at 1066.

Judge Wright concluded that "Rule 6 requires the grand jury as a body to pass on the actual terms of an indictment," because "[w]ithout an indictment before them, the jurors might not have focused upon each particular element and determined which particular facts should be included in the ultimate accusation." 413 F.2d at 1071.

109. *U.S. Department of Justice Materials Relating to Prosecutorial Discretion*, 24 CRIM. L. REP. (BNA) 3001, 3002 (1978) [hereinafter cited as *Justice Department Standards*]. The comment to this provision certifies that this probable cause determination is a "minimal requirement." *Id.* at 3002. The prosecutor may still decide not to prosecute.

110. *Id.* at 3002.

111. *United States v. O'Shea*, 447 F. Supp. 330, 331 (S.D. Fla. 1978), *aff'd. per curiam*, 588 F.2d 199 (5th Cir. 1979).

sions as to the credibility of any witnesses you may consider . . . the demeanor of the witness, the witness' manner of testifying, the reasonableness or probability of the witness' story as it is related to you, whether a witness has been corroborated by other witnesses, evidence or circumstances in the case.¹¹²

While the probability-of-conviction standard of probable cause clearly suggests a more rigorous evidentiary barrier to indictment than the probable-cause-to-arrest standard, most judicial instructions using the former legal guilt standard fail to explain how the grand jury should measure convictability.¹¹³ Even if this defect were remedied, the grand jury could not evaluate the legal sufficiency of the government's proof or assess the likelihood of conviction unless it considered evidence that the government could use at trial.¹¹⁴ Indeed, the presentation of some types of hearsay testimony could also prevent the grand jury from making a reliable assessment of a defendant's factual guilt.¹¹⁵ Therefore, the next Subsection examines the quality of the evidence presented to the grand jury.

b. *Judicial supervision of evidence presented to the grand jury.* Most federal courts have consistently declined to review the evidentiary basis of a grand jury's indictment. Their reluctance to do so stems in large part from the Supreme Court's refusal to dismiss an indictment based exclusively on hearsay testimony in *Costello v. United States*.¹¹⁶ To understand the importance of *Costello*, one must place it in historical context.

(1) *Costello's antecedents.* Before *Costello*, some precedent suggested that the rules of trial evidence applied to the grand jury. No

112. *United States v. Gallo*, 394 F. Supp. 310, 314 (D. Conn. 1975) (quoting routine federal grand jury instructions for the United States District Court for the District of Connecticut).

113. For example, a judge, who defined probable cause to indict as sufficient evidence to convince a trial jury to convict, dismissed an indictment because his review of the grand jury transcript indicated that the prosecutor had not presented "prima facie evidence of probable cause." *United States v. O'Shea*, 447 F. Supp. 330, 331 (S.D. Fla. 1978), *affd. per curiam*, 588 F.2d 199 (5th Cir. 1979). Yet the judge insisted that he was not dismissing the indictment "because of the quality of the evidence." 447 F. Supp. at 332. Dismissal was required because the indictment was not supported "by any evidence, competent or otherwise, to establish a prima facie case." 447 F. Supp. at 332 (emphasis added).

114. *See United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972).

115. Admittedly, the rules of evidence applicable at trial are "generally not applied in ex parte proceedings . . . mainly because the system of Evidence rules was devised for the special control of trials by jury." *Brinegar v. United States*, 338 U.S. 160, 174 n.12 (1949) (quoting 1 J. WIGMORE, EVIDENCE § 19 (3d ed. 1940)). But hearsay testimony is also excluded because it is often less reliable than first-hand accounts of factual events. C. McCORMICK, LAW OF EVIDENCE § 244, at 580 (1954). *See United States v. Arcuri*, 282 F. Supp. 347, 349 (E.D.N.Y.), *affd.*, 403 F.2d 691 (2d Cir. 1968), *cert. denied*, 395 U.S. 913 (1969).

116. 350 U.S. 359 (1956).

less of a jurist than Justice Nelson had stated, "evidence before a grand jury must be competent legal evidence, such as is legitimate and proper before a petit jury."¹¹⁷ Moreover, there was a significant trend in nineteenth-century state courts to "judicialize"¹¹⁸ grand jury proceedings when it became apparent that the indictment itself imposed serious sanctions against the individual.

However, an examination of the federal case law before *Costello* reveals a decided reluctance to dismiss indictments as long as some competent evidence was presented to the grand jury.¹¹⁹ Even if convinced that the grand jury had considered incompetent evidence, most trial courts would presume that there was enough admissible evidence to support the indictment, and all courts refused to weigh the sufficiency of that evidence.¹²⁰ The denial of a motion to quash an indictment based on incompetent evidence was within the discretion of the trial court and not appealable before trial.¹²¹

The Supreme Court's only significant comment on this subject before *Costello* was consistent with this trend. Writing for a unanimous Court in *Holt v. United States*,¹²² Justice Holmes vigorously rejected the petitioner's argument that his indictment should have been quashed because the grand jury had considered reliable but

117. *United States v. Reed*, 27 F. Cas. 727, 735 (C.C.N.D.N.Y. 1852) (No. 16,134).

118. Beginning with a hearing restricted to the prosecution's case alone, with a firm ban on calling the defendant or his witnesses, most states soon authorized the grand jury to hear them if it chose. A considerable number enacted statutes providing that the grand jury was to hear only "legal evidence," or that it "ought" to indict only on the basis of such evidence. And those requirements were frequently enforced through the granting of motions to quash indictments based on no evidence at all, or no evidence as to an element of the crime, or "utterly insufficient" evidence.

Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 *YALE L.J.* 1149, 1170 (1960).

119. See Note, *Quashing Federal Indictments Returned upon Incompetent Evidence*, 62 *HARV. L. REV.* 111, 113 (1948).

120. See *id.* at 113. For example, in *United States v. Reed*, 27 F. Cas. 727 (C.C.N.D.N.Y. 1852) (No. 16,134), Justice Nelson rejected a defense counsel's challenge to an indictment based on the counsel's affidavit that no competent evidence was presented to the grand jury on a material element of the crime. 27 F. Cas. at 735. While Justice Nelson conceded that the rules of evidence applied to the grand jury, 27 F. Cas. at 735, 738, he argued that judicial review of the evidence would interfere with grand jury secrecy. 27 F. Cas. at 738. Moreover, if courts permitted challenges based merely on a defense counsel's assertion that no competent evidence was presented to the grand jury, they would be faced with reviewing the evidentiary basis of every indictment. 27 F. Cas. at 738. Decisions like *Reed* made it quite difficult for counsel to raise such challenges since they had no direct access to what transpired before the grand jury. This difficulty did not trouble Justice Nelson because he trusted that the grand jury would function properly without judicial interference. 27 F. Cas. at 738.

121. See, e.g., *Nanfito v. United States*, 20 F.2d 376, 378 (8th Cir. 1927) (citing *Durland v. United States*, 161 U.S. 306 (1896)); *United States v. Rosenburgh*, 74 U.S. (7 Wall.) 580 (1868); *Lewis v. United States*, 295 F. 441 (1st Cir. 1924).

122. 218 U.S. 245 (1910).

inadmissible testimony.¹²³ The opinion did not address the question of whether an indictment should be quashed when it rested exclusively on incompetent evidence.¹²⁴

The first case to face that question directly was *Nanfito v. United States*.¹²⁵ The Eighth Circuit explained that the grand jury's screening function required it to consider competent evidence:

It has become accepted as a general rule that investigations before the grand jury should be made in accordance with the well-established rules of evidence . . . and ample justification exists for such a rule, in order that the time of the trial courts may not be consumed in disposing of matters incapable of proof by competent evidence; and further that persons may not be indicted upon mere suspicion.¹²⁶

Therefore, the court concluded that the trial judge should have permitted the defendants to show that the indictment rested exclusively on incompetent evidence.¹²⁷ Moreover, in reaffirming *Nanfito* a year later,¹²⁸ the Eighth Circuit came close to imposing a directed-verdict standard, concluding that an indictment should be quashed "where a grand jury returns an indictment without any evidence whatever before it of a separate, distinct, and essential element of the offense."¹²⁹ With the exception of those Eighth Circuit cases, however, federal courts rarely analyzed the grand jury's screening function or how the rules of evidence would frustrate or promote it. Instead, most federal courts refused to examine the evidentiary basis for the grand jury's action because they feared that their inquiry would interfere with the grand jury's independence, violate grand jury secrecy, and create intolerable administrative burdens for the courts.

(2) *Costello and its progeny*. *Costello*¹³⁰ presented the Supreme Court with an opportunity to clarify the juridical confusion over

123. 218 U.S. at 247-48.

124. The validity of an indictment based solely on incompetent evidence was not squarely before the Court since only part of the evidence considered by the grand jury in *Holt* had been incompetent. See 218 U.S. at 248.

125. 20 F.2d 376 (8th Cir. 1927). The *Nanfito* court held specifically that the wife of a coconspirator was incompetent to testify before a grand jury that subsequently indicted her husband. 20 F.2d at 378. The husband's guilty plea could not retroactively make the wife's testimony competent, and, thus, the trial court should have allowed the defendants to make a showing in support of their motion to quash the indictment. 20 F.2d at 378.

126. 20 F.2d at 378 (citations omitted).

127. 20 F.2d at 378.

128. *Brady v. United States*, 24 F.2d 405 (8th Cir. 1928). The specific problem in *Brady* was not that the evidence presented to the grand jury was incompetent but that there was no evidence of the defendants' use of the United States mail, which was a critical element of the offenses charged. 24 F.2d at 408.

129. 24 F.2d at 408.

130. *Costello v. United States*, 350 U.S. 359 (1956).

what types of evidence an indicting grand jury should consider because it raised the questions that *Holt* left unresolved. After hearing the testimony of three federal agents, a federal grand jury indicted Frank Costello for willfully attempting to evade federal income taxes.¹³¹ The agents' testimony was technically hearsay because they had no first-hand knowledge of the transactions upon which they based their net worth computations.¹³² However, their testimony was admitted into evidence at Costello's trial after the government had laid a proper foundation for it by calling 144 witnesses who testified about the transactions involved and authenticated the documents relied upon by the three agents.¹³³

Costello filed a pretrial motion to dismiss the indictment supported by an affidavit alleging his belief that the grand jury had heard only incompetent evidence before it returned the indictment.¹³⁴ At the close of the government's case, Costello renewed his motion to dismiss the indictment after cross-examination of the government's trial witnesses established that the grand jury had heard only the agents' hearsay testimony. The court denied that motion and Costello was convicted.¹³⁵

The Second Circuit could have resolved Costello's appeal¹³⁶ on the narrow ground that the grand jury may rely exclusively on net worth hearsay testimony because such testimony does permit the grand jury to screen both factual and legal guilt: the agents' testimony had clear probative value and became competent evidence at trial once the government laid the proper foundation for its admission. Little would be accomplished by requiring the government to repeat the entire trial before the grand jury by calling 144 witnesses to lay that foundation. Deciding the case in that manner would have illustrated how unthinking application of all trial rules of evidence to the grand jury would create a prolonged mini-trial without materially enhancing the grand jury's capacity to screen either factual or legal guilt.

However, Judge Hand was not inclined to rest the circuit court's decision on such narrow grounds. His critical discussion of the Eighth Circuit's definition of incompetent evidence in *Nanfito* reflected his view that the grand jury's sole function was to screen fac-

131. 350 U.S. at 360-61.

132. 350 U.S. at 361.

133. 350 U.S. at 360.

134. 350 U.S. at 360.

135. 350 U.S. at 361.

136. *United States v. Costello*, 221 F.2d 668, 670 (2d Cir. 1955), *aff'd.*, 350 U.S. 359 (1956).

tual guilt.¹³⁷ He emphasized that hearsay information is often quite reliable and that the primary reason for its exclusion, the inability to cross-examine the declarant, does not apply to *ex parte* proceedings like a grand jury.¹³⁸ He concluded that the courts should not inquire into the evidentiary basis of the grand jury's action unless "it appeared that no evidence had been offered that rationally established the facts."¹³⁹ In that case, "the indictment ought to be quashed; because then the grand jury would have in substance abdicated."¹⁴⁰

Although Judge Frank concurred in the court's judgment, he expressed "serious misgivings about concurring in a conclusion that a grand jury may indict solely on the basis of evidence that would not support a verdict after trial."¹⁴¹ One might infer from that comment that Judge Frank wanted the grand jury to screen legal as well as factual guilt, at least to some extent. Nevertheless, out of "esteem for Judge Hand's wisdom," Judge Frank reluctantly concurred.¹⁴²

The Supreme Court granted certiorari to consider whether "a defendant [may] be required to stand trial and a conviction be sustained where only hearsay evidence was presented to the grand jury which indicted him."¹⁴³ Costello argued that such an indictment violated the fifth amendment provision that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of the grand jury"¹⁴⁴ In the alternative, he asked the Court to exercise its supervisory power over the federal courts by issuing a rule invalidating all such indictments.¹⁴⁵ A unanimous Court affirmed Costello's conviction.¹⁴⁶

137. If "incompetent" is to cover all evidence, however rationally persuasive it may be, that would be excluded at a trial[,] with great deference we cannot agree. Legal rules presuppose that the occasions to which they apply, shall be decided under the ordinary postulates of reasoning; and the exclusory rules are an exception, for they apply to evidence that is relevant rationally, but that courts will not accept, not because it does not prove the issue, but it is thought unjust to the opposite party to use it against him, or because it is within some privilege to suppress the truth.

221 F.2d at 677.

138. 221 F.2d at 677-78.

139. 221 F.2d at 677.

140. 221 F.2d at 677.

141. 221 F.2d at 679 (Frank, J., concurring).

142. 221 F.2d at 680 (Frank, J., concurring).

143. 350 U.S. at 359 (quoting 350 U.S. at 819, the grant of the writ of certiorari).

144. 350 U.S. at 361.

145. *See* 350 U.S. at 361. In *McNabb v. United States*, 318 U.S. 332, 340-41 (1943), the Court held that it would exercise its supervisory power to exclude a confession when federal officers had failed to comply with a statutory requirement that defendants be brought promptly before a magistrate after their arrest.

146. Justices Clark and Harlan did not participate. Justice Burton concurred with the Court's decision. 350 U.S. at 364.

Writing for the Court, Justice Black offered three justifications for refusing to prescribe the kind of evidence upon which a grand jury could act. First, since the American grand jury was patterned after its English progenitor, Black argued that it should have the same powers and duties as the English grand jury.¹⁴⁷ He noted that the English grand jury's freedom "from control by the Crown or the judges" was strengthened by its power to act "on such information as they deemed satisfactory," secure in the knowledge that their work would not be "hampered by rigid procedural or evidential rules."¹⁴⁸ Justice Black's conclusion that the grand jurors' work would be hampered by technical rules designed to ensure the fair determination of legal guilt in an adversary proceeding reflected his belief that the grand jury's sole function was to screen factual guilt. If the grand jury was to screen legal guilt, applying some of those rules of evidence would enhance rather than frustrate its screening objective.

Second, Justice Black wanted to avoid the administrative burdens that would be generated by judicial enforcement of a rule prescribing the evidence a grand jury could consider. Since the defendant did not have direct access to what transpired before the grand jury, Justice Black feared that judicial inquiry into the evidentiary basis of the indictment would foster significant pretrial delay because it would require "a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury."¹⁴⁹ Finally, Justice Black argued that such a cumbersome procedure was unnecessary because it would "add nothing to the assurance of a fair trial,"¹⁵⁰ at which the rules of evidence would be applied to vindicate the requirements of legal guilt.¹⁵¹ In other words, the grand jury need not screen legal guilt because the defendant's trial will adjudicate it.

In rejecting Costello's arguments, the Supreme Court more thoroughly insulated indictments from judicial review than had Judge Hand's opinion. Justice Black concluded that "[a]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment re-

147. 350 U.S. at 362.

148. 350 U.S. at 362.

149. 350 U.S. at 363.

150. 350 U.S. at 364.

151. "In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial." 350 U.S. at 364.

quires nothing more.”¹⁵² The breadth of that language combined with the Court’s refusal to use its supervisory powers to regulate the quality of grand jury evidence, might suggest that courts would be powerless to dismiss indictments even in an extreme case where the grand jury received no probative evidence of the defendant’s factual guilt. Responding to that implication, Justice Burton’s concurring opinion repeated Judge Hand’s admonition that an indictment should be quashed “if it is shown that the grand jury had before it no substantial or rationally persuasive evidence upon which to base its indictment.”¹⁵³

While *Costello*’s holding is limited to indictments based exclusively on hearsay testimony, its assumptions apply with equal force to indictments based on other incompetent evidence that could not be used to prove legal guilt at trial. The Court has verified that conclusion by relying on *Costello* to preclude attacks against indictments that were based on evidence seized in violation of a defendant’s fourth and fifth amendment rights.

In *Lawn v. United States*,¹⁵⁴ the Court held that the petitioners were not entitled to a hearing to examine their “unsupported suspicion” that the grand jury which indicted them had made direct or derivative use of materials illegally obtained by a previous grand jury.¹⁵⁵ Although Justice Whittaker emphasized that the petitioners had “laid no foundation for the holding of a protracted preliminary hearing” to prove their “suspicion,”¹⁵⁶ he noted that the Court in *Costello* had already declined to “establish a rule permitting defendants to challenge indictments on the ground that they are not supported by adequate or competent evidence.”¹⁵⁷

Justice Whittaker’s reference to *Costello* implied that courts should not entertain such challenges even when the grand jury undoubtedly considered incompetent evidence. *United States v. Blue*¹⁵⁸ transformed *Lawn*’s dictum into precedent. In *Blue*, the district court had dismissed a six-count tax-evasion indictment because pending tax court proceedings dealing with the same alleged tax de-

152. 350 U.S. at 363 (footnote omitted).

153. 350 U.S. at 364 (Burton, J., concurring) (quoting Judge Hand’s opinion below, 221 F.2d at 677). Since the same evidence that established probable cause to arrest satisfies Justice Burton’s factual guilt standard, few indictments would be dismissed under this exception.

154. 355 U.S. 339 (1958).

155. 355 U.S. at 350.

156. 355 U.S. at 349.

157. 355 U.S. at 350 (quoting *Costello v. United States*, 350 U.S. 359, 364 (1956)).

158. 384 U.S. 251 (1966).

iciencies had forced Blue to incriminate himself.¹⁵⁹ Writing for the Court, Justice Harlan ruled that the indictment should not have been dismissed: "Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth Amendment, Blue would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial."¹⁶⁰ Although Blue had not argued that the indicting grand jury had considered the tainted evidence, Harlan cited both *Costello* and *Lawn* as authority for the proposition that "in any event our precedents indicate this would not be a basis for abating the prosecution pending a new indictment, let alone barring it altogether."¹⁶¹

In *United States v. Calandra*,¹⁶² the Supreme Court dashed any remaining hopes of overturning indictments based on illegally seized evidence by rejecting a grand jury witness's attempt to apply the fourth amendment's exclusionary rule to grand jury proceedings.¹⁶³ In ruling that a grand jury witness may not refuse to answer questions based on evidence obtained in violation of the fourth amendment, the Court repeated and expanded *Lawn*'s admonition:

[T]he validity of an indictment is not affected by the character of the evidence considered. Thus, an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence; or even on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination.¹⁶⁴

Although Justice Powell's opinion did not state whether an accusatory grand jury's consideration of illegally seized evidence would further or hinder its screening objectives, he did state that litigation about the legality of evidence involves "issues only tangentially related to the grand jury's primary objective."¹⁶⁵ While Justice Powell did not define that objective in terms of factual or legal guilt, his analysis paralleled Justice Black's argument in *Costello* that the application of trial rules to the grand jury would frustrate its dual objective of investigating alleged criminal activity and accusing wrongdoers. Excluding illegally seized evidence "would seriously impede the grand jury. Because the grand jury does not finally adjudicate guilt or innocence, it has traditionally been allowed to pursue

159. 384 U.S. at 252-53.

160. 384 U.S. at 255.

161. 384 U.S. at 255 n.3.

162. 414 U.S. 338 (1974).

163. 414 U.S. at 349-52.

164. 414 U.S. at 344-45 (citations omitted).

165. 414 U.S. at 349.

its investigation and accusatorial functions unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial."¹⁶⁶

Justice Powell's conclusions are defensible if the grand jury's accusatorial function is to screen factual guilt because most material seized in violation of fourth amendment rights will constitute reliable evidence of a defendant's factual guilt. However, if a grand jury should also weed out cases of improbable legal guilt, its screening objectives would be impeded by the admission of evidence that would not be admissible at trial. But, Justice Powell's discussion of the benefits of applying the exclusionary rule to grand jury proceedings indicates that he did not see any compelling reason why grand juries should screen legal guilt. After arguing that the exclusionary rule's application at trial sufficiently deters illegal searches, he concluded that most prosecutors would not seek indictments based primarily on illegally seized evidence because, "[f]or the most part, a prosecutor would be unlikely to request an indictment where a conviction could not be obtained."¹⁶⁷ In other words, we must rely on the prosecutor, not the grand jury, to screen out cases where proof of legal guilt is unlikely. In those exceptional cases where the prosecutor does not perform that screening function, the trial will rectify the prosecutor's error.

Admittedly, Justice Powell was concerned primarily with how the application of the exclusionary rule to an ongoing grand jury investigation would disrupt its proceedings and impair its ability to detect criminal activity. However, it would make little sense for the court to approve the introduction of illegally seized evidence if such evidence would invalidate any resulting indictment.¹⁶⁸ Accordingly, most federal courts have refused to dismiss indictments based in part on illegally obtained evidence.¹⁶⁹

166. 414 U.S. at 349.

167. 414 U.S. at 351.

168. See *United States v. Mackey*, 405 F. Supp. 854, 863 (E.D.N.Y. 1975).

169. See, e.g., *United States v. James*, 493 F.2d 323, 326 (2d Cir.), cert. denied, 419 U.S. 849 (1974); *United States v. Doe*, 455 F.2d 1270, 1274 (1st Cir. 1972). Some federal courts have suggested that an indictment based almost completely on tainted evidence might be dismissed. See, e.g., *Laughlin v. United States*, 385 F.2d 287, 291 (D.C. Cir. 1967), cert. denied, 390 U.S. 1003 (1968); *United States v. Kahn*, 366 F.2d 259, 264 (2d Cir.), cert. denied, 385 U.S. 948 (1966); *United States v. Tane*, 329 F.2d 848, 853-54 (2d Cir. 1964).

In a pre-*Calandra* decision, one circuit suggested that *Costello* did not bar a federal court from dismissing an indictment where the grand jury proceedings themselves violated the defendant's fifth amendment privilege against self-incrimination. *Jones v. United States*, 342 F.2d 863, 871-73 (D.C. Cir. 1962) (plurality opinion). Moreover, some federal courts have suggested that *Calandra* does not completely immunize an indictment from challenge on the basis of any constitutional exclusionary rule, especially where the grand jury proceedings are

Thus, *Costello*, *Lawn*, *Blue*, and *Calandra* all reflect the Supreme Court's view that the grand jury's function is to screen out those cases where there are no reasonable grounds for believing that the accused committed the crime. Accordingly, the grand jury should be free to consider evidence of a defendant's factual guilt regardless of whether it would be excluded at an adversarial proceeding to protect the defendant's right of confrontation or to deter improper police conduct. The Court trusted the grand jury to protect the factually innocent and the prosecutor to screen out cases where there was little likelihood of securing a conviction. Consequently, the Court concluded that judicial review of the evidentiary basis for the indictment would serve little purpose besides generating pretrial delay, increasing administrative burdens on the courts, and interfering with the grand jury's investigatory function.

(3) *Costello's legacy for pretrial screening.* While the Supreme Court viewed the grand jury as a protector of only the factually innocent, its refusal to prescribe the evidence that may be presented to the grand jury impaired even that limited screening function. Since the validity of an indictment usually does not depend either on the quality or sufficiency of the evidence presented to the grand jury,¹⁷⁰ the lower courts have generally refused to dismiss indictments in cases where the prosecutor's evidentiary presentation may have impaired the grand jury's ability to assess a defendant's factual guilt. For example, some courts have refused to dismiss indictments when the prosecutor presented perjured testimony to the grand jury.¹⁷¹ Others have sustained indictments based exclusively on hearsay testimony in cases where the government offered no substantial justification for its failure to present its best evidence.¹⁷² Many courts have refused to dismiss indictments in cases where the prosecutor failed to present exculpatory evidence to the grand jury.¹⁷³ Until recently,¹⁷⁴ most federal courts have justified their decisions by repeat-

responsible for the constitutional violation. *See, e.g.*, *United States v. Hinton*, 543 F.2d 1002, 1008 n.7 (2d Cir. 1976).

170. *See* *United States v. Kennedy*, 564 F.2d 1329, 1338 (9th Cir. 1977), *cert. denied*, 435 U.S. 944 (1978); *United States v. Klaes*, 453 F.2d 1375 (5th Cir.) (per curiam), *cert. denied*, 406 U.S. 920 (1972).

171. *See, e.g.*, *United States v. Coppedge*, 311 F.2d 128 (D.C. Cir. 1962), *cert. denied*, 373 U.S. 946 (1963). *But see* text at notes 427-43 *infra*.

172. *See, e.g.*, *United States v. Klaes*, 453 F.2d 1375 (5th Cir.) (per curiam), *cert. denied*, 406 U.S. 920 (1972).

173. *See, e.g.*, *Lorraine v. United States*, 396 F.2d 335, 339 (9th Cir.), *cert. denied*, 393 U.S. 933 (1968). *But see* text at notes 444-77 *infra* (discussing recent trends to require the prosecutor to disclose some exculpatory evidence to the grand jury).

174. *See* text at notes 388-506 *infra* for a discussion of a recent judicial trend to use the

ing *Costello's* reasoning that the grand jury conducts an ex parte inquiry that does not decide the ultimate question of defendant's guilt or innocence.¹⁷⁵ Those courts have assumed that any evidentiary error made before the grand jury will be cured at defendant's trial.

As a result of *Costello* and its progeny, the federal grand jury can hardly be considered an independent screening agency that carefully evaluates the merits of each case. In the words of one grand juror, it has become

an indictment mill. Grand jurors are running on this treadmill to make it go as fast as possible so business can be finished by the afternoon. We did not know how to stand up to the U.S. Attorney, we did not understand our rights and responsibilities, we did not feel qualified to question the government.¹⁷⁶

To keep that mill running smoothly, the prosecutor may present the evidence for several cases before the grand jury retires to deliberate. In routine federal prosecutions, a grand jury may only deliberate for a few minutes on each case before voting to return a true bill.¹⁷⁷ Given this type of evidentiary presentation, it should not be surprising that the grand jury usually agrees with the prosecutor's charging decisions. After all, it is the third pretrial screen to apply a minimal probable cause standard to the government's case. Most cases that cannot meet this minimal factual guilt standard have already been weeded out of the process.

Ironically, *Costello* left the grand jury totally dependent upon the prosecutor whose actions it was supposed to review.¹⁷⁸ While endorsing the grand jury's historic function to act as an independent buffer between the state and the accused, the Supreme Court emasculated the grand jury's ability to do so by precluding it from screening defendants' legal guilt and impairing its ability to assess defendants' factual guilt reliably and independently.

prosecutorial misconduct doctrine to supervise prosecutors' evidentiary presentations before the grand jury.

175. See *Loraine v. United States*, 396 F.2d 335, 339 (9th Cir.), cert. denied, 393 U.S. 933 (1968); *United States v. Coppedge*, 311 F.2d 128, 132 (D.C. Cir. 1962), cert. denied, 373 U.S. 946 (1963).

176. *1977 Hearings*, pt. 1, *supra* note 108, at 561 (letter from William P. Gloege).

177. "Instruction from the U.S. Attorney is like the fox explaining to the chickens how to be on guard against foxes. It is very hard for the fox to be effective in this role, no matter how sincere he is." *Id.* at 560.

178. The grand jury's review of the prosecutor's case serves little purpose in routine prosecutions because the prosecutor often presents the government's case through the hearsay testimony of law enforcement agents who summarize the results of the government's investigation. Obviously, grand juries that consider such evidence cannot evaluate the credibility of the government's witnesses or gauge the strength of its case.

One can criticize *Costello*'s implicit model of the pretrial process from two perspectives. Even if the Court is correct in viewing the pretrial process as essentially a screening mechanism and the trial as the primary protector of the system's legal guilt requirements, there should still be a more neutral pretrial screener of a defendant's legal guilt than the prosecutor. In a system that guarantees that a neutral body (magistrate, judge, or jury) will review law enforcement officials' determinations of factual and legal guilt, some pretrial screener should evaluate the prosecution's case to determine whether conviction is sufficiently likely to justify imposing the sanctions of indictment and incurring the expense of holding a defendant for trial.

However, this analysis about who should screen what begs the more basic question of whether the screening model of the pretrial process comports with reality. In a system of justice where guilty pleas are the norm and trials are the exception, we can no longer view the prosecutor's and grand jury's decisions to indict as mere interim screening decisions. Since guilty pleas have supplanted trials as our primary method of securing convictions, we cannot assume that the trial will necessarily deter prosecutors from seeking indictments against defendants whom they could not convict at trial. Nor can we safely assume that only factually guilty defendants are indicted since the pretrial process requires only a minimal showing of factual guilt.

This Section has demonstrated that the formal stages of pretrial review require only a minimal demonstration of the defendant's factual guilt before indictment. As a result, the prosecutor now bears primary responsibility for screening out cases where factual guilt is questionable or where the government cannot satisfy the trial's formal proof requirements. For the vast majority of cases that never reach trial, the prosecutor's decision to file charges is the only assessment of legal guilt that will be made before plea-bargaining. Once we view our criminal process from this perspective, *Costello*'s reliance on the prosecution as the sole pretrial screener of legal guilt becomes far more questionable. Far from being the "sole inquisitorial figure in an essentially adversarial landscape,"¹⁷⁹ the prosecutor has become the most powerful and important official in our criminal process. Therefore, the next Section examines the prosecutor's exercise of charging and plea-bargaining powers to determine whether prosecutorial screening effectively bars either the indictment or conviction of factually or legally innocent defendants.

179. Morris, *supra* note 46, at 684.

II. THE PROSECUTOR

Costello precluded any effective lay or judicial review of the prosecutor's decisions. The Court assumed that the trial's stringent proof requirements would deter prosecutors from indicting defendants whom they could not convict at trial. This Section challenges that assumption.

A. Preliminary Standards

In some federal prosecutions,¹⁸⁰ the prosecutor's first contact with the case¹⁸¹ occurs after the defendant's warrantless arrest.¹⁸² The federal law enforcement agency responsible for the arrest asks the Assistant U.S. Attorney to initiate prosecution by drafting or approving a complaint that sets forth the probable cause for the arrest, in compliance with rule 4(a).¹⁸³ The prosecutor's evaluation of the evidentiary basis for the arrest constitutes a preliminary screen of the defendant's factual guilt. Thus, the prosecutor may weed out cases at this early stage because the agents clearly lacked probable cause to arrest. Theoretically, the prosecutor could also eliminate cases

180. In other federal prosecutions, the pretrial process begins with the prosecutor's decision to start a grand jury investigation into the alleged criminal activity of various target defendants. At the start of these grand jury investigations, the federal prosecutor has already made some tentative decisions concerning the appropriateness of prosecution against unknown or known offenders if sufficient evidence can be developed. Federal prosecutors often use the grand jury's investigatory powers most frequently in cases involving political corruption, organized crime, white collar crime, and complex economic crimes such as commercial fraud, anti-trust violations, and tax offenses. By using the grand jury's subpoena power to compel production of relevant documents and immunity and judicial contempt powers to compel the testimony of alleged participants, the federal prosecutor may develop sufficient evidence against particular defendants to warrant the return of an indictment. At this juncture, the grand jury must shift roles from investigator to screener in order to assess whether there is probable cause to charge these putative defendants for various offenses. If the grand jury returns an indictment, the indictee loses the right to a judicial evaluation of the probable cause basis for arrest because the indictment itself establishes it. *See, e.g., Gerstein v. Pugh*, 420 U.S. 103, 117 n.19 (1975). *But see* Thompson, *supra* note 62, for a critical evaluation of the grand jury's capacity to make a neutral fourth amendment inquiry.

Accordingly, a warrant may issue for the indictee's arrest upon the indictment's authority. FED. R. CRIM. P. 9(a). After arrest, the defendant will be arraigned on those charges. Since the indictment precludes judicial evaluation of the evidentiary basis for the charges, the judge's role is limited to apprising the defendant of constitutional rights, setting bail, and fixing a trial date.

181. When a warrant has issued for the defendant's arrest, the prosecutor's first contact will occur earlier. The prosecutor may use the grand jury to aid the pre-arrest investigative activities of the law enforcement agency. At the very least, the law enforcement agency will ask the prosecutor to draft or review the affidavits in support of the application for an arrest warrant in those cases.

182. In practice, arrests routinely occur without a warrant. *See, e.g., Payton v. New York*, 100 S. Ct. 1371 (1980); *United States v. Santana*, 427 U.S. 38, 43 (1976); *United States v. Watson*, 423 U.S. 411, 423-24 (1976) (allowing warrantless arrests in public where there is probable cause to arrest).

183. *See* note 86 *supra*.

where proof of legal guilt is unlikely, but that decision is usually deferred until later in the process. If there is sufficient evidence of factual guilt to satisfy the probable-cause-to-arrest standard, the prosecutor would probably draft a complaint because evidence may still be developed before the case goes to the grand jury.

However, even a prosecutor who believes the accused is factually guilty and convictable may decide not to prosecute because the case is not worth the expenditure of scarce criminal justice resources. The Justice Department recommends¹⁸⁴ a series of selective enforcement criteria that may justify a decision not to prosecute, including the de minimis nature of the offense, public antipathy toward enforcement of the relevant penal statute, a history of nonenforcement of the statute,¹⁸⁵ the probable sentence if the accused is convicted,¹⁸⁶ the accused's relative culpability in connection with the offense,¹⁸⁷ the accused's willingness to cooperate with law enforcement officials,¹⁸⁸ the availability of more appropriate civil or administrative remedies,¹⁸⁹ and the possibility that state criminal prosecution might be more appropriate.¹⁹⁰

B. *The Decision To Seek an Indictment*

1. *Prosecutorial Screening of Factual Guilt*

Justice Department standards bar prosecution unless the prosecutor finds probable cause to believe the accused has committed a federal offense.¹⁹¹ However, that minimal probable-cause-to-arrest standard does not terminate prosecutorial assessment of factual guilt. A review of the literature concerning prosecutorial discretion indicates that many prosecutors do not seek an indictment unless they are personally convinced that the suspect has in fact committed the proscribed offense.¹⁹² In making that determination, the prosecutor considers information probative of factual guilt such as informer statements, illegally seized items, and hearsay that could

184. *Justice Department Standards*, *supra* note 109, at 3001.

185. Thus, some prosecutors have refused to charge for possession of marijuana in cases where less than an ounce was involved. Laws prohibiting certain sexual conduct between consenting adults are rarely enforced in some jurisdictions.

186. *Justice Department Standards*, *supra* note 109, at 3002.

187. *Id.*

188. *Id.*

189. *Id.* at 3002-03.

190. *Id.* at 3003. For example, federal prosecutors may decide not to prosecute small drug dealers so that they may instead direct their efforts to higher-ups, leaving the street dealers to be prosecuted by state authorities.

191. *Id.* at 3002.

192. Kaplan, *supra* note 23, at 178.

not be used at trial. For example, a prosecutor may decide not to prosecute even when probable cause to arrest exists, because the accused has passed a lie-detector test.¹⁹³

However, pragmatic considerations may lead prosecutors to seek indictments despite their own serious doubts about the defendant's factual guilt. Writing about his experience as an Assistant United States Attorney, Professor John Kaplan notes that tactical considerations sometimes prompted the indictment of both spouses for tax evasion when they both signed a fraudulent return, even though the prosecutor felt that only the husband was guilty.¹⁹⁴ In conspiracy cases, "those on the fringes might be prosecuted despite genuine doubt as to whether their involvement was sufficiently great."¹⁹⁵ Kaplan concluded that, "as a general principle, a far lower degree of belief in guilt (or perhaps even none at all) seemed to be required when the question was whether the subject under consideration should be joined as a co-defendant with one whom the prosecutor did believe to be guilty."¹⁹⁶ Apart from those few notable exceptions, it seems reasonable to conclude that a federal prosecutor will not knowingly seek indictments against factually innocent defendants. However, prosecutorial assessment of factual guilt may not always be as reliable as the prosecutor presumes it to be because of its ex parte nature and the quality of the information relied upon.¹⁹⁷

2. Prosecutorial Screening of Legal Guilt

a. *The directed-verdict standard.* Current Justice Department guidelines dictate that the prosecutor should select charges that "adequately reflect the nature of the criminal conduct involved,"¹⁹⁸ "provide the basis for an appropriate sentence under all the circumstances of the case,"¹⁹⁹ and "can be supported by admissible evidence sufficient to sustain a conviction."²⁰⁰ The comments accompanying these standards suggest that the last factor — the

193. *Id.*

194. *Id.* at 179.

195. *Id.*

196. *Id.* at 179-80.

197. While nearly "all prosecutors assert they would not proceed with a case where they felt the defendant was in fact innocent," most believe "that defendants do not plead guilty if they are factually innocent and that the screening process (police and prosecutorial) is sufficiently reliable and error-free so that defendants passing through the screen are in fact guilty." L.E.A.A. STUDY, *supra* note 26, at xix.

198. *Justice Department Standards, supra* note 109, at 3003.

199. *Id.*

200. *Id.*

strength of the government's case — should be measured by the directed-verdict standard:

Experience indicates that many considerations can influence the strength of a prosecution. Foremost among these [is] the weight of the evidence that will be available and admissible at trial. . . . At a minimum, the prosecutor should have reason to believe that he will have sufficient admissible evidence at trial to sustain a conviction — the standard set forth in Rule 29(a), F.R.Cr.P., to avoid a judgment of acquittal.²⁰¹

Those guidelines, as well as some impressionistic accounts of federal prosecutorial screening,²⁰² seem to support *Costello's* reliance on the prosecutor to screen legal guilt. While trials may not occur frequently, the possibility of having to prove a compelling case of legal guilt at trial forces the prosecutor to review the legal sufficiency of the recommended charges.

However, these guidelines do not compel the prosecutor to decline prosecution when there is insufficient evidence of legal guilt to satisfy the directed verdict standard *at the time of indictment*. The comment accompanying the guideline explains that the prosecutor “should not . . . recommend in an indictment charges which he cannot reasonably expect *to be able to prove at trial*.”²⁰³ Accordingly, prosecutors can use the indictment as an evidence-gathering device because they may reasonably believe that the sanctions imposed by the indictment will induce defendants to incriminate themselves or others in return for a plea-bargain. By failing to require legally sufficient charges at the time of indictment, the guidelines permit the government to impose the indictment's sanctions against the accused before it has established a minimum case of legal guilt.

I have already suggested that indictment without some preliminary showing of legal guilt undermines basic accusatorial principles like the presumption of innocence²⁰⁴ and the defendant's privilege against self-incrimination.²⁰⁵ The Justice Department guidelines ex-

201. *Id.* at 3002.

202. *See, e.g.*, Kaplan, *supra* note 23, at 182.

203. *Justice Department Standards*, *supra* note 109, at 3003 (emphasis added).

204. If one shares Professor Packer's view that the presumption of innocence is a normative doctrine that requires the government to treat the accused as innocent until legal guilt is adjudicated at trial, then the government should be required to make some preliminary showing of convictability before it is permitted to impose the indictment's serious economic, moral, and physical sanctions against the accused. *See* note 77 *supra*.

205. The defendant's privilege against self-incrimination promotes a fair state-individual balance by requiring the government to prove the defendant's guilt through its independent efforts. Permitting the government to indict the accused upon a minimal showing of factual guilt dilutes this principle because it allows the government to use the indictment's sanctions to induce self-conviction in return for some expected concession from the state. *See* note 29 *supra*.

pressly authorize that practice. Of course, the existence of loopholes in the guidelines does not mean that prosecutors will always exploit them. Left to regulate themselves, many conscientious prosecutors will not seek indictments unless they already have sufficient admissible evidence to meet the directed-verdict test. Indeed, recent studies of state prosecutorial screening practices indicate that prosecutors dismiss a significant percentage of complaints because critical witnesses will not be available to testify at trial.²⁰⁶ Nevertheless, the possibility for abuse clearly exists under the present guidelines.²⁰⁷

b. *The likelihood-of-conviction standard.* Once satisfied that the government's case will eventually include sufficient admissible evidence to reach the jury, the prosecutor must evaluate the likelihood of securing a conviction on that evidence.²⁰⁸ That complex prediction requires the prosecutor to anticipate flaws in the government's case as well as defenses that the accused might raise at trial. Does the evidence dispel any reasonable doubt about the accused's guilt? Will the fact-finder believe the government's witnesses? Will any nonevidentiary factors lead a jury to acquit the accused? Negative answers to any of those questions might lead to a decision not to prosecute. For example, a prosecutor may screen out cases where the jury probably would not convict because the case boils down to one witness's word against another's, the government's witnesses are reluctant to testify, or the case rests on the testimony of an admitted accomplice who is receiving some concession for testifying.²⁰⁹ In close or controversial cases, some prosecutors may use the grand jury's reaction to its evidence to make that prediction.

While most prosecutors claim that they would not seek an indictment unless there was a high probability of securing a conviction at trial, recent studies of *state* prosecutorial practices suggest otherwise.²¹⁰ Foremost among the reasons for defective screening of legal

206. A recent L.E.A.A. study in 13 jurisdictions, K. BROSI, A CROSS-CITY COMPARISON OF FELONY CASE PROCESSING 14-18 (1979), found that prosecutors did not prosecute more than half of all felony arrests referred to them. The major reasons for those dismissals were poor evidence and problems with witnesses. See 25 CRIM. L. REP. (BNA) 2318 (1979) for a brief summary of the report's findings.

207. Former Attorney General Bell announced publicly that the Justice Department was drafting a new policy governing prosecutions dictating that no prosecution should be recommended unless the evidence presented to the grand jury would be at least likely to produce a conviction. "We will not go forward, absent highly unusual circumstances, where we have only enough evidence to withstand a motion to dismiss the prosecution at the close of what would be the government's case at trial." Address by the Honorable Griffin B. Bell, University of Georgia Law School (Apr. 28, 1979). See also 25 CRIM. L. REP. (BNA) 2279 (1979).

208. *Id.*

209. See Kaplan, *supra* note 23, at 183.

210. See, e.g., L.E.A.A. STUDY, *supra* note 26, at 101; Alschuler, *supra* note 25.

guilt is the possibility of conviction through plea-bargaining. Many state prosecutors find nothing wrong with charging and convicting a defendant whom they believe is factually guilty even though the government lacks sufficient admissible evidence to convict at trial.²¹¹ Not surprisingly, they view the doctrine of legal guilt as a technicality that interferes with their own view that justice is done when criminal sanctions are applied to defendants they believe to be factually guilty.²¹² Others accept the doctrine's validity but equate it with the exclusionary rule and the trial's formal proof requirements.²¹³ In their view, defendants waive²¹⁴ its requirements when they plead guilty because the doctrine applies only to the criminal trial itself.

Given this prosecutorial ambivalence about the validity of legal guilt requirements and their applicability to proceedings other than trial, it is not surprising that prosecutors see nothing wrong with securing the guilty plea of a defendant who could not be convicted at trial. As one national evaluation of state prosecutorial plea-bargaining practices noted:

When prosecutors say they would never intentionally convict an "innocent person" they virtually always mean one kind of innocence. A prosecutor personally convinced that a defendant did not in fact commit the crime probably will drop the prosecution. On the other hand, many prosecutors personally convinced that a defendant committed the crime, but who also believe it questionable that the government could prove its case at trial, may not dismiss the case

Few prosecutors interviewed by project staff are willing to dismiss a case solely because it may be difficult to prove at trial. On the contrary, virtually all prosecutors regard these weak cases as prime targets for plea negotiations.²¹⁵

Thus, a prosecutor may seek an indictment when the evidence of

211. L.E.A.A. STUDY, *supra* note 26, at 62-63; Specter, Book Review, 76 YALE L.J. 604, 606-07 (1967).

212. See L.E.A.A. STUDY, *supra* note 26, at 108.

213. *Id.*

214. *But see* notes 15-17 *supra* and accompanying text. See also notes 29 & 71 *supra*. While certain formal proof requirements like the rules of evidence are designed to promote an accurate and reliable determination of guilt in an adversarial forum, the Supreme Court has emphasized that legal guilt requirements that preclude the state from establishing a defendant's guilt are not necessarily waived by the guilty plea. See *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975) (*per curiam*) (citations omitted):

Neither *Tollett v. Henderson* . . . nor our earlier cases on which it relied . . . stand for the proposition that counseled guilty pleas inevitably "waive" all antecedent constitutional violations . . . [I]n *Tollett* we emphasized that waiver was not the basic ingredient of this line of cases A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt Here, however, the claim is that the State may not convict petitioner no matter how validly his factual guilt is established. The guilty plea, therefore, does not bar the claim. See also *Blackledge v. Perry*, 417 U.S. 21, 30 (1974).

215. L.E.A.A. STUDY, *supra* note 26, at 101 (footnotes omitted).

guilt is marginal and then offer an attractive bargain to induce a guilty plea. Moreover, the absence of any effective limits on prosecutorial discretion in filing charges permits the prosecutor to enhance the government's plea-bargaining position by charging the defendant with more serious crimes than the evidence or the facts of a particular case warrant.²¹⁶ To prompt a plea in weak²¹⁷ cases, some prosecutors engage in bluffing tactics where they puff the strength of the case before offering an attractive bargain. These prosecutors regard this practice as legitimate and skillful bargaining even in cases where the prosecutor knowingly lacks sufficient evidence of legal guilt to reach the jury.²¹⁸

Nor is the possibility of securing a guilty plea the only factor that may bias the prosecutor's screening of legal guilt. A law enforcement agency's pressure to prosecute a serious offender may lead the prosecutor to seek an indictment in order to preserve interoffice harmony when the agency can develop no better case against the accused.²¹⁹ In conspiracy cases, tactical considerations might prompt prosecutors to seek indictments against marginally involved participants.²²⁰ In politically motivated prosecutions, the government may ultimately be more interested in the sanctions generated by the in-

216. Prosecutorial overcharging is encouraged not only by plea-bargaining but by the fact that the defendant cannot be convicted at trial for more serious crimes than those contained in the formal accusation. Accordingly, prosecutors will charge defendants with the most serious crimes that the evidence could support.

The practice of "charging up" because you can convict "down" but not "up" is the more rational bureaucratically because that early in the process probably no one believes that the final outcome will depend on a precise evaluation of the evidence. . . . Having in mind that a negotiated plea of guilty is the probable outcome, the prosecutor has no reason at the outset to make a difficult calculation of what crime the defendant actually committed and should be convicted for. Although in theory the indictment or information is a solemn accusation, in practice it is not meant to reflect that kind of careful determination.

L. WEINREB, *supra* note 12, at 57-58.

217. Estimating the strength of the prosecution's case is not a simple matter. The accuracy of the estimate depends upon the prosecutor's experience and the point in the process when the estimation is made. Recent empirical studies have "shown that the prosecutor's estimate is not highly correlated with the observed probability of conviction for criminal cases going to trial." PROMIS STUDY, *supra* note 33, at 19. Moreover, what may appear to be a strong case immediately after arrest may turn out to be a weak one if critical testimony is lost or suppressed.

The L.E.A.A. Study described five types of weak cases: (1) where evidence linking the defendant to the crime is weak; (2) where evidence of the requisite intent is in doubt or an applicable defense may exculpate the accused; (3) where critical evidence needed to establish guilt may be suppressed; (4) where evidence necessary to go to trial is absolutely unavailable (*e.g.*, the critical witness has died); and (5) where such evidence is theoretically unavailable (*e.g.*, the critical witness is not in the court's jurisdiction). L.E.A.A. STUDY, *supra* note 26, at 106-07. These last two categories describe "the ultimate in a weak case," that is, "no case at all." Alschuler, *supra* note 25, at 65, because the prosecutor does not have sufficient evidence of legal guilt to reach a jury. See note 71 *supra*.

218. L.E.A.A. STUDY, *supra* note 26, at 110-13.

219. See Kaplan, *supra* note 23, at 181-82.

220. See *id.* at 179.

dictment including the public damage to the indictée's reputation than in any resulting conviction.²²¹ Any one of these factors may lead a prosecutor to seek an indictment despite the unlikelihood of conviction at trial.

Obviously, federal prosecutors are subject to similar pressures. Like their state counterparts, they must choose between the concrete reality of applying criminal sanctions to someone who has probably committed a crime and the abstract ideal of convicting only the legally guilty defendant. "For the working prosecutor who hears of the injuries and damages to victims everyday the choice is not difficult. Securing a half loaf . . . (the conviction of a defendant whom the prosecutor presumes is factually guilty) . . . at the expense of upholding the pure ideals of the law is a natural choice."²²² The choice may prove irresistible in prosecutions of indigent defendants who in all likelihood will plead guilty anyway because they lack the resources to battle the government on equal footing.

At the very least, prosecutors' ambivalence about legal guilt requirements and their capacity to circumvent most of them by plea-bargaining, suggest the need for a more neutral pretrial screener of legal guilt. Since some factually and legally innocent defendants will pass through the grand jury's leaky sieve, the prosecutor's pre-indictment screening decisions and post-indictment bargaining practices raise the possibility that factually and legally innocent defendants will plead guilty. Whether that possibility can become a reality de-

221. By 1970, all the pieces were in place; all that was required was a Justice Department willing to abuse its prosecutorial responsibility. The Nixon administration supplied that ingredient. From 1970 to 1973, the ISD [Internal Security Division] conducted over 100 Guy Goodwin-supervised grand juries in eighty-four cities of thirty-six states, calling some 1,000 to 2,000 witnesses by subpoena, returning some 400 indictments. The indictments were often merely *pro forma*, to cover the real investigative purposes of the grand juries. The normal conviction rate on grand jury indictment is 65 percent; less than 15 percent of the 400 ISD indictments were convictions or pleas to lesser charges. Targets included the Back [*sic*] Panther party, Vietnam Veterans Against the War, Daniel Ellsberg, the Los Angeles antidraft movement, the Catholic Left, Mayday, the Puerto Rican independence movement, the American Indian movement, the Movimiento Chicano, the women's movement, Irish unification supporters, labor unions, radical lawyers, and legal workers.

Reform of the Grand Jury System: Hearing Before the Subcomm. on the Judiciary, 94th Cong., 2d Sess. 214 (1976) (footnotes omitted) (excerpts from M. HALPERIN, J. BERMAN, R. BOROSAGE & C. MARWICK, THE LAWLESS STATE (1976)). Considerable commentary has addressed how the Justice Department's Internal Security Division used the investigatory powers of the federal grand jury to harass enemies of the Nixon administration and gather political intelligence information about their activities. See generally *1977 Hearings* pt. 1 & pt. 2, *supra* note 108; Comment, *Federal Grand Jury Investigation of Political Dissidents*, 7 HARV. C.R.-C.L. L. REV. 432 (1972).

222. L.E.A.A. STUDY, *supra* note 26, at 108-09; 110-15. Some studies have suggested that prosecutors would face this choice less frequently if better procedures for maintaining the custody of evidence were adopted. See PROMIS STUDY, *supra* note 33, at 73.

pend upon the plea-bargaining roles played by the defense attorney and the court.

III. THE DEFENDANT'S PLEA-BARGAINING POSTURE

As shown above,²²³ the Supreme Court has assumed that the trial adequately protects our system's legal guilt requirements. A defendant who is factually innocent or believes the state cannot prove legal guilt may choose to stand trial. If the defendant voluntarily forgoes that option upon the advice of competent counsel, the Court has assumed that the plea reliably demonstrates factual guilt²²⁴ and intelligently surrenders the right to contest legal guilt at trial.²²⁵ I shall examine the roles played by the defense attorney and the trial court during plea bargaining to demonstrate the lack of foundation for either of those assumptions.²²⁶

A. *The Defense Attorney*

If a defendant voluntarily and intelligently enters a plea upon the advice of competent counsel, the courts consider such a plea "an admission of factual guilt so reliable that . . . it quite validly removes the issue of factual guilt A guilty plea, therefore simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt."²²⁷ The Supreme Court also treats guilty pleas as reliable indicators of defendants' legal guilt: it assumes that a competent defense attorney will evaluate whether the government's evidence can satisfy the trial's stringent proof requirements before advising a client to plead. In *McMann v. Richardson*,²²⁸ the Court emphasized the defense attorney's importance:

In the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case. Counsel must predict how the facts, as he understands them, would be viewed by a court. If proved, would those facts convince a judge or jury of a defendant's guilt? On those facts would evidence seized without a warrant be admissible? Would the trier of fact on those facts find

223. See notes 114-83 *supra* and accompanying text.

224. See *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975) (per curiam).

225. See *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970). See also *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) ("Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation.").

226. The following analysis relies heavily on the findings of a recently published national study of state plea-bargaining practices, L.E.A.A. STUDY, *supra* note 26.

227. *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975) (per curiam) (emphasis deleted).

228. 397 U.S. 759 (1970).

a confession voluntary and admissible?²²⁹

Despite the Court's heavy reliance on defense attorneys to protect factually and legally innocent defendants from pleading guilty, it has not adequately defined what constitutes effective assistance of counsel in the plea-bargaining context.²³⁰ More importantly, few courts have confronted the possibility that the realities of the criminal process may prevent defense counsel from giving minimally competent legal assistance. For example, the courts have assumed that defense attorneys will be "devoted solely"²³¹ to the interests of their clients without considering whether the attorneys' relationship with prosecutors and judges may lead them to adopt a more cooperative attitude towards the institutional norms of the criminal justice system.

One of those norms is the system's preference for plea-bargaining as the dominant mode of guilt determination. Since the criminal justice system would collapse if more defendants contested their culpability, the system "encourages"²³² defendants to plead by making it clear they will be punished more severely if convicted after trial. Ne-

229. 397 U.S. at 769-70. See also *Brady v. United States*, 397 U.S. 742, 756-57 (1970).

230. At a minimum, defense counsel should evaluate the strength of the prosecution's case to predict the likelihood of conviction. Some courts require that counsel conduct a complete factual and legal investigation to determine appropriate defenses. See, e.g., *United States v. DeCoster*, 487 F.2d 1197, 1204 (D.C. Cir. 1973). But cf. *United States v. Decoster*, No. 72-1283 (D.C. Cir. July 10, 1979) (examining whether claimed inadequacy constitutes "a serious incompetency that falls measurably below the performance ordinarily expected of fallible lawyers" and whether it probably "affected the outcome at trial." Slip op. at 21. Applying that standard, the court concluded that the defendant did not satisfy his burden of proving that counsel's failure to investigate possible witnesses to support an alibi defense probably affected the outcome of the trial. Slip op. at 34); *Alschuler, The Defense Attorney's Role in Plea-Bargaining*, 84 YALE L.J. 1179, 1265-67 (1975) (noting that a number of courts have disputed that an effective defense counsel must examine possible defenses before entering a plea of guilty).

The Supreme Court has refused to vacate guilty pleas when a defense counsel mistakenly concluded that a coerced confession would be admissible at trial, *McMann v. Richardson*, 397 U.S. 759 (1970), or where defense counsel failed to investigate the possibility that the indictment was returned by a grand jury that had been unconstitutionally selected, *Tollett v. Henderson*, 411 U.S. 258 (1973). In both cases the Court concluded that the attorney's advice was "within the range of competence demanded of attorneys in criminal cases." 411 U.S. at 266 (quoting 397 U.S. at 771). The Court emphasized that consideration of such factors as "the expectation or hope of a lesser sentence, or the convincing nature of the evidence against the accused . . . might well suggest the advisability of a guilty plea without elaborate consideration of whether pleas in abatement . . . might be factually supported." 411 U.S. at 268.

For a recent critique of the Court's failure to articulate criteria for measuring counsel's competency, see *Tague, The Attempt to Improve Criminal Defense Representation*, 15 AM. CRIM. L. REV. 109 (1977). See also *Brown Transport Corp. v. Atcon, Inc.*, 439 U.S. 1014 (1978) (White and Blackmun, JJ., dissenting from denial of certiorari).

231. *Von Moltke v. Gillies*, 332 U.S. 708, 725 (1948).

232. "While confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable' — and permissible — 'attribute of any legitimate system which tolerates and encourages guilty pleas.'" *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 31 (1973)).

gotiated determinations of guilt permit the prosecutor, the defense attorney, and the court to process a high volume of cases efficiently while giving the defendant an apparent concession in charge or sentence as fair consideration.²³³ In the vast majority of cases, an indigent defendant's attorney will urge submission to the systemic pressures to plead. Numerous studies²³⁴ have shown that both private and public defense attorneys suffer from a "burn-out" syndrome. High caseloads, sketchy information, and uncooperative clients often make attorneys cynical about their clients' factual guilt or innocence.²³⁵ Although the public is convinced that clever defense attorneys manipulate legal technicalities to free guilty criminals, many defense lawyers presume their clients are guilty of some crime and justify their failure to investigate the facts or the law by assuming that a plea-bargain is the best they can do.²³⁶

Moreover, plea-bargaining often serves a defense attorney's own interests. The economics of private practice and the limited resources of public defender agencies require criminal defense attorneys to handle a high volume of cases. Plea-bargaining makes that volume possible. Indeed, prosecutorial overcharging followed by a "sweet deal" that dismisses the inflated charges can create the impression that the defense attorney has effectively represented the client's interest.²³⁷

A defense attorney might also consider how an adversarial stance in one case may affect future clients. Theoretically, the defense lawyer has an adversarial relationship with the prosecutor. In practice, the defense lawyer "may feel constrained to go along with the system because of potential retaliation should accepted norms be breached."²³⁸ Uncooperative defense attorneys who file too many suppression motions may find the prosecutor unwilling to offer attractive bargains or informal discovery privileges in future cases.²³⁹

233. Recent empirical studies of plea-bargaining have suggested that many defendants who plead guilty are not getting real bargains because they are receiving sentences that approximate the penalties they would have received if they had been convicted at trial. See PROMIS STUDY, *supra* note 33, at 20.

234. See L.E.A.A. STUDY, *supra* note 26, at 168. See also A. ROSETT & D. CRESSEY, JUSTICE BY CONSENT 126-27 (1976).

235. One study found that many defense attorneys "appear to assume that a defendant is guilty of something, thus enhancing a rate of guilty pleas as well as reinforcing a 'presumption of guilt throughout the system.' . . . Certainty as to factual guilt appears to override investigation into legal guilt." L.E.A.A. STUDY, *supra* note 26, at xxxiii. See generally Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RESOLUTION 52, 60-62 (1967).

236. See L.E.A.A. STUDY, *supra* note 26, at 167.

237. See L. WEINREB, *supra* note 12, at 57-58.

238. L.E.A.A. STUDY, *supra* note 26, at 189.

239. "The inescapable reality, insufficiently appreciated, is that the discretionary power of public officers to confer privileges or to be lenient is always intrinsically a discretionary power

Conversely, defense counsel who do not insist on time-consuming legal technicalities may be rewarded for their cooperation.²⁴⁰

Even when defense attorneys resist those pressures and zealously perform their adversarial role, they often cannot obtain the information needed to make an informed judgment about a client's factual guilt or the likelihood of conviction at trial. While some courts have held that a competent defense attorney should conduct a thorough factual and legal investigation,²⁴¹ many defense attorneys lack the necessary time or resources to make such an inquiry.²⁴² Thus, they must rely primarily on information gained from the client and from the limited²⁴³ pretrial discovery rights afforded to them. For example, federal defendants are not entitled to see the statements or the grand jury testimony of government witnesses until after the witnesses testify at trial.²⁴⁴ In most cases, the defense cannot even get a list of the government witnesses.²⁴⁵ Unless a preliminary examination was held before the indictment, a defense attorney must rely on informal discovery devices, which may convey inaccurate informa-

not to confer a privilege or not to be lenient and is susceptible to many kinds of abuse, including the worse sort of discrimination, favoritism, or caprice . . ." K. DAVIS, *DISCRETIONARY JUSTICE* 231-32 (1969).

240. See generally A. BLUMBERG, *CRIMINAL JUSTICE* (1967); L.E.A.A. STUDY, *supra* note 26, at 183; Skolnick, *supra* note 235, at 62-64.

241. *E.g.*, United States v. DeCoster, 487 F.2d 1197, 1204 (D.C. Cir. 1973). See generally ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, *STANDARDS RELATING TO PLEAS OF GUILTY*, § 3.2 (Approved Draft 1968) [hereinafter cited as ABA PLEA STANDARDS].

242. Court appointed attorneys received fees which did not permit the hiring of investigators. Privately retained counsel could hire investigators only in certain kinds of cases where the clients had the needed fiscal resources. Public defenders usually had a limited investigative support service which could only be used on a selective basis. Where investigations occurred they were restricted to felony cases. L.E.A.A. STUDY, *supra* note 26, at 180.

243. Most of the states have . . . limited a defendant's discovery by a variety of doctrines that had their origins in the halting and cautious growth of discovery. The most common of these doctrines holds that the question of whether to grant discovery is in the discretion of the trial court. . . . In addition, many states deny discovery of particular categories of information — for example . . . the statements of prospective witnesses, and the transcript or minutes of grand jury testimony.

Nakell, *Criminal Discovery for the Defense and the Prosecution — The Developing Constitutional Considerations*, 50 N.C. L. REV. 437, 474-75 (1972).

Recognizing this problem, the American Bar Association has recommended that the defendant be given sufficient information to make an informed decision to plead. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL* § 1.1a(ii) (Approved Draft 1970). Some states have recently responded to this problem by providing far more liberal discovery privileges. See Appendix note 9 *infra*. *But cf.* United States v. Wolczik, 26 CRIM. L. REP. 2287 (W.D. Pa. 1979) (prosecutor not required to disclose exculpatory evidence to defense counsel during plea bargaining).

244. Jencks Act, 18 U.S.C. § 3500 (1976). Some federal courts have interpreted the Jencks Act to permit them to order disclosure of witnesses' statements before trial. See 8 MOORE'S FEDERAL PRACTICE ¶ 16.10[2] (2d ed.1978).

245. The federal rules of criminal procedure do not mandate disclosures of a list of the government's witnesses. FED. R. CRIM. P. 16(a)(2). See 8 MOORE'S FEDERAL PRACTICE ¶ 16.03[3] (2d ed. 1978).

tion, to determine whether the government has a strong case.²⁴⁶

The preceding description of the defense attorney's role suggests that the Supreme Court has relied too heavily on the defense counsel to protect the system's legal guilt requirements during plea-bargaining. First, a counseled guilty plea does not reliably demonstrate the defendant's factual guilt in all cases. The defense attorneys' presumptions of guilt and their inability to investigate factual or legal defenses may lead them to advise factually innocent defendants to plead guilty. Without adequate advice from counsel, such defendants may even believe they are guilty.²⁴⁷

It is not unlikely that a large number of defendants are unaware of the exculpatory nuances of the law under which they believe they have committed a crime. This is especially true where individual elements of the crime are each independent preconditions to conviction and each necessary of proof, or where the acts themselves are measured in fine degree when assessing whether a crime has taken place.²⁴⁸

Nor can we rely on the attorney's advice to ensure that the defendant is intelligently surrendering the right to contest legal guilt at trial. At a minimum, the defense attorney should have enough information to predict the likely outcome at trial. But defense attorneys' access to the state's case is often so limited that they may not even realize that the prosecutor lacks sufficient evidence to reach a jury. Indeed, recent empirical studies suggest that defense attorneys often advise clients to plead guilty to charges that the government could not have proven at trial.²⁴⁹

Increased reliance on the guilty plea to secure convictions, combined with the growing realization that innocent defendants might be pleading guilty, prompted the courts to supervise plea-bargaining more actively. The next Subsection examines judicial review at the

246. One of the major sources of informal discovery is the prosecutor, who will often disclose some evidence to induce a plea when the case for legal guilt is compelling. Problems arise, however, when the prosecutor has a marginal case. Alschuler and others have documented the common prosecutorial practice of bluffing in weak cases. Alschuler, *supra* note 25, at 65-67. See L.E.A.A. STUDY, *supra* note 26, at 10-15, and notes 217-22 *supra* and accompanying text. The prosecutor gives the defense counsel whatever evidence formal discovery procedures require and then exaggerates the strength of the government's case, offering an attractive bargain to induce a plea. Some prosecutors regard that practice as legitimate and skillful bargaining even when it secures the conviction of legally innocent defendants. L.E.A.A. STUDY, *supra* note 26, at 110-15.

247. See Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas But Innocent Defendants?*, 126 U. PA. L. REV. 88, 96 (1977).

248. *Clicque v. United States*, 514 F.2d 923, 931 (5th Cir. 1975).

249. See PROMIS STUDY, *supra* note 33, at 20. Using regression equations to predict what would have occurred if pleading defendants in the District of Columbia Superior Court had gone to trial, the study concluded that "defendants who enter guilty pleas (a) frequently forgo a reasonably good chance of acquittal at trial but (b) do not always receive demonstrable sentence concessions from the prosecutor or the judge in return." *Id.* See note 300 *infra* and accompanying text for further discussion of this study's findings.

plea hearing and concludes that it does not prevent innocent defendants from pleading guilty or even ensure that their pleas intelligently surrender their right to contest legal guilt at trial.

B. *Judicial Review of the Plea*

1. *Voluntariness*

Courts deciding whether to accept a plea consider whether the defendant offered it "voluntarily."²⁵⁰ For a plea to be voluntary, the defendant must understand (1) the nature of the charge,²⁵¹ (2) the consequences of the plea,²⁵² (3) the rights waived by choosing to plead,²⁵³ and (4) the permissible inducements to the plea.²⁵⁴ Courts also assessed the voluntariness of the plea by determining whether any impermissible pressures might have induced the defendant to plead guilty. Impermissible pressures include violence, threats of violence, improper inducements, deception, and trickery.²⁵⁵

One of the most important inducements to plead guilty is the sentencing differential between conviction by plea and conviction by trial: The defendant knows that more severe punishment often follows conviction by trial than follows a guilty plea to the same offense. Rejecting arguments that this sentencing differential unconstitutionally burdens the defendant's right to contest culpability at trial, the Supreme Court has concluded that this differential is a permissible inducement that does not render the plea involuntary.²⁵⁶

The voluntary nature of the plea becomes suspect, however, when one considers the bargaining power of each party. The prosecutor can enhance the government's position by bringing or threatening more serious charges than the particular case warrants.²⁵⁷ The prosecutor may also offer the most attractive bargains in the weakest cases. When the prosecutor applies those pressures to an indigent

250. *E.g.*, *McCarthy v. United States*, 394 U.S. 459, 467 (1969).

251. *See Henderson v. Morgan*, 426 U.S. 637, 645 (1976); *FED. R. CRIM. P.* 11(c).

252. *See FED. R. CRIM. P.* 11(c). The consequences that must be understood are only those that flow directly from the plea. *Bell v. North Carolina*, 576 F.2d 564, 565 (4th Cir.), *cert. denied*, 439 U.S. 956 (1978).

253. Rights waived include the privilege against self-incrimination, the right to confront adverse witnesses, and the right to a trial by jury. *See Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

254. *See Machibroda v. United States*, 368 U.S. 487, 493 (1962).

255. *See Machibroda v. United States*, 368 U.S. 487, 493 (1962).

256. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). Some state trial courts effectuate this sentencing differential by assigning judges who typically give stiff sentences to conduct trials and judges who give more lenient sentences to take pleas.

257. *See L. WEINREB, supra* note 12, at 57-58.

defendant who cannot make bail before trial, they may prove irresistible.²⁵⁸

Several factors enhance the prosecutor's bargaining position when the defendant is in custody. If the prosecutor believes that the defendant has already been incarcerated for a sufficient period of time and is willing to recommend a "time-in" sentence, the defendant will invariably agree to plead guilty to obtain immediate freedom. Even if the prosecutor does not agree to a "time-in" sentence, an incarcerated defendant, frightened and demoralized by the prospect of an indefinite period of confinement, may be willing to enter a plea and accept a fixed period of imprisonment.²⁵⁹

Since the courts have either ignored or legitimized those pressures, a determination that the plea "is voluntary and not the result of force or threats or of promises"²⁶⁰ obscures the fact that "the plea agreement is the *source* of the coercion and already embodies the involuntariness."²⁶¹

The coercive aspects of plea-bargaining might be less offensive if we could say with some assurance that they only occur *after* the government has independently developed some reliable evidence of the defendant's factual and legal guilt. But Sections I and II have indicated that no such showing is required before indictment. The state may indict a defendant without making even a *prima facie* showing of legal guilt and then exploit the leverage it gains from the indictment to induce a guilty plea. Thus, the minimal screening standards used in the pretrial screening process help tip the balance of advantage between the state and the accused decidedly in the state's favor. This fact alone raises serious questions about the accuracy of a determination of guilt negotiated by two parties with such unequal bargaining power. Concern about the accuracy of the guilty plea has prompted the courts to assess whether the defendant understands the basic elements of the crime and whether there is a factual basis for the plea.

258. Numerous studies have documented that defendants who remain in custody before trial are much more likely to be convicted than those defendants who secure pretrial release. One study found that the defendant's pretrial status as a detainee had a far higher correlation to an unfavorable disposition than factors such as the defendant's previous record or employment record. Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. REV. 641, 652-53 (1964). The Rankin study found that 64% of those defendants jailed awaiting trial were eventually sentenced and sent to prison compared to 17% of those defendants who were out on bail before trial; 47% of those bailed were not convicted compared to 27% of those who were detained prior to disposition. *Id.* at 642.

259. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 444 (1971).

260. FED. R. CRIM. P. 11(d).

261. Langbein, *supra* note 12, at 14 (emphasis original). See also Thaler, *Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial*, 1978 WIS. L. REV. 441, 457.

2. Intelligence

As the Supreme Court explained in *McCarthy v. United States*,²⁶² a guilty plea “is an admission of all the elements of a formal criminal charge.”²⁶³ Therefore, “it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.”²⁶⁴ The intelligence requirement is designed to protect innocent defendants from pleading to crimes they did not commit by ensuring that the defendant understands at least the “essential elements”²⁶⁵ of the crime.

The facts in *McCarthy* illustrate how potentially innocent defendants might mistakenly conclude that they are guilty. McCarthy pleaded guilty to a charge that he “willfully and knowingly” attempted to evade tax payments. The trial judge personally examined McCarthy to determine whether he was entering the plea voluntarily, with an understanding of the rights he was waiving and the consequences that could follow.²⁶⁶ The court ordered a presentence investigation and continued the case for sentencing. At the sentencing hearing, McCarthy claimed his “failure to pay taxes was ‘not deliberate’ and that they would have been paid if he had not been in poor health.”²⁶⁷ After examining the presentencing report and concluding that “‘the manner in which [the petitioner’s] books were kept was not inadvertent,’”²⁶⁸ the judge imposed a one year sentence.

The Supreme Court reversed McCarthy’s conviction because of the trial court’s failure to inform the defendant personally of the nature of the charge, as required under rule 11.²⁶⁹ While its holding rested on an improper method for determining the intelligence of the

262. 394 U.S. 459 (1969).

263. 394 U.S. at 466.

264. 394 U.S. at 466.

265. See *Henderson v. Morgan*, 426 U.S. 637, 640 n.6 (1976). The Court in *Henderson* affirmed the lower court’s judgment vacating the defendant’s second-degree murder plea entered upon advice of competent counsel. The record indicated that no one had explained to the defendant (who had substantially below average intelligence) that second-degree murder required an intent to kill. 426 U.S. at 642. In a footnote, Justice Stevens added that since [t]here is no need in this case to decide whether notice of the true nature, or substance, of a charge always requires a description of every element of the offense; we assume it does not. Nevertheless, intent is such a critical element of the offense of second-degree murder that notice of that element is required.

426 U.S. at 647 n.18. Accord, *United States v. Hedgecoe*, 420 F.2d 458, 460 (4th Cir. 1970); *United States v. Steele*, 413 F.2d 967, 969 (2d Cir. 1969), *overruled on other grounds*, *Manley v. United States*, 432 F.2d 1241, 1245 (2d Cir. 1970).

266. 394 U.S. at 461.

267. 394 U.S. at 461.

268. 394 U.S. at 462.

269. 394 U.S. at 467.

plea,²⁷⁰ the Court emphasized that judicial review of the plea was designed to produce a reliable record of the defendant's guilt. Since the trial judge had failed to explain that the charge required proof of a specific intent and McCarthy had denied that he had acted deliberately, the possibility existed "that if . . . adequately informed [McCarthy] would have concluded that he was actually guilty of one of two closely related lesser included offenses, which are mere misdemeanors."²⁷¹

Thus, judicial inquiry into the intelligence of the plea provides some minimal protection of factually innocent defendants by ensuring that they understand the essential elements of the crime. However, the intelligence inquiry does not require the courts to determine whether the defendant understands that some affirmative defense might apply, nor does it assess whether the government has sufficient admissible evidence other than the defendant's admission to prove the essential elements of the crime.

3. *Factual Basis*

Even if defendants understand the essential elements of a crime, they may not realize that the questioned conduct does not fall within the statute. To deal with that problem, rule 11 requires the court to find a "factual basis"²⁷² for the plea before it can enter judgment on it. The factual basis inquiry protects factually innocent defendants by requiring a judicial determination "that the conduct which the defendant admits constitutes the offense charged."²⁷³ Whether that inquiry adequately protects legally innocent defendants depends upon the evidentiary standard used to measure factual basis,²⁷⁴ the sources of information relied upon, and the scope of the judicial inquiry that occurs when the court is alerted to the possibility that an

270. 394 U.S. at 464 n.9.

271. 394 U.S. at 471 (footnote omitted).

272. See FED. R. CRIM. P. 11(f). While the voluntariness inquiry is constitutionally required for all guilty pleas, the Court has not held that the factual basis requirement is mandated by the Constitution. *But see* Barkai, *supra* note 247, at 112 (noting that language in *McCarthy v. United States*, 394 U.S. 459, 466 (1969), suggests that the factual basis inquiry is a federal constitutional requirement for a valid plea because "the voluntariness and factual basis requirements are inextricably linked").

State courts are constitutionally required to establish a factual basis before accepting guilty pleas from defendants who protest their innocence. *North Carolina v. Alford*, 400 U.S. 25 (1970). See text at notes 287-97 *infra*, for discussion of *Alford*. For a listing of states that use some form of a factual basis requirement, see Barkai, *supra* note 247, at 89 n.6. The majority of states have not applied a factual basis requirement for misdemeanors. *Id.* at 93 n.30.

273. FED. R. CRIM. P. 11, Advisory Comm. Notes (1966).

274. For example, if factual basis is measured by a probable cause standard, a judicial determination of a factual basis for the plea would not safeguard legally innocent defendants or indicate whether there was compelling evidence of factual guilt. It would simply repeat the screening performed by the magistrate, prosecutor, and grand jury.

innocent defendant might be pleading guilty.²⁷⁵ Unfortunately, rule 11 inadequately addresses those issues. It neither defines any evidentiary standard for measuring factual basis,²⁷⁶ nor restricts the sources of information that the court can rely upon to determine its presence. Left without guidance, courts have relied upon sources such as the defendant's own admissions,²⁷⁷ presentence reports,²⁷⁸ the prosecutor's synopsis of his case,²⁷⁹ statements or testimony from government witnesses,²⁸⁰ grand jury testimony,²⁸¹ and even the judge's personal knowledge of the case.²⁸² Most trial courts have failed to identify a particular evidentiary standard to measure an adequate factual basis. Some appellate courts appear to use a probable cause standard,²⁸³ others demand evidence of the "essential elements,"²⁸⁴ while a growing number refer to a probability-of-conviction standard.²⁸⁵ The lack of clarity in defining a minimum standard of proof for measuring factual basis prompted one commentator to conclude:

A federal court standard of proof for factual basis is virtually nonexistent. The subjectivity inherent in rule 11, which merely states that a court must satisfy itself that a factual basis exists, and the deference given to a trial court's discretion in accepting or rejecting pleas have

275. See Barkai, *supra* note 247, at 118.

276. The Advisory Committee Notes that accompanied the factual basis amendment to rule 11 noted that the court could determine a factual basis by inquiry of the defendant or the attorney for the government, or by examining the presentence report. FED. R. CRIM. P. 11, Advisory Comm. Notes (1966).

277. Courts will often give a synopsis of the charges including the specific acts and intent alleged and then ask the accused if the allegations are true. See, e.g., Ruiz v. United States, 494 F.2d 1 (5th Cir.), *cert. denied*, 419 U.S. 899 (1974). Some appellate courts have criticized that common practice, especially in cases involving complex questions of fact or law. See United States v. Untiedt, 479 F.2d 1265, 1266 (8th Cir. 1973) (reading the indictment and asking the defendant whether he committed acts charged does not properly establish factual guilt). *But see* Paradiso v. United States, 482 F.2d 409, 413-14 (3d Cir. 1973) (adequacy of the procedure depends upon the facts of the particular case).

278. See McCarthy v. United States, 394 U.S. 459, 463 n.6 (1969); FED. R. CRIM. P. 11, Advisory Comm. Notes (1966); ABA PLEA STANDARDS, *supra* note 241, § 1.6. *But cf.* United States v. Zampitella, 416 F. Supp. 604 (E.D. Pa. 1976) (trial judge's possession of the presentence report does not satisfy rule 11's factual basis requirement); Barkai, *supra* note 247, at 137 ("The principal disadvantage in the use of . . . presentence reports is that the sources of the factual basis will not have any personal knowledge of the alleged crime.").

279. See Ruiz v. United States, 494 F.2d 1, 3 (5th Cir.), *cert. denied*, 419 U.S. 899 (1974) (factual basis demonstrated by defendant admitting truth of facts alleged in prosecutor's synopsis of case).

280. See, e.g., Gilbert v. United States, 466 F.2d 533, 534 (per curiam)(5th Cir. 1972).

281. See United States v. Romanello, 425 F. Supp. 304, 309-10 (D. Conn. 1975).

282. See United States v. Maggio, 514 F.2d 80, 87 (5th Cir.), *cert. denied*, 423 U.S. 1032 (1975).

283. See People v. Hudson, 7 Ill. App. 3d 800, 803, 288 N.E.2d 533, 535 (1972).

284. See notes 262-71 *supra* and accompanying text.

285. See United States v. Webb, 433 F.2d 400 (1st Cir. 1970), *cert. denied*, 401 U.S. 958 (1971); Bruce v. United States, 379 F.2d 113, 119-20 & n.19 (D.C. Cir. 1967).

resulted in an "I-know-it-when-I-see-it" approach²⁸⁶

Despite the absence of any general standard for measuring factual basis, the lower courts *have* consistently required a stronger showing of factual basis for "equivocal" guilty pleas than for "unequivocal" ones. Most courts characterize a plea as equivocal when the defendant refuses to admit culpability at the plea hearing. In *North Carolina v. Alford*,²⁸⁷ the Supreme Court considered whether such a plea could be accepted despite the pleader's protestation of innocence. Charged with a capital offense, Alford pleaded guilty to second-degree murder to avoid the death penalty, but he insisted that he was innocent at the plea hearing.²⁸⁸ Before accepting Alford's plea, the judge established its factual basis by considering the sworn testimony of a police officer and two other witnesses. The judge found that their summary of the prosecution's case presented sufficient evidence to support a first-degree murder conviction.²⁸⁹

The Supreme Court upheld the constitutionality of accepting such a plea despite the defendant's denial of culpability. The Court explained that

while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.²⁹⁰

Such equivocal pleas could be accepted as long as they were voluntary, intelligent, and supported by a "strong factual basis."²⁹¹ While the Court did not define the evidentiary standard to measure a "strong factual basis," it referred with approval to the state judge's determination from live testimony that the prosecutor had sufficient evidence of legal guilt to warrant a first-degree murder conviction.²⁹² The Court seemed to be suggesting that formal proof requirements should apply in establishing the factual basis for an equivocal guilty plea.

At minimum, *Alford's* definition of "a strong factual basis" requires a trial court to review the legal sufficiency of the government's

286. Barkai, *supra* note 247, at 123 (footnote omitted).

287. 400 U.S. 25 (1970). The Court made it clear that it found no difference between a plea where the defendant protested innocence and a plea where a defendant did not admit culpability. 400 U.S. at 37.

288. 400 U.S. at 28.

289. 400 U.S. at 28.

290. 400 U.S. at 37.

291. 400 U.S. at 37-38.

292. 400 U.S. at 37-38.

evidence before accepting a plea.²⁹³ That standard serves three distinct purposes. First, it protects factually innocent defendants, since judicial verification of a "strong factual basis" demonstrates that the government has more than a probable cause basis for believing in the defendant's factual guilt. The Court felt that a convincing demonstration of a defendant's factual guilt was needed to negate the protestation of innocence and thereby guard against the spectacle of an unjust conviction.²⁹⁴ Second, it protects legally innocent defendants who could not possibly be convicted at trial because the government lacks sufficient evidence of legal guilt to reach the jury. Finally, a judicial determination that the government's evidence could satisfy a trial's formal proof requirements indicates that the defendant has intelligently surrendered the right to contest legal guilt at trial. As the Court noted in *Alford*, the strong factual basis for the plea indicated that the defendant "had absolutely nothing to gain by a trial and much to gain by pleading. Because of the overwhelming evidence against him, a trial was precisely what neither Alford nor his attorney desired."²⁹⁵

Alford reflects the Court's view of the plea as an alternative mechanism for resolving criminal disputes. Accordingly, the plea's legitimacy depends in part on the fact that the plea reflects the trial's probable outcome. The defendant's failure to admit culpability does not defeat the plea's legitimacy as long as there are reasonable grounds for believing that the defendant would have been convicted at trial.²⁹⁶ However, most federal and state courts have assumed that

293. In *Alford*, the state trial court actually conducted a mini-trial proceeding before accepting Alford's plea, hearing live testimony from government witnesses before finding that the government's evidence was legally sufficient to warrant a conviction. Thus, the North Carolina judge could assess the credibility of the government's witnesses and predict the likelihood of Alford being convicted on that evidence. In effect, the judge was doing more than testing the legal sufficiency of the charges; he was independently adjudicating disputed facts. At least one commentator has suggested that such mini-adjudication of guilt be required before *Alford*-type pleas are accepted. See Uviller, *supra* note 17, at 126. I suggest in Section IV that the grand jury should perform that mini-adjudication for all federal prosecutions.

294. 400 U.S. at 37-38. To "minimize the adverse effects of *Alford* pleas on public perceptions of the administration of justice," the Justice Department has advised its prosecutors that they "may wish to ask leave of the court to make a proffer of the evidence . . . [they] could produce at trial to prove the defendant's guilt beyond a reasonable doubt." *Justice Department Standards*, *supra* note 109, at 3005. Actually, demonstrating a strong factual basis for the plea cannot "verify the accuracy of the resultant judgment of conviction any more than a jury verdict can be verified." Uviller, *supra* note 17, at 126. Instead, it demonstrates that the defendant has intelligently capitulated his right to contest his legal guilt at trial. *Id.* I agree with Professor Uviller's analysis, but it raises an interesting question. If the real function of the strong factual basis standard is to demonstrate that the defendant has intelligently surrendered the right to contest legal guilt, why shouldn't it apply to all guilty pleas regardless of whether the defendant admits culpability? See text at notes 298-300 *infra*.

295. 400 U.S. at 37.

296. 400 U.S. at 38.

such strict judicial scrutiny of the legal sufficiency of the government's evidence is unnecessary when the defendant admits culpability at the plea hearing. Therefore, they have only applied *Alford's* strong factual-basis standard to those rare pleas where the defendant protests innocence or refuses to admit guilt.²⁹⁷

In the vast majority of cases, however, a defendant's "voluntary" admission of culpability at the plea hearing is part of the price the defendant pays for the plea-bargain. When a defendant offers such an "unequivocal" plea by admitting culpability, the courts will usually establish the plea's factual basis by correlating the admitted facts with the essential elements of the crime. Most courts agree that the defendant's admission alone satisfies the factual basis requirement²⁹⁸ as long as the defendant receives notice of the essential elements of the crime.

Judicial treatment of unequivocal guilty pleas reflects the Supreme Court's dual assumptions that the defendant's admission reliably demonstrates factual guilt and that the presence of competent counsel ensures that the plea intelligently surrenders the right to contest legal guilt at trial. Section III has demonstrated why these assumptions are not always correct. The defendant's admission of culpability does not necessarily demonstrate factual guilt because defense counsel may have failed to explore the applicability of an affirmative defense that would justify or excuse the defendant's criminal conduct.²⁹⁹ Since the defendant's admission does not indicate whether the government had sufficient independent proof of legal guilt to warrant a conviction, it cannot possibly demonstrate that the defendant has intelligently surrendered the right to contest legal guilt at trial. Thus, if the chief risk of an equivocal guilty plea is that an innocent defendant might plead guilty, several aspects of our pre-trial system — the absence of an independent adjudication of factual or legal guilt before indictment, prosecutorial overcharging, the coercive aspects of plea-bargaining, and the defense attorney's limited

297. See, e.g., *Bruce v. United States*, 379 F.2d 113, 119-20 & n.19 (D.C. Cir. 1967); *United States v. Webb*, 433 F.2d 400, 403 (1st Cir. 1970). Of course, trial courts will still retain the discretion to reject the defendant's guilty plea. See Barkai, *supra* note 247, at 125.

298. *Alford* requires state courts to establish a factual basis before accepting an equivocal plea. Many states require a factual basis for unequivocal guilty pleas as well. See Barkai, *supra* note 247, at 89 n.6. A recent national study of 25 states found that "in approximately three fourths of the jurisdictions visited, judges determined factual basis and accuracy of the plea by simply asking the defendant if he committed the offense to which he had pled." L.E.A.A. STUDY, *supra* note 26, at 282.

299. See *Clicque v. United States*, 514 F.2d 923, 931 (5th Cir. 1975); Barkai, *supra* note 247, at 128-29.

ability to prepare a defense or predict the trial's outcome — render many allegedly unequivocal guilty pleas equivocal in fact.

By distinguishing between unequivocal and equivocal guilty pleas, the courts have permitted most defendants to convict themselves by their own admissions without requiring any government showing of legal guilt. While we cannot calculate how many factually innocent defendants are convicted through plea-bargaining, some studies have concluded that a significant percentage of defendants who plead guilty would not have been convicted at trial. As the author of one such study concluded:

These findings mean that plea-bargaining is expected to increase the convictions of the factually guilty by reducing the number of criminal cases that are nolle. As such, plea-bargaining is consistent with the crime control perspective. Plea-bargaining also increases the conviction of the legally innocent by (1) increasing the conviction of persons who otherwise would have been dismissed and (2) by substituting guilty pleas for trials. In this instance, plea-bargaining works against the normative prescriptions of the due process model. The conflict is clearly not moot: on the contrary, even though the estimates are approximations, they indicate that conviction of the legally innocent is likely to increase significantly along with conviction of the factually guilty.³⁰⁰

Those findings support my conclusion that our criminal justice system cannot rely solely on the defense attorney and on judicial review of the plea-bargaining process to ensure that the defendant's plea intelligently surrenders the right to contest legal guilt at trial.

At the very least, the preceding analysis demonstrates the need for a factual basis inquiry that tests the legal sufficiency of the government's proof.³⁰¹ But this reform alone would not cure the

300. PROMIS STUDY, *supra* note 33, at 72.

301. To provide greater protection to both the factually and legally innocent defendant, Professor Barkai has proposed that the courts use a directed verdict standard to measure factual basis for all pleas. *See* Barkai, *supra* note 247, at 140.

The choice of the directed verdict standard implies that only admissible evidence may be considered for factual basis purposes. This concern for the quality of proof . . . relates to the definition of factual and legal innocence. Concern for the admissibility of evidence would benefit not only the factually innocent defendant, but also the defendant who, although having committed the offense, would be acquitted at trial because of the inadmissibility of the evidence. Since trial — for which the plea is a substitute — would protect this category of defendants, the plea should do so as well. *Id.* at 140-41.

See also U.S. NATIONAL ADVISORY COMM. ON CRIM. JUSTICE STANDARDS AND GOALS, NATIONAL CONFERENCE ON CRIMINAL JUSTICE Standard 3.7(8), at Ct.-55 (1973), which precludes acceptance of a plea if the "admissible evidence is insufficient to support a guilty verdict on the offense for which the plea is offered, or a related greater offense." Under MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 350.4(3) (1975), unless a prior judicial determination of reasonable cause was made at the preliminary hearing, the court cannot accept a guilty plea until it satisfies itself that reasonable cause exists. Reasonable cause requires more than a testing of the legal sufficiency of the evidence accomplished by the directed verdict test. While the directed verdict standard requires the judge to consider the evidence in the light most

problems described in the first three Sections of this Article. If the state can satisfy a directed-verdict (or likelihood-of-conviction) test for factual basis by relying on the defendant's bargained-for admissions, it can still sidestep its accusatorial obligation to develop well-founded charges against the defendant.³⁰² Accordingly, *Alford's* strong factual basis standard, which tests the legal sufficiency of the government's independent proof of legal guilt, should be applied to all guilty pleas. However, strengthening the factual basis inquiry in this manner would still allow the state to bring charges that were not supported at the time of the formal accusation by sufficient evidence of legal guilt to support a conviction.³⁰³ To ensure a fair accusatorial process before guilt is negotiated, the pretrial process must provide greater protection of the system's legal guilt requirements *before* the plea hearing.

SUMMARY OF SECTIONS I, II, AND III

Our criminal justice system has relied primarily on the trial to vindicate values at the ideological heart of an accusatorial system. The presumption of innocence, proof beyond a reasonable doubt, lay participation in the adjudication of guilt, the privilege against self-incrimination, formal proof requirements designed to protect factually and legally innocent defendants — all make their entrance at trial. Judicial analysis of the pretrial process reflects this reliance on the trial. With the exception of the prosecutor, courts view pretrial screeners as making only interim determinations of factual guilt.

favorable to the government, *see* *United States v. Amato*, 495 F.2d 545, 549 (5th Cir.), *cert. denied*, 419 U.S. 1013 (1974), to find reasonable cause the court must determine that there is sufficient credible evidence to support a guilty verdict. *See* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 330.5 (1975).

Since Professor Barkai views the factual basis requirement as a safeguard for the defendant, he would permit any accused who is notified of a deficiency in the factual basis to waive its protection. "Possible sources of the deficiency could be conflicting facts, inference of a legal defense, a claimed defense, a denial of guilt, a missing element, necessity of inferring specific intent, inadmissible evidence, or a violation of a constitutional right." Barkai, *supra* note 247, at 141 n.329. I believe this waiver rule makes sense as long as the deficiency does not negate the legal sufficiency of the charges, because defendants should be permitted to conclude that a plea is in their best interests.

302. For example, Professor Barkai observed that the most reliable method of establishing the factual basis for defendant's plea "is by direct interrogation of the defendant." Barkai, *supra* note 247, at 135. That conclusion is valid if we are using the factual basis inquiry only to assess factual guilt. However, that narrow inquiry does not demonstrate whether the government has shouldered its accusatorial burden of gathering reliable evidence of factual and legal guilt before it pressured the defendant to plead guilty.

303. Professor Uviller has suggested that "[n]o defendant should [be] called upon to plead except to a well-founded charge," which he defines as one "where the credible and admissible evidence is legally sufficient to support a verdict of guilt." Uviller, *supra* note 17, at 124. However, he would not require that the prosecution's case meet that test before the plea hearing. He concedes that his "suggestion tolerates a guilty plea to a case sufficient at the time of plea though the charge was lodged at a time when the case suffered gaps in proof." *Id.*

Moreover, the courts rely on the trial to ensure that the most powerful pretrial official, the prosecutor, does not abuse that office's investigatory and accusatory powers. Thus, *Calandra*³⁰⁴ refused to apply the exclusionary rule to the grand jury because its application at trial sufficiently deters improper police behavior. Similarly, *Costello*³⁰⁵ assumed that the need to prove legal guilt at trial would deter a prosecutor from indicting individuals who could not be convicted.

By confining most legal guilt safeguards to a stage of the process that most defendants never reach, the courts have seriously diluted the basic values of our accusatorial system. The first three Sections of this Article have demonstrated how the collapse of the adjudicatory model for determining guilt has transformed the pretrial process into far more than an interim screening system. In most cases, pretrial screening decisions by law enforcement officials, the magistrate, the prosecutor, and the grand jury are the only formal determinations of guilt that are made. Instead of presuming innocence, the pretrial process presumes guilt. Instead of providing a neutral forum to adjudicate a defendant's guilt, the pretrial process relies on the ex parte determination of factual guilt made by the police and the prosecutor. The indictment imprints that presumption of guilt, and the guilty plea insulates it from those legal guilt requirements at trial that are meant to vindicate the defendant's constitutional rights.³⁰⁶ Lay participation in the adjudication of guilt is limited to the grand jury, which is dominated by the prosecutor. While in theory the state must develop its case independently, in practice it may use all its permissible pressures to induce the defendant to plead guilty before it ever has to present reliable evidence of factual and legal guilt to an independent adjudicator. As a result, our accusatorial system "has become more dependent on proving guilt from the defendant's own mouth than any European 'inquisitorial system.'"³⁰⁷

Of course, it is far easier to describe the problem than to suggest

304. 414 U.S. 338 (1974). See notes 162-69 *supra* and accompanying text.

305. 350 U.S. 359 (1956). See notes 142-53 *supra* and accompanying text.

306. A guilty plea not only waives the government's obligation to prove factual guilt beyond a reasonable doubt at trial, it may also effectively waive the right to appeal various pretrial motions made and lost before the plea, see *Tollett v. Henderson*, 411 U.S. 258 (1973). *But cf. Menna v. New York*, 423 U.S. 61, 62-63 n.2 (1975) (per curiam) (guilty plea does not necessarily bar a defendant from raising post-plea claim that a legal guilt requirement like the double jeopardy clause precludes the state from establishing factual guilt in any forum). Judicial approval of "conditional" guilty pleas alleviates some of these defects because the defendant retains the right to appeal certain pretrial rulings affecting his fourth and fifth amendment rights. See Note, *Conditional Guilty Pleas*, 93 HARV. L. REV. 564 (1980). While the conditional plea provides greater protection of those legal guilt requirements, this reform does not ensure that a reliable and independent adjudication of guilt will be made before application of the criminal sanction.

307. Alschuler, *supra* note 13, at 42.

solutions that stand a chance of enactment. But any attempt to reform our system must begin with a sound analysis of the system's defects. If we cannot rely solely on the trial to protect our system's legal guilt requirements, reform proposals must address the basic question of how our system should protect those accusatorial principles that the trial was designed to vindicate. Section IV suggests that present reform proposals inadequately answer that question.

IV. EXISTING REFORM PROPOSALS

One's prescriptions for reform depend upon one's diagnosis of the problem. Not surprisingly, reformers disagree about the diagnosis and treatment for our system's present ills. For purposes of discussion, I shall distinguish between those proposals that radically remodel our criminal process and those that build on existing institutions.

A. *Radical Proposals for Systemic Reform*

1. *Abolish Plea-Bargaining*³⁰⁸

Since our accusatorial system has relied primarily on the adversarial trial to protect its legal guilt requirements, the most obvious reform would be to abolish plea-bargaining and guarantee trials for all defendants.³⁰⁹ However, when one considers that the trial has not been used to process most cases in this century,³¹⁰ such a reform hardly seems feasible. We simply cannot afford to provide for trials

308. "Plea bargaining is defined as the defendant's agreement to plead guilty to a criminal charge with the reasonable expectation of receiving some consideration from the state." L.E.A.A. STUDY, *supra* note 26, at 1-2. That definition includes both explicit bargaining, where defendants bargain for express considerations from the state such as charge reductions or sentencing recommendations, and implicit bargaining, where no specific consideration is negotiated but defendants realize that they will be punished more severely if they go to trial than if they plead guilty. See D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 60 (1966).

That definition of plea-bargaining recognizes that while defendants entertain reasonable expectation of securing some consideration for the plea, they may not get one. See PROMIS STUDY, *supra* note 33, at 43; Shin, *Do Lesser Pleas Pay?: Accommodations in the Sentencing and Parole Processes*, 1 J. CRIM. JUST. 27, 36-42 (1973) (actions of parole board may negate bargain by delaying release date). Given the widespread practice of prosecutorial overcharging, charge reductions often create the appearance of a bargain when in fact the defendant receives a sentence no different from what would follow conviction at trial.

Finally, that definition of plea-bargaining does not specify which criminal justice official makes the explicit or implicit offer. For example, prosecutors who claim they have abolished plea-bargaining in their jurisdiction are actually referring to explicit prosecutorial bargaining with defense counsel for charge or sentencing considerations. But implicit plea-bargaining still occurs as long as defendants believe they may be treated more leniently if they plead guilty. See L.E.A.A. STUDY, *supra* note 26, at 7.

309. See Note, *The Unconstitutionality of Plea-Bargaining*, 83 HARV. L. REV. 1387, 1395-411 (1970); U.S. NATIONAL ADVISORY COMM. ON CRIM. JUSTICE STANDARDS AND GOALS, COURTS 46-49 (1973).

310. See Alschuler, *supra* note 13, at 5. See generally R. MOLEY, POLITICS AND CRIMINAL

in all cases unless we are willing to commit far more resources than are presently allocated to our criminal justice system.³¹¹ If a jurisdiction that relies on plea-bargaining to secure ninety percent of its convictions decided to cut that reliance to eighty percent, the number of trials would double³¹² and trials are far more expensive and time consuming than guilty pleas for all parties concerned.³¹³ In large urban districts like New York City,³¹⁴ the criminal justice system would collapse if plea-bargaining were abolished.

Even if we could abolish plea-bargaining,³¹⁵ we should not. Guilty pleas reduce the delay between arrest and punishment, avoid costly trials in uncontested cases, and increase the finality with which the criminal sanction is imposed. Moreover, plea-bargaining would not subvert our system's legal guilt requirements if sufficient safeguards were provided in the pretrial process to ensure that the parties bargained on equal footing and the resulting plea reliably approximated the trial's probable outcome.³¹⁶

2. *Inquisitorial Reforms — The Investigatory Magistrate and the Non-Adversarial Trial*

Those who would abolish plea-bargaining see the adversarial

PROSECUTION 149-92 (1929); Friedman, *Plea Bargaining in Historical Perspective*, 13 LAW & SOC. REV. 247 (1979); Miller, *The Compromise of Criminal Cases*, 1 S. CAL. L. REV. 1 (1927).

311. To suggest that we cannot afford trials in all cases does not mean the rise of plea-bargaining as the dominant method of guilt determination can be explained purely in economic terms. See, e.g., Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC. REV. 261 (1979).

312. See Burger, *State of the Judiciary*, 56 A.B.A.J. 929, 931 (1970).

313. For example, a California study found that state jury trials took 24.2 hours on the average and cost the state over \$3,000. Guilty pleas, which require far less preparation time for defense counsel and prosecution, were processed in about 15 minutes and cost \$215. See PROMIS STUDY, *supra* note 33, at 51.

314. However, recent statewide data compiled in a national study on plea-bargaining suggest that "the population of the jurisdiction may not be related to the guilty plea rate." L.E.A.A. STUDY, *supra* note 26, at 18. Substantial differentials in the guilty plea rates of different jurisdictions with comparable populations within the same state suggest that higher trial rates might be possible without increasing costs. *Id.* at 23.

315. Reports of the death of plea-bargaining in certain jurisdictions have been greatly exaggerated. In many jurisdictions, explicit charge or sentencing bargaining by the prosecutor's office has been sharply curtailed but implicit bargaining still occurs. See *id.* at 8-15.

316. See Church, *supra* note 65. Church argues that plea-bargaining need not subvert rational sentencing goals or coerce the defendant to waive the right to trial if the system includes four requirements:

- (1) The defendant must always have the alternative of a jury trial at which both verdict and sentence are determined and can be justified solely on the merits of the case.
- (2) The defendant must be represented throughout negotiations by competent counsel.
- (3) Both defense and prosecution must have equal access to all available information likely to bear on the outcome of the case should it go to trial.
- (4) Both should possess sufficient resources to take the case to trial if an acceptable agreement does not result from the negotiations.

Id. at 512-13.

trial as the solution to our current problems. Other scholars see the adversarial process as the cause of our present ills, not their solution.³¹⁷ They charge that instead of admitting that the adversarial trial is too cumbersome to process a high volume of cases with limited resources, our system preserves the accusatorial model in form while relying in substance upon an inadequate nontrial procedure — plea-bargaining. One consequence of this “subterfuge”³¹⁸ is that our informal procedures provide less protection of our system’s legal guilt requirements than could be achieved by developing a more workable system to adjudicate guilt. While our formal system reflects accusatorial values, our informal procedures rely primarily on the official determination of guilt made by state officials, a basic characteristic of inquisitorial systems.³¹⁹ But the dominant official in our system is the prosecutor,³²⁰ whereas inquisitorial systems rely more on judicial officials to ensure that guilt will be determined in a manner that satisfies the substantive and procedural goals of the systems.³²¹

Proponents of the inquisitorial model suggest that we explicitly abandon the adversarial system and replace it with some of the best features of continental criminal procedure. Professor Weinreb has proposed that we strip the police of all investigatory powers beyond those incidental to their peace-keeping and emergency functions.³²² He would also divest the prosecutor of all investigatory, accusatory, and adjudicative duties.³²³ A judicial officer, the investigatory magistrate,³²⁴ would assume all of those powers. Patterned after France’s *juge d’instruction*, the investigating magistrate would conduct an official inquiry to determine whether the accused is guilty, considering any probative evidence and questioning the accused in a noncoercive manner. A defense attorney and the prosecutor would

317. See L. WEINREB, *supra* note 12, at 82; Langbein, *supra* note 12, at 20-21.

318. Langbein, *supra* note 12, at 20-21:

But subterfuges are intrinsically overbroad, precisely because they are not framed in a careful, explicit, and principled manner directed to achieving a proper balance between repression and safeguard. The upshot is that the criminal justice system is saddled with a lower level of safeguard than it could and would have achieved if it had not pretended to retain the unworkable formal system.

319. See notes 4-5 *supra*.

320. Our criminal justice system has relied on the trial to check the prosecutor’s broad powers. The trial also insured a proper division of responsibilities, as the prosecutor would be responsible for the charging decision, the jury would adjudicate the defendant’s guilt, and the judge would determine the appropriate sentence. Plea-bargaining merges all of these functions and delegates them to the prosecutor. See Langbein, *supra* note 12, at 18.

321. *Id.*

322. L. WEINREB, *supra* note 12, at 118-19.

323. See note 320 *supra*.

324. L. WEINREB, *supra* note 12, at 122-31.

suggest witnesses or lines of inquiry. Thus, instead of two partisan investigations designed to produce evidence favorable to a particular party, one official investigation would determine the truth.³²⁵ The magistrate would prepare a complete evidentiary record (a dossier) to substantiate all findings. Prosecutorial discretion in filing charges would be eliminated as the magistrate would make all charging decisions. Instead of a prosecutor bringing the most serious charges that could possibly apply, the magistrate would formally accuse only if convinced beyond a reasonable doubt of the defendant's guilt for the specific crime charged.³²⁶

Once the magistrate concluded the investigation and filed charges, Weinreb and Langbein³²⁷ suggest that the case should proceed quickly to a nonadversarial trial. Plea-bargaining would be abolished.³²⁸ The charge would reflect the crimes for which the state sought conviction, and a defendant's confession would not negate the state's obligation to adjudicate guilt fairly and carefully at trial. A presiding judge would direct the presentation of evidence. The defense attorney and the prosecutor would advise the court by suggesting witnesses, lines of inquiry, and ways to interpret the evidence. A mixed panel of professional and lay members would then adjudicate the defendant's guilt.³²⁹

If such inquisitorial safeguards function as advertised, they are attractive because they provide for lay participation in a neutral body that adjudicates the defendant's guilt. However, I must agree with Dean Norval Morris that these proposals do not offer a politically realistic solution to our present dilemma because their enactment would require a radical restructuring of our entire criminal process.³³⁰ Although our system already contains inquisitorial elements,³³¹ these inquisitorial reforms would alter the traditional legal roles of the American prosecutor³³² and the defense counsel by dras-

325. *Id.* at 133.

326. *Id.* at 134-37.

327. See Langbein, *supra* note 12, at 22. See generally J. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* (1977); Langbein & Weinreb, *supra* note 38.

328. See L. WEINREB, *supra* note 12, at 138.

329. *Id.* at 137-44.

330. Morris, *supra* note 41, at 1368-69.

331. See Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 *STAN. L. REV.* 1009, 1018 (1974).

332. For example, the effectiveness of West Germany's compulsory prosecution rule, which requires the prosecutor to bring charges for which there is a sufficient factual and legal basis, rests in part upon the special career role and training of the West German prosecutor. The prosecutorial staff is "a career service with strictly meritocratic promotion standards." Langbein, *Land Without Plea Bargaining — How the Germans Do It*, 78 *MICH. L. REV.* 204, 211 (1979). "German prosecutors undergo periodic departmental review on a variety of fac-

tically curtailing their powers and importance. Moreover, the career patterns and training of our judiciary would have to change because we presently have no analogue to the career role of the European judiciary.³³³ As Morris has remarked, "the outcry from those who have settled themselves into careers based on the old procedural system would coalesce with the force of general institutional inertia to make such reforms unlikely."³³⁴

At the very least, proponents of such radical change bear the burden of persuading the body politic that the inquisitorial safeguards function as described. The current academic controversy over those safeguards' effectiveness in controlling police investigations and limiting prosecutorial discretion suggests that this burden has not yet been met.³³⁵ While proponents insist that their description of inquisitorial procedures is not idealized,³³⁶ other scholars have concluded that the pure inquisitorial model describes the continental systems' processing of most cases no more accurately than the due process, accusatorial model describes our system's performance.³³⁷

tors including dispatch in handling caseloads (including dismissals as well as prosecution); intra-office relations; legal analysis and drafting; and avoidance of judicial rebuke and citizen complaint." *Id.* at 217. Citizen complaints may occur where the victim of a crime challenges the prosecutor's decision not to prosecute. The victim of the crime may first obtain departmental review of the prosecutor's no-go decision. If the department supports the prosecutor, the citizen may then appeal to the courts to compel the prosecution. The prosecutor's desire to keep his personnel record free of citizen complaints or judicial rebuke provides a strong incentive to abide by the compulsory prosecution rule.

While Langbein concedes that the American system lacks "the procedural institutions" that would permit adoption of a compulsory prosecution rule, he stresses the absence of a "workable trial procedure" as the major procedural obstacle to implementing such a rule. *Id.* at 212. However, the American system also lacks the institutional analogue to the West German prosecutorial system itself. Moreover, serious constitutional questions concerning the separation of powers doctrine would be posed by any reform that empowered American courts to compel the prosecutor to bring a prosecution. *See Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973).

333. Morris, *supra* note 41, at 1369.

334. *Id.*

335. Compare Goldstein & Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L.J. 240 (1977), with Langbein & Weinreb, *supra* note 38.

336. Professor Langbein has cited West Germany's system as an example of how "advanced industrial societies can institute efficient criminal procedures that nevertheless provide for lay participation and for full adjudication in every case of serious crime." Langbein, *supra* note 12, at 21. Although no plea-bargaining occurs for serious crimes, confessions are still tendered "not because they are rewarded, but because there is no advantage to be wrung from the procedural system by withholding them." *Id.* at 22. While such confessions abbreviate the time of the trial, trials without confessions do not take appreciably greater time because the procedure is "shorn of all the excesses of adversary procedure and the law of evidence." *Id.*

337. *See* Goldstein & Marcus, *supra* note 335. The authors contend that the pure inquisitorial model greatly exaggerates the role of judicial supervision in the pretrial process for most cases. In France, the *juge d'instruction's* examination is mandatory only for serious crimes. In the vast majority of criminal prosecutions for less serious offenses called *délits*, the prosecutor has the discretion to order a judicial examination but rarely exercises it. The prosecutor can also circumvent the mandatory examination for serious crimes by treating them as *délits*. For

That discrepancies may exist between the inquisitorial model and its day-to-day functioning should not be surprising. With the exception of Professor Herbert Packer's crime control model,³³⁸ models of

example, the authors report that in 1971 only 14.5% of all crimes and *délits* were considered by a *juge d'instruction*. *Id.* at 250-51. Moreover, they claim that the inquisitorial model exaggerates the degree of judicial control exercised over the police's investigation for those cases that receive judicial examination. They suggest that in most cases the investigation is completed by the police before the case is sent to the *juge d'instruction*. Even where the investigation has not been completed before it is sent to the *juge d'instruction*, a judicial examination

generally means only that a judge must formally authorize certain aspects of the criminal investigation in advance — for example, the length of the detention, the interrogation, the search, the medical tests. But . . . this authorization often occurs after the fact and confirms the validity of "informal" measures already taken by the police. The judge's investigative role, therefore, is essentially reactive and interstitial.

Id. at 250. Thus the "overwhelming proportion of *délits* is likely to proceed to trial with a dossier that is little more than a police report," *id.* at 255, because the judges do not carefully screen the dossiers to determine whether the charges were supported by sufficient evidence.

Id. at 263. Given these findings, the authors contend that pretrial judicial supervision in most cases does not function as effectively as its proponents suggest. *Id.* at 263-64. Indeed, they conclude that "[i]n Continental systems, as in ours, truth is pursued in most cases in much the same way: police gather facts, put them into a file, and through processes of acquiescence and consensus, the file and the prosecutor's characterization of it usually govern the result." *Id.* at 280-81.

Goldstein and Marcus also argue that the absence of careful judicial pretrial screening is not cured by the nonadversarial trial that follows. While the inquisitorial model assumes that the court will aggressively pursue the truth, "genuinely probing trials take place only in those few cases in which the defendant actively contests the charges against him." *Id.* at 265. For the majority of cases where the defendant admits guilt or does not contest culpability, the nonadversarial trial offers a public recapitulation of the dossier's findings. *Id.* at 266. In France, the presiding judge at the correctional court that hears all *délits*, *id.* at 250-51, need not call witnesses if their statements are contained in the dossier. *Id.* at 266 & n.26. In Germany, the defendant can secure a noncustodial sentence by admitting the commission of a minor offense. The defendant can then be dealt with by a "penal order" that allows the court to convict without any trial at all. "At least one-half of all criminal cases are disposed of by this direct analogue of the American guilty plea." *Id.* at 267. In other words, implicit bargaining can and does occur because defendants know that they can receive more lenient treatment when their cooperation enables the prosecutor to handle the case summarily. *But see* Langbein, *supra* note 332. Langbein argues that the analogy between American plea-bargaining and the nonpenal order is exceedingly misleading. First, the nonpenal order only applies to those misdemeanor prosecutions where imprisonment is not an issue. Second, it lacks the most coercive aspect of American plea-bargaining: the sentencing differential between conviction by plea and conviction after trial. While the West German prosecutor is not formally precluded from recommending a stiffer penalty after trial than that offered in a penal order that the accused rejected, interviews with German defense counsel, prosecutors, and judges provide no evidence that such a sentencing differential exists. *Id.* at 215.

338. As Professor Goldstein points out, Packer's crime control model "is less a procedural model than a general tendency to resist legal restraints in the pursuit of highly desired ends." Goldstein, *supra* note 331, at 1015. Its major goal is to repress criminal conduct by applying the criminal sanctions to defendants that the police and prosecutor determine are probably factually guilty. While it describes some central themes of how our pretrial process determines guilt in most cases, it does not present a completely accurate picture.

While factual guilt concerns predominate, pretrial officials will consider legal guilt requirements at least informally. Even if the legality of police conduct in securing evidence is not litigated, defense counsel may use the possibility of raising a successful suppression motion to get a more lenient bargain from the prosecutor. Although the prosecutor is not required to present a *prima facie* case of legal guilt to the grand jury, many conscientious prosecutors will not seek indictments unless they can satisfy such a standard. Courts can rely on a defendant's admission to an offense to satisfy the factual basis requirement, but a few courts have inquired into possible constitutional violations, *see* *Clicque v. United States*, 514 F.2d 923 (5th Cir.

criminal procedure usually describe how guilt is adjudicated when a case receives the full process of the system. But no system of justice has the resources necessary to vindicate the principles of its full process in all prosecutions. The inquisitorial principles of compulsory prosecution and judicial supervision, as well as the accusatorial principle of an adversarial adjudication, demand the impossible. "Inevitably, adjustments must be made in the way in which the principle is to be applied; where formal law or ideology does not permit these adjustments, informal processes are created that do."³³⁹

Our present models of criminal procedure inadequately describe how informal processes compromise the system's principles. Accordingly, institutional reform cannot be simplistically reduced to a choice between alternative models. The strong inquisitorial themes in our pretrial system should not compel us to borrow inquisitorial safeguards or to purify our accusatorial model by requiring adversarial trials in all cases.

Since any criminal justice system must compromise principles that would be vindicated through its full process, the critical question for reformers is how to mold a more summary process of guilt adjudication that accommodates the competing concerns of repressing criminal conduct and respecting individual rights. The next Subsection and Section V propose reforms that use existing pretrial procedures to provide greater protection of our system's legal guilt requirements without sacrificing some of the valuable benefits of plea-bargaining such as speed, efficiency, and finality.

B. *Reforming Pretrial Procedures*

To protect accusatorial values, the government should be required to present reliable evidence of a defendant's factual and legal guilt to a neutral screener when it files charges. Such a requirement would limit the prosecutor's discretion in filing charges. It would also prevent the state from imposing the indictment's moral stigma, economic sanctions, and potential loss of liberty upon defendants who could not be convicted at trial. Finally, this requirement would preclude conviction without adjudication because the state would be forced to make an independent and reliable demonstration of the defendant's guilt before securing the defendant's conviction through plea-bargaining.

Because few people take the grand jury's screening function seri-

1975), or affirmative defenses, *see* Carreon v. United States, 578 F.2d 176, 179 (7th Cir. 1978), before accepting the plea.

339. Goldstein & Marcus, *supra* note 335, at 280.

ously,³⁴⁰ most commentators³⁴¹ have selected the preliminary hearing as the ideal forum to effectuate these types of reforms. The magistrate would protect defendants who could not be convicted at trial by applying a "reasonable cause"³⁴² standard. A finding of reasonable cause would be an adequate substitute for full adjudication at trial because the adversarial hearing would permit the defendant to expose flaws in the prosecution's case. The magistrate would also be able to determine whether the state had complied with other relevant legal guilt requirements.³⁴³ Finally, the preliminary hearing would offer the defendant an opportunity to discover the prosecution's case, preserve the testimony of witnesses,³⁴⁴ and, if transcribed, provide an evidentiary foundation for a subsequent guilty plea.

This reform would require major changes in how most jurisdic-

340. See notes 385-86 *infra* and accompanying text.

341. See, e.g., MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 330.1 (1975) (defendant's right to preliminary hearing cannot be preempted by indictment); Anderson, *The Preliminary Hearing — Better Alternatives or More of the Same?*, 35 MO. L. REV. 281, 284-86 (1970); Graham & Letwin, *supra* note 18; Robison, *The Determination of Probable Cause in Illinois — Grand Jury or Preliminary Hearing*, 7 LOY. CHI. L.J. 931 (1976); Weinberg & Weinberg, *The Congressional Invitation to Avoid the Preliminary Hearing: An Analysis of Section 303 of the Federal Magistrates Act of 1968*, 67 MICH. L. REV. 1361, 1368-79 (1969); Comment, *The Preliminary Examination in the Federal System: A Proposal for a Rule Change*, 116 U. PA. L. REV. 1416 (1968).

342. To find reasonable cause, the magistrate must find sufficient evidence to support a guilty verdict and find it credible. See MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 330.6(3) (1975). Therefore, reasonable cause is a more stringent screening standard than the directed-verdict test that requires the screener to consider the evidence in the light most favorable to the government.

Both the directed verdict and reasonable cause standards protect legally innocent defendants because they evaluate the legal sufficiency of the government's evidence. I believe the reasonable cause standard should be used because it empowers magistrates to make their own credibility judgments. Since the preliminary hearing will be the only opportunity for adjudication of most defendants' legal guilt in information jurisdictions, the presiding official should be able to resolve factual disputes that involve credibility questions. See *Jones v. Superior Court*, 4 Cal. 2d 660, 666, 483 P.2d 1241, 1244-45, 94 Cal. Rptr. 289, 293-94 (1971) (magistrate can properly dismiss rape charges when he believes defendant's testimony that the prosecutrix had consented despite contrary account given by prosecutrix); *Myers v. Commonwealth*, 363 Mass. 843, 853, 298 N.E.2d 819, 826 (1973). Cf. Thaler, *Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial*, 1978 WIS. L. REV. 441. Thaler proposes a "probable guilt" hearing whose purpose "is to obtain a more accurate determination of legal guilt before an accused can be further detained for trial." *Id.* at 473-74. At this hearing, "the state must show by clear and convincing evidence that there is a substantial likelihood of conviction." *Id.* at 474.

Unlike my proposal, which seeks to improve the quality of pretrial adjudication of legal guilt for all prosecutions, Thaler is more concerned with protecting the due process rights of defendants who are incarcerated before trial. Therefore, his probable guilt hearing does not replace the preliminary hearing and is only held for those who remain incarcerated after their bail has been determined. *Id.* at 481-82.

343. For example, the magistrate could rule on suppression motions before the start of the preliminary hearing. If evidence was suppressed, the magistrate would not consider it in determining whether the government had sufficient evidence to hold the defendant for trial. See MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 330.3 (1975); Note, *supra* note 60, at 780.

344. See notes 60-62 *supra*.

tions conduct their preliminary hearings. As Section I noted, the federal preliminary examination presently screens only factual guilt.³⁴⁵ Unrestricted by rules of evidence, the hearing determines only whether there is probable cause to hold the defendant for further action. While most states use the preliminary examination as their major pretrial screening device, many use the same probable-cause-to-arrest standard employed at the federal level³⁴⁶ and therefore do not apply the rules of evidence to the hearing.³⁴⁷ Obviously, the preliminary hearing cannot protect legal guilt requirements if it applies such a minimal factual guilt standard.

Accordingly, most *state* jurisdictions would have to adopt the following reforms if they wished to use the preliminary hearing as a legal guilt screening device:

- (1) Apply the rules of evidence, with certain limited exceptions, to the hearing.³⁴⁸
- (2) Permit the defense to raise suppression motions before or during the hearing so the magistrate's screening decision is not influenced by illegally seized evidence.³⁴⁹
- (3) Require the prosecutor to present credible³⁵⁰ evidence on every element of the crime (the reasonable-cause standard).³⁵¹

345. See text at notes 94-98 *supra*.

346. The quantum of evidence of the screening standard applicable to the preliminary hearing is usually stated in terms of probable cause but is not further defined. Because the same term is used to state the standard applicable to arrests and because the hearing often serves the function of reviewing the legality of the arrest in addition to screening cases for trial, the two standards are often confused and many courts apply the arrest standard to the preliminary hearing.

MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 330.5, at 596-97 (1975). See generally Note, *The Rules of Evidence as a Factor in Probable Cause in Grand Jury Proceedings and Preliminary Examinations*, 1963 WASH. U. L.Q. 102, 119-24.

347. See Comment, *Preliminary Examination — Evidence and Due Process*, 15 KAN. L. REV. 374, 376-77 (1967). Cf. F. REMINGTON, D. NEWMAN, E. KIMBALL, M. MELLI & H. GOLDSTEIN, *CRIMINAL JUSTICE ADMINISTRATION* 563 (1969) (citing an American Bar Foundation report that concludes that rules of evidence are generally applied regardless of whether they are formally required by law).

348. See *Myers v. Commonwealth*, 363 Mass. 843, 849 n.6, 298 N.E.2d 819, 824 n.6 (1973); Note, *supra* note 60, at 779-80. While the rules of evidence should generally apply so the magistrate can evaluate legal guilt, exceptions could be made. For example, hearsay evidence may be admitted if the magistrate determines that it is reliable, that it would be unduly burdensome to produce the primary evidence at the hearing, and that competent evidence would be presented at trial to provide the testimony furnished by the hearsay. See MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 330.4(4) (1975). See also N.Y. CRIM. PROC. LAW. §§ 180.60(8), 190.30(2) (McKinney Supp. 1979) (permitting the admission of certain scientific reports). However, mere inconvenience should not by itself justify admitting a hearsay account of a critical government witness's testimony that is contested by the defendant. Otherwise, the defendant's confrontation rights would be easily nullified.

349. See *State v. Jacobsen*, 106 Ariz. 129, 130, 471 P.2d 1021, 1022 (1970); *Priestly v. Superior Court*, 50 Cal. 2d 812, 815, 330 P.2d 39, 41 (1958); *People v. Walker*, 385 Mich. 565, 574-75, 189 N.W.2d 234, 238-39 (1971). See also MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 330.3 (1975).

350. See note 356 *infra*.

351. See note 342 *supra*.

- (4) Permit defendants to cross-examine the government's witnesses,³⁵² subpoena witnesses,³⁵³ and present testimony in their own behalf,³⁵⁴ including evidence of an affirmative defense.³⁵⁵
- (5) Permit dismissal of the charges if the magistrate disbelieves the prosecution's essential witnesses.³⁵⁶

The major obstacles to implementing these reforms are their expense, the pretrial delay they might generate, and the administrative burdens they would impose on prosecutors, defense counsel, and the courts. While proponents of these reforms can point to the successful experience of those states³⁵⁷ that use their preliminary hearing to screen legal guilt, essential differences between state and federal pretrial screening systems make these reforms far less feasible for the federal system.

1. State Reform — Remodeling the Preliminary Hearing

Since most states already rely on the preliminary hearing to screen most criminal prosecutions,³⁵⁸ using it and not the grand jury to protect legal guilt requirements before trial makes considerable

352. Most jurisdictions permit defendants to cross-examine government witnesses, but some do not permit them to confront witnesses not called by the prosecution. Note, *supra* note 60, at 778 n.28.

353. See MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 330.4(5) (1975). *But see* Note, *The Preliminary Hearing — An Interest Analysis*, 51 IOWA L. REV. 164, 170 (1965) (While the accused has the right to introduce witnesses in his own behalf, a controversy exists as to whether the accused has the right to have witnesses summoned. To circumvent the problem, some courts have held that magistrates lack authority to subpoena witnesses).

354. See CAL. PENAL CODE § 866 (West 1970); FED. R. CRIM. P. 6.1; MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 330.4(5) (1975); Note, *supra* note 60, at 781.

While many jurisdictions permit the defendant to offer testimony, this right may be negated in practice. Some magistrates end the hearing at the close of the government's case because they are satisfied that the government has established probable cause. *See id.* at 777-78 n.27. This proposal would prohibit that practice as the magistrate would be required to consider all evidence including any presented by the defendant. *See Myers v. Commonwealth*, 363 Mass. 843, 851, 298 N.E.2d 819, 824 (1973).

355. *See Jennings v. Superior Court*, 66 Cal. 2d 867, 879-80, 428 P.2d 304, 312-13, 59 Cal. Rptr. 440, 448-49 (1967) (entrapment); *Myers v. Commonwealth*, 363 Mass. 843, 851, 298 N.E.2d 819, 825 (1973); MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 330.4(5) (1975); Note, *supra* note 60, at 781.

356. Defendants' right to cross-examine government witnesses or introduce evidence on their own behalf, including affirmative defenses, would serve little purpose if the magistrate was precluded from making any credibility judgment. *See* Note, *supra* note 60, at 782-83. *See also Myers v. Commonwealth*, 363 Mass. 843, 851, 298 N.E.2d 819, 825-26 (1973). The hearing should not only assure the legal sufficiency of the charge but also preliminarily adjudicate the defendant's guilt. Thus, magistrates must have the power to dismiss a charge where they disbelieve testimony that would satisfy a directed-verdict standard.

357. Massachusetts has adopted all of these reforms. *See Myers v. Commonwealth*, 363 Mass. 843, 298 N.E.2d 819 (1973). California's preliminary examination approximates this model.

358. *See* note 43 *supra*. Even in those jurisdictions that require prosecution by indictment for all felonies, defendants usually receive a preliminary hearing before their case is considered by a grand jury. While most state courts have held that the return of the indictment eliminates the need for the preliminary hearing, *see, e.g., Lataille v. District Court*, 366 Mass.

sense. Since preliminary examinations already take place in most cases, requiring them for all prosecutions would not impose intolerable financial or administrative burdens.³⁵⁹ Furthermore, the grand jury's screening function would be duplicated only in the few cases that were initiated by indictment. Therefore, the only significant obstacles to this reform would be the timing of the hearing and the added costs of expanding the hearing's scope, both of which appear surmountable.

a. *Timing*

Most jurisdictions require a preliminary examination soon after arrest³⁶⁰ so that the magistrate can promptly determine the legality of the defendant's custody. At first glance, this seems to pose a problem: the later the hearing, the less fourth amendment protection it provides,³⁶¹ but a hearing held promptly after arrest might prevent the prosecutor from preparing an adequate case of legal guilt. Nevertheless, both these timing concerns may be accommodated. The fourth amendment could be satisfied by the magistrate's *ex parte* finding of probable cause for arrest at the defendant's initial appearance.³⁶² A defense attorney wishing to challenge the arrest could

525, 320 N.E.2d 877 (1974); *State v. Boykin*, 113 N.J. Super. 594, 274 A.2d 620 (Law Div. 1971).

[S]tate prosecutors generally do not follow the common federal practice of "mooting" almost all scheduled preliminary hearings by obtaining a prior indictment. In many jurisdictions that practice would not be feasible since the grand jury is not available for prompt consideration of requested charges In other jurisdictions, where grand jury review would be available at the same point as the preliminary hearing, the hearing presumably is not mooted because of its significant screening role.

Y. KAMISAR, W. LAFAVE & J. ISRAEL, *supra* note 43, at 975.

Accordingly, my proposal to use the preliminary hearing to screen legal guilt applies to all those indictment jurisdictions where preliminary hearings are held before indictment in the majority of prosecutions. To avoid duplicated screening, the defendant's election to receive a preliminary hearing should waive the right to grand jury screening unless indictment by grand jury is a jurisdictional requirement that cannot be waived. *See* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 330.1(3) (1975).

359. The California Supreme Court has held that all inditees are entitled to post-indictment preliminary hearings to insure that inditees receive the same procedural rights accorded to defendants who are charged by an information followed by a preliminary hearing. *Hawkins v. Superior Court*, 22 Cal. 3d 584, 586 P.2d 916, 150 Cal. Rptr. 435 (1978). In a concurring opinion, Justice Mosk noted that such a requirement would not be unduly burdensome to the state because only 3.9% of felony filings were prosecuted by indictment in California. "The actual duplication of prosecutorial effort and administrative burden resulting from providing indicted defendants with a preliminary hearing would thus be minimal." 22 Cal. 3d at 606, 586 P.2d at 930, 150 Cal. Rptr. at 449.

360. *See, e.g.*, MASS. ANN. LAWS ch. 276 § 38 (Michie/Law. Co-op. 1968) (the hearing must be held "as soon as may be" after the defendant's initial appearance); WIS. STAT. § 970.03(2) (1977) (hearing must be held within 10 days of the defendant's initial appearance if in custody; within 20 days otherwise).

361. *See* note 90 *supra* and accompanying text.

362. *See* *Gerstein v. Pugh*, 420 U.S. 103, 123-25 (1975).

still do so at the preliminary examination. Moreover, in routine state prosecutions,³⁶³ neither the prosecutor nor the defense attorney should need more than twenty days to prepare for the preliminary hearing.

b. *Administrative burdens*

A more serious objection is that this proposal would convert the preliminary examination into a mini-trial, imposing intolerable administrative burdens on the courts and generating further delay. But the fear of turning preliminary hearings into mini-trials is unfounded: tactical considerations would usually lead defense attorneys to use the hearing as a discovery mechanism.³⁶⁴ Most defendants do not present a defense at the preliminary hearing because they do not want to disclose their case to the prosecutor or expose their witnesses to searching cross-examination.³⁶⁵ The experience of those few jurisdictions that use their hearings to screen legal guilt suggests that the added costs and delay are tolerable.³⁶⁶

363. A more serious objection might arise in complex criminal prosecutions: an early hearing that screens legal guilt may deter prosecutors from arresting any suspects until they have developed a prima facie case. But since the prosecutor will probably be involved in the investigation of such complex cases, this delay really does not prejudice the prosecutor.

364. See F. BAILEY & H. ROTHBLATT, *SUCCESSFUL TECHNIQUES FOR CRIMINAL TRIALS* 18-19 (1971).

365. See *California v. Green*, 399 U.S. 149, 197 (1970) (Brennan, J., dissenting); *Myers v. Commonwealth*, 363 Mass. 843, 856, 298 N.E.2d 819, 829 (1973); 8 MOORE'S FEDERAL PRACTICE ¶ 5.102[3], at 5.1-12 (rev. 2d ed. 1979).

366. For example, California municipal courts handled 48,601 felony filings in 1965-1966. 16,200 cases were disposed of by guilty pleas or dismissals without any hearing. 31,896 involved hearings at which the defendant did not contest the state's evidence. *People v. Gibbs*, 255 Cal. App. 2d 739, 743 n.2, 63 Cal. Rptr. 471, 475 n.2 (1967).

Admittedly, these statistics do not conclusively demonstrate the preliminary hearing's suitability for screening legal guilt for several reasons. First, they refer to a time period when indicted defendants had no right to a preliminary hearing. Accordingly, California could expect at least a 4% increase in the number of hearings after its decision that mandated post-indictment preliminary hearings. See *Hawkins v. Superior Court*, 22 Cal. 3d 584, 586 P.2d 916, 150 Cal. Rptr. 435 (1978). But this minimal increase in the number of hearings conducted is not the only cost. California prosecutors often use indictments in complex criminal prosecutions with multiple defendants. 22 Cal. 3d at 606, 586 P.2d at 930, 150 Cal. Rptr. at 449 (Mosk, J., concurring). Therefore, "the relatively small number of indictments might yield a disproportionate increase in consumed court time because complex cases . . . would require relatively lengthy adversary hearings." 22 Cal. 3d at 606, 586 P.2d at 930, 150 Cal. Rptr. at 449 (Mosk, J., concurring).

Justice Mosk suggested that those additional burdens might be offset by the fact that these hearings "would likely yield a greater number of dismissals or guilty pleas as the parties would have a superior opportunity to appraise the relative strengths and weaknesses of their positions." 22 Cal. 3d at 606, 586 P.2d at 930, 150 Cal. Rptr. at 449 (Mosk, J., concurring). Moreover, the rules governing the conduct of the preliminary hearing can alleviate this concern. For example, hearsay testimony could be used under certain limited circumstances to remove undue inconvenience or unnecessary delay. See note 347 *supra*. Cf. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 330.4(6) (1975) (court can promote expeditious hearing by limiting length of examination and the number of witnesses to be called).

Even if these safeguards limiting the scope of the hearing prove ineffective and the result-

2. Federal Reform

Using the federal preliminary examination to screen legal guilt faces similar objections of expense, administrative burden, and pre-trial delay, but the objections carry far greater force. Unlike most states, the federal system relies primarily on the grand jury, and not the preliminary hearing, to screen prosecutions because the fifth amendment³⁶⁷ requires that all federal prosecutions for felonies commence by indictment.³⁶⁸ In contrast to most states,³⁶⁹ only about twenty percent of federal prosecutions involve preliminary examinations because³⁷⁰ most defendants are indicted before the hearing is

ing administrative burdens are not offset by an increase in dismissals or guilty pleas, increasing the scope of the hearing would probably not impose intolerable costs and delay. Expanding the hearing's scope might demand more preparation time by the prosecutor and the defense attorney and increase the time spent at the hearing by all participants. But a significant increase in the number of hearings would be far more expensive because of the increased need for prosecutors, defense counsels, and judges.

I have not discovered any empirical data that compares the expense and duration of preliminary hearings that screen factual guilt (probable cause) with those that screen legal guilt (directed verdict). My own observations as a criminal defense attorney in Massachusetts before and after *Myers v. Commonwealth*, 363 Mass. 843, 298 N.E.2d 819 (1973), lead me to conclude that the additional time and expense is not unduly burdensome. Before *Myers*, some district court judges conducted the preliminary hearing like its federal counterpart. Police officers gave hearsay summaries of the prosecution's witnesses over the defense counsel's objections. Some judges would end the hearing before the defense had an opportunity to cross-examine witnesses or introduce testimony. After *Myers*, those practices were clearly illegal. Accordingly, preliminary hearings in these courts were somewhat longer because the court could not end the hearing prematurely after testimony of one government witness. However, defense counsel rarely raised affirmative defenses. Indeed, defense testimony was rarely offered. Post-*Myers* hearings were somewhat longer than pre-*Myers* hearings because defense counsel had a greater opportunity to discover the prosecution's case.

367. See note 45 *supra*.

368. The fifth amendment requires indictment for all "infamous" crimes. FED. R. CRIM. P. 7(a) equates an infamous crime with an offense punishable by imprisonment for a term exceeding one year. See FED. R. CRIM. P. 7(a), Advisory Comm. Note 1. All crimes punishable by a term of imprisonment exceeding one year are felonies; all other crimes are misdemeanors. While the fifth amendment does not require indictments for misdemeanors, prosecutors may commence prosecutions for misdemeanors by either indictment or information. See FED. R. CRIM. P. 7(a).

The indictment requirement for felonies cannot be waived in a capital case. See *Smith v. United States*, 360 U.S. 1 (1959). Defendants are permitted to waive the indictment requirement for other felonies, see *Barkman v. Sanford*, 162 F.2d 592 (5th Cir.), *cert. denied*, 332 U.S. 816 (1947), and defendants who have decided to plead guilty frequently do waive indictment. See 8 MOORE'S FEDERAL PRACTICE ¶ 7.03(1), at 7-9 (rev. 2d ed. 1979). The prosecutor may proceed by filing an information for any misdemeanor and any noncapital felony in which indictment has been waived. *Id.* ¶ 7.02, at 7-7.

369. Many states permit the prosecutor to proceed on an information that will be followed by a preliminary hearing. See note 43 *supra*. Even in some jurisdictions that require an indictment for all felonies, the defendant receives a preliminary hearing before the grand jury considers the case. See note 358 *supra*.

370. In fiscal year 1976, 24,991 criminal prosecutions were commenced by indictment, 12,278 were commenced by information where indictment was waived, and 11,543 were commenced by information. ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, Table 37,254 (1977). Preliminary examinations were conducted in only 5,502 cases. *Id.* at 122. In the Southern District of New York, 1,129 original criminal prosecutions

held and the indictment obviates the need for the hearing.³⁷¹ Therefore, a reform that mandates preliminary hearings for all federal prosecutions would be far more expensive for the federal system than for the states. While some defendants would decide to plead guilty before the hearing, it is unlikely that the hearing's stiffened standard of proof will increase the number of pleas that are presently made before the hearing. Indeed, a more rigorous standard of proof should encourage defendants to delay bargaining until the government passes this preliminary hurdle.³⁷² Any significant rise in the number of hearings held would require a tremendous increase in the prosecutorial, defense, and judicial resources presently expended. This proposal would also clash with Congress's commitment to guarantee federal defendants a speedy trial:³⁷³ pretrial delay would be lengthened by the increased number of preliminary examinations³⁷⁴

(including misdemeanors and petty offenses) were filed, *id.* at 358, Table DIAC, and only one preliminary examination was conducted, *id.* at 293, Table 51.

371. FED. R. CRIM. P. 5(c).

372. *Contra*, Note, *supra* note 60, at 791. The Note argues that the federal preliminary hearing should screen legal guilt. Though conceding that "the expense might well be intolerable," if every felony defendant in the federal system were given such a hearing, the author suggests that most defendants who now plead guilty before trial would probably plead guilty before this hearing was conducted. *Id.* That prediction is based on the author's belief that the government will have little to gain by bargaining once the prosecutor "has gone to the trouble of producing sufficient evidence to avoid a direct acquittal and has generally memorialized its case." *Id.*

That argument ignores several reasons why defendants would exercise their right to a preliminary examination. First, if the hearing is held promptly after arrest and before the case is sent to the grand jury, many defense attorneys will use the hearing as a discovery device to determine the strength of the government's case. Second, although the government may pass this directed-verdict hurdle at the hearing, conviction at trial is not a foregone conclusion. Witnesses might change their testimony; evidence might be lost or suppressed. Moreover, a magistrate's determination at this early stage that there is sufficient evidence of legal guilt to support a conviction does not mean that the same evidence will convince a jury beyond a reasonable doubt. Finally, the strength of the prosecution's case is not the only factor that fosters plea-bargaining. A defendant's plea after the hearing will still spare prosecutors considerable effort and expense preparing for trial. Admittedly, the defendant's negotiating position will be weaker after the prosecutor passes this hurdle, but an incentive to bargain remains.

373. 18 U.S.C. §§ 3161-3174 (1976).

374. *See* note 370 *supra*. Proponents of reform measures such as H.R. 94, which calls for preliminary hearings in all federal prosecutions, have suggested that such a reform is a compromise. They insist that requiring preliminary hearings in all cases would be less time-consuming than those grand jury reform bills that "have suggested 'mini-trials' at which a defendant would have the right to object to the sufficiency of the evidence [.] the admissibility of the evidence, and other legal improprieties before the grand jury . . ." 1977 *Hearings*, pt. 2, *supra* note 108, at 1593 (Memorandum by Alfred M. Little and Martin H. Belsky). Supporters assert that H.R. 94 would not mandate such mini-trials but would rather apply the existing machinery, (the preliminary examination) to insure that the prosecutor has sufficient admissible evidence to proceed to trial. *Id.* That argument overlooks that the existing machinery is rarely used and that using it for most federal prosecutions would dramatically increase pretrial delay.

Ironically, the proponents of H.R. 94 have retained the hearing's probable cause to arrest standard even though they intended the hearing to screen legal guilt. *Id.* at 1593-94.

and by the expanded scope of the hearing.³⁷⁵

Finally, the reform inflicting these costs would duplicate the grand jury's screening function for most federal prosecutions. Since passage of a constitutional amendment abolishing the indictment requirement is unlikely,³⁷⁶ most federal prosecutions would have to pass through both the grand jury and the preliminary hearing. Two full-dress presentations of the prosecution's case are hard to justify.³⁷⁷ If the preliminary hearing preceded the grand jury and the prosecutor's case satisfied the hearing's stringent legal guilt standards,³⁷⁸ why should the prosecutor repeat³⁷⁹ that performance before a lay body that applies a less stringent factual guilt standard?

375. I discounted this problem at the state level because of the routine nature of most state criminal prosecutions. However, the adversarial presentation of a prima facie case of legal guilt for many complex federal crimes (e.g., antitrust, tax, fraud prosecutions) could prove time-consuming. See *1977 Hearings*, pt. 2, *supra* note 108, at 794 (testimony of Bruce Babbitt, Arizona Attorney General), which states in part:

The second area of specific concern is the provision of Section 9 requiring a preliminary hearing, in addition to the present Fifth Amendment requirement of a grand jury indictment for all infamous crimes. The clear effect of this will be to turn the present two step criminal process into a three tiered proceeding. In complex paper cases this extra step, interposing an additional adversary proceeding, will burden both prosecution and courts to the breaking point.

Our office has prosecuted and is presently prosecuting complex fraud cases, often involving the reconstruction of several years of business transactions and accumulated financial records. These cases routinely require a year or more of investigation by many investigators and lawyers aided by the grand jury's subpoena power After indictment, this type of case will then require several months of trial time.

. . . In our experience, complex paper cases cannot be effectively handled through the preliminary hearing route.

Absent the strictures of the Fifth Amendment, many federal cases would probably be more suitable for a preliminary hearing than grand jury action. I believe that in many types of cases both prosecutors and defense counsel would generally agree that the preliminary hearing is a superior alternative.

But in some areas, particularly complex financial cases, the preliminary hearing, as a form of mini-trial, is not feasible. The large case involving multiple defendants, scores of witnesses and literally rooms of paper is a new phenomenon that presents special problems. Few jurisdictions outside the Federal government have experience in this area. The apparent lack of objection from many states to the preliminary hearing proposal of H.R. 94 should not be interpreted as endorsement based on experience with this type of prosecution.

376. Resolutions have been introduced calling for constitutional amendments. H.R. 62 would eliminate the constitutional requirement of the grand jury but permit Congress to authorize investigatory grand juries and to require indictments in certain cases. H.R. 61 would eliminate the indicting grand jury but permit retention of the investigatory grand jury. *1977 Hearings*, pt. 2, *supra* note 108, at 1003. These resolutions have attracted little support in Congress.

377. See *1977 Hearings*, pt. 1, *supra* note 108, at 722 (statement of Benjamin R. Civiletti, Asst. Attorney General, U.S. Dept. of Justice).

378. H.R. 94 makes even less sense since the bill does not purport to change the hearing's minimal probable cause standard. *1977 Hearings*, pt. 2, *supra* note 108, at 1593-94 (memorandum by Alfred M. Nittle and Martin H. Belsky).

379. There would not be duplication in every prosecution because more defendants would waive indictment once the prosecution had passed the preliminary hearing's more stringent hurdle. *But cf.* A. AMSTERDAM, B. SEGAL & M. MILLER, *TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES* § 156 (2d ed. 1971) (generally recommending against waiver even when indictment is a virtual certainty).

Conversely, the value of the grand jury would be seriously diminished if a magistrate could veto its findings after seeing an identical evidentiary presentation.

Proponents of this reform respond in two ways, neither of which resolves the dilemma. First, they argue that no duplication in screening occurs because the grand jury merely rubberstamps the prosecutor's decision.³⁸⁰ That argument assumes the grand jury's institutional incapacity to screen the prosecutor's case. It thus begs the basic question of whether the grand jury could be reformed to perform a valuable screening function, thereby avoiding duplicated screening. Second, they suggest that when the grand jury functions properly, it serves different purposes from the preliminary examination. The grand jury is an *ex parte* proceeding that allows the community to check oppressive executive power by interjecting community notions of justice. In contrast, the preliminary examination's adversarial format and professional magistrate promote a more accurate determination of factual guilt and weed out those cases where proof of legal guilt is unlikely.³⁸¹ But that argument overlooks the fact that neither the grand jury nor the preliminary hearing presently screens legal guilt. It compares the grand jury's present limited screening function with a reformed preliminary hearing that would screen legal guilt. Although the two proceedings would then appear to serve different screening purposes, they would still require two dress-rehearsals of the prosecution's case. Moreover, the preliminary hearing's stringent review should deter bad-faith prosecutions, thereby rendering the grand jury's function of checking oppressive executive action fairly superfluous.³⁸²

Unlike many states, the federal system has a choice: it could use either the constitutionally compelled grand jury or the preliminary hearing to screen legal guilt. Skepticism about the grand jury's ability to perform an independent screening function coupled with our system's preference for adversarial rather than *ex parte* proceedings have led reformers to choose the preliminary hearing. In an ideal world with unlimited resources, I would make the same choice. But, in a federal system that rarely conducts preliminary hearings, this reform would be a step in the wrong direction. Instead of adding another major procedural step in an already cumbersome pretrial

380. See Note, *supra* note 60, at 802.

381. *Id.* at 803.

382. The grand jury could still serve an equitable function by refusing to indict when it believed that justice would not be served by a literal application of the criminal law. See *United States v. Ciambone*, 601 F.2d 616, 629 (2d Cir. 1979) (Friendly, J., dissenting); *United States v. Asdrubal-Herrera*, 470 F. Supp. 939 (N.D. Ill. 1979).

process, federal reform efforts should consider how the grand jury and some limited form of judicial review could be used to preclude conviction without adjudication.

V. REFORMING THE FEDERAL GRAND JURY'S ACCUSATORY FUNCTION

Section IV concluded that the pretrial process should provide for a preliminary adjudication of a defendant's factual and legal guilt before the state secures a conviction through plea-bargaining. This Section evaluates whether the federal grand jury can be reformed to perform that function. Subsection A examines how some federal courts have revitalized the prosecutorial misconduct doctrine to improve the quality of grand jury screening. Expanding on the reforms suggested in those cases, Subsection B offers several proposals that would enable the grand jury to vindicate some of the accusatorial values embodied in the concept of legal guilt.

A. *Prosecutorial Misconduct Doctrine*

While the grand jury was enshrined in our Constitution because of its reputed ability to protect the innocent from unfounded prosecution,³⁸³ few scholars take its screening function seriously today.³⁸⁴ Critics of the grand jury argue that inexperienced and untrained citizens cannot possibly screen out unwarranted prosecutions in an ex parte proceeding where they hear only the government's side of the case and depend on the prosecutor for all legal advice and direction. Relying on empirical studies indicating that the grand jury rarely refuses to indict,³⁸⁵ those critics have concluded that the grand jury can serve no useful accusatorial function.³⁸⁶

The question often overlooked in these broadside attacks is whether the grand jury's tendency to rubberstamp the prosecutor's decisions stems from some inherent institutional defect or from some

383. Supporters of the grand jury have often responded to critics' charges by pointing to its historic role as an independent buffer between the state and the innocent accused. However, recent accounts of the grand jury's history both in England and in this country indicate that the grand jury extended its protection in a highly politicized manner. See, e.g., L. CLARK, *THE GRAND JURY* 16-18 (1975); Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM. L. REV. 701 (1972).

384. See, e.g., Campbell, *supra* note 46; Antell, *supra* note 48.

385. See, e.g., Morse, *A Survey of the Grand Jury System*, 10 OR. L. REV. 101, 217, 295 (1931). Cf. Dession, *From Indictment to Information — Implications of the Shift*, 42 YALE L.J. 163, 178-79 (1932) (arguing in part that grand jury's high rate of concurrence with prosecutor's decisions merely demonstrates excellent pretrial screening by prosecutor).

386. In 1976, federal grand juries returned approximately 23,000 indictments and reported only 123 no true bills. 1977 *Hearings*, pt. 1, *supra* note 108, at 738 (testimony of Benjamin R. Civiletti, Asst. Attorney General, U.S. Dept. of Justice).

other cause that can be remedied without turning its *ex parte* inquiry into a full-fledged adversarial hearing. One cannot answer this question by pointing to the grand jury's past failures, because the courts have not given the grand jury an opportunity to prove its institutional value.³⁸⁷ As Section I suggested, the courts have weakened the grand jury's capacity to perform a valuable accusatory function by assigning it a minimal factual guilt screening standard and by granting the prosecutor complete control over the quality of evidence presented to it.

Recognizing this problem, some federal courts have cautiously begun to supervise the prosecutor's evidentiary presentation to the grand jury. To do so, they have used a revitalized prosecutorial misconduct doctrine to circumvent *Costello's* prohibition against directly evaluating the sufficiency of the evidence presented to the grand jury.³⁸⁸ Seizing upon Justice Black's caveat that an indictment must be returned by an "unbiased" grand jury,³⁸⁹ some lower courts have posited a series of evidentiary duties that the prosecutor owes the grand jury to ensure the return of an "unbiased" indictment. When the prosecutor violates those duties, these courts will find prosecutorial misconduct, which may justify dismissal of the indictment.³⁹⁰ While the prosecutorial misconduct doctrine is not new, the courts had traditionally applied it only when the prosecutor had acted outrageously toward a witness³⁹¹ or had unfairly pressured the grand jury into returning a true bill.³⁹² This Subsection examines the courts' expanded application of the doctrine to determine whether it offers a principled standard for system-wide reform.

387. See text accompanying notes 170-79 *supra*. Admittedly, one cannot say for certain whether the grand jury would reliably adjudicate the defendant's factual guilt once these disabilities were removed. However, I believe a lay body can perform a valuable fact-finding function like its counterpart at trial if appropriate safeguards are enacted. We should give the grand jury an opportunity to prove its value before we give up on the one lay body that participates in federal criminal prosecutions.

388. See text at note 164 *supra*.

389. 350 U.S. at 363.

390. See, e.g., *United States v. Samango*, 450 F. Supp. 1097 (D. Hawaii 1978), *affid.*, 607 F.2d 877 (9th Cir. 1979).

391. See, e.g., *United States v. Wells*, 163 F. 313 (D. Idaho 1908) (indictment dismissed because prosecutor badgered defendant's witnesses in his questioning, entered grand jury room during its private deliberations, and urged them to indict). But see *United States v. Bruzgo*, 373 F.2d 383 (3d Cir. 1967) (court criticized prosecutor for threatening one grand jury witness with jail and calling her a "racketeer" but refused to dismiss the defendant's indictment). Cf. *United States v. Serubo*, 604 F.2d 807 (3d Cir. 1979) (vacating judgment on sentence and remanding case so that district court could determine whether prosecutorial misconduct tainted grand jury which returned indictment).

392. See, e.g., *United States v. Wells*, 163 F. 313 (D. Idaho 1908).

1. *Excessive Use of Hearsay Evidence*

Costello legitimated a common prosecutorial practice in routine cases of presenting the government's case through the hearsay testimony of federal law enforcement agents.³⁹³ That practice saves time and minimizes inconvenience to government witnesses. It also prevents the grand jury from predicting the likelihood of conviction by precluding any assessment of the credibility of the government's trial witnesses. Finally, such a practice permits the prosecutor to secure indictments when there may be insufficient legally admissible evidence to warrant a conviction at trial. Concern about the quality of grand jury screening under such circumstances prompted the Second Circuit to reevaluate *Costello*'s approval of indictments based exclusively on hearsay testimony.

The first signs of judicial dissatisfaction came in a dissenting opinion by Judge Friendly in *United States v. Payton*.³⁹⁴ Judge Friendly noted that the use of government agents to summarize voluminous financial records in *Costello* made sense because their hearsay testimony would be admissible at trial once the proper expert foundation had been established.³⁹⁵ To require presentation of that foundation to the grand jury would have converted its *ex parte* inquiry into a prolonged mini-trial. Moreover, "the agent's lack of direct knowledge must have been apparent" to the *Costello* grand jurors.³⁹⁶ Judge Friendly concluded, however, that *Costello* did not justify the use of hearsay testimony in routine prosecutions where more reliable evidence was readily available. Relying on Justice Burton's concurring opinion in *Costello*, he suggested that the prosecutor who presents hearsay evidence

must make clear to the jurors the shoddy merchandise they are getting so they can seek something better if they wish, thus pressing the prosecution for more reliable evidence — particularly important in these narcotics prosecutions where there is often a problem of the reliability of an agent's identification.³⁹⁷

Echoing Judge Friendly's concern, a three-judge panel in *United States v. Umans*³⁹⁸ observed that excessive reliance on hearsay testimony "tends to destroy the historical function of grand juries in as-

393. See 8 MOORE'S FEDERAL PRACTICE ¶ 6.03(2), at 6-44 (rev. 2d ed. 1979).

394. 363 F.2d 996 (2d Cir.), cert. denied, 385 U.S. 993 (1966).

395. 363 F.2d at 1000 (Friendly, J., dissenting).

396. 363 F.2d at 1000.

397. 363 F.2d at 1000.

398. 368 F.2d 725 (2d Cir. 1966), cert. dismissed as improvidently granted, 389 U.S. 80 (1967).

sessing the likelihood of prosecutorial success.”³⁹⁹ Writing for the panel, Circuit Judge Waterman warned government prosecutors that “[h]earsay evidence should only be used when direct testimony is unavailable or when it is demonstrably inconvenient to summon witnesses able to testify to facts from personal knowledge.”⁴⁰⁰

Apparently the courts’ sanctionless warnings did not have their intended effect. Two years after *Umans*, Judge Weinstein noted in *United States v. Arcuri*⁴⁰¹ that “[t]he practice revealed in the case before us, where the indictment was handed down some two months after the decision in *Umans*, suggests the need for a stronger rule and more uniformly applied sanctions to enforce it.”⁴⁰² Accordingly, he announced a prospective rule that indictments would be dismissed without a showing of prejudice to the defendants “if it is clear that hearsay alone was deliberately relied upon when better evidence was readily available for presentation to the grand jury.”⁴⁰³ Judge Weinstein justified this stringent best-evidence requirement by explaining that the government’s practice of offering only hearsay testimony obstructed the grand jury’s screening functions. While Judge Friendly’s *Payton* dissent had emphasized that the excessive use of unreliable hearsay testimony weakens the grand jury’s ability to screen factual guilt, Judge Weinstein emphasized how it impairs the grand jury’s ability to evaluate the likelihood of a conviction at trial. To make that prediction of legal guilt, the grand jury must be given the opportunity to judge the credibility of the government’s principal trial witnesses.

The practice — as in the instant case — of relying on hearsay rather than upon the testimony of eye-witnesses is pernicious for two reasons. First, it habituates the grand jury to rely upon “evidence” which appears smooth, well integrated and consistent in all respects. Particularly because neither cross-examination nor defense witnesses are available to them, grand jurors do not hear cases with the rough edges that result from the often halting, inconsistent and incomplete testimony of honest observers of events. Thus, they are unable to distinguish between prosecutions which are strong and those which are relatively weak. All cases are presented in an equally homogenized form. A grand jury so conditioned is unable to adequately serve its function as a screening agency. It cannot exercise its judgment in refusing to indict in weak cases where, technically, a *prima facie* case may have been made out. It is, moreover, unlikely to demand addi-

399. 368 F.2d at 730.

400. 368 F.2d at 730.

401. 282 F. Supp. 347 (E.D.N.Y.), *aff'd.*, 405 F.2d 691 (2d Cir. 1968), *cert. denied*, 395 U.S. 913 (1969).

402. 282 F. Supp. at 351.

403. 282 F. Supp. at 351.

tional evidence.⁴⁰⁴

A year later, in *United States v. Leibowitz*,⁴⁰⁵ the Second Circuit applied a far less rigorous standard of review in considering the same prosecutorial practice condemned by Judge Weinstein. Instead of calling its chief trial witness, who would have testified about the critical events underlying the indictment from personal knowledge, the prosecutor called an FBI agent who presented a hearsay summary of the government's evidence.⁴⁰⁶ Without even a passing reference to *Arcuri*, the court of appeals affirmed the trial court's refusal to dismiss the indictments. The court attempted to rebut the government's argument that its *Umans* warning was inconsistent with *Costello*. After noting that the Second Circuit had consistently upheld indictments based upon hearsay testimony despite its *Umans* admonition, Judge Hays concluded that indictments based exclusively on such testimony should not be dismissed, "unless it appears that dismissal is required to protect the integrity of the judicial process."⁴⁰⁷ He then identified two seemingly independent criteria for determining when judicial integrity was at stake: (1) where the grand jury "is misled into thinking it is getting eye-witness testimony from the agent whereas it is actually being given an account whose hearsay nature is concealed,"⁴⁰⁸ or (2) where "the defendant could show that there is a high probability that with eye witness rather than hearsay testimony the grand jury would not have indicted."⁴⁰⁹

The differences between Judge Weinstein's suggested rule in *Arcuri* and the *Leibowitz* rule for improper use of hearsay are striking. To predict the likelihood of conviction, a grand jury must consider the evidence that the government intends to use at trial. *Arcuri* promotes that legal guilt screening function by forcing the prosecutor to present the best available evidence. On the other hand, *Leibowitz* offers only minimal protection of the grand jury's factual guilt screening function by encouraging prosecutors not to mislead grand jurors about the quality of the evidence they are considering. Even when that occurs, *Leibowitz* leaves open the possibility of sustaining indictments where the defendant fails to convince the court that the

404. 282 F. Supp. at 349.

405. 420 F.2d 39 (2d Cir. 1969).

406. 420 F.2d at 41.

407. 420 F.2d at 42.

408. 420 F.2d at 42.

409. 420 F.2d at 42. Applying this test to the facts before it, the court found that the district court had correctly denied the defendant's motion to dismiss because the grand jury knew it was receiving hearsay evidence and probably would have indicted Leibowitz if it had considered the government's best evidence.

grand jury would not have issued the indictment had it heard the best evidence available.

Not surprisingly, federal prosecutors continued their hearsay presentations to grand juries after *Leibowitz*. Defendants' challenges to these practices met with little success until 1972 when a three-judge panel decided *United States v. Estepa*,⁴¹⁰ the only reported Second Circuit decision to reverse a conviction and dismiss an indictment solely because of the prosecutor's hearsay presentation to the grand jury. The only witness before the *Estepa* grand jury was a police officer who testified about events he did not witness and statements he did not hear.⁴¹¹ The prosecutor did not call any of the police officers who had more intimate knowledge of the narcotics investigation and the subsequent arrests for distributing heroin even though they were available to testify.⁴¹² Moreover, except for one comment, the Assistant U.S. Attorney did not alert the grand jury to the limits of the testifying officer's knowledge.⁴¹³

The court reversed *Estepa*'s conviction and dismissed the indictments because the prosecutor had misled the grand jurors about the quality of the evidence they were considering.⁴¹⁴ In justifying dismissal as a proper exercise of the court's supervisory power, Judge Friendly pointedly noted that the government's persistent refusal to heed the *Umans* warning left the court with little choice.

The many opinions in which we have affirmed convictions despite the Government's needless reliance on hearsay before the grand jury show how loath we have been to open up a new road for attacking convictions on grounds unrelated to the merits. We have been willing to allow ample, many doubtless think too ample, latitude in the needless use of hearsay, subject to only two provisions. We cannot, with proper respect for the discharge of our duties, content ourselves with yet another admonition; a reversal with instructions to dismiss the indictment may help to translate the assurances of the United States Attorneys into consistent performance by their assistants.⁴¹⁵

Estepa and *Leibowitz* attempted to fashion a rule consistent with *Costello* that would trigger judicial intervention only when the prosecutor egregiously impairs the grand jury's ability to screen guilt. Far from signalling a new judicial willingness to require the prosecutor to present the government's best evidence to the grand jury,⁴¹⁶

410. 471 F.2d 1132 (2d Cir. 1972).

411. 471 F.2d at 1134.

412. 471 F.2d at 1134.

413. 471 F.2d at 1134-35.

414. 471 F.2d at 1137.

415. 471 F.2d at 1137.

416. Post-*Estepa* cases reflect the Second Circuit's continued unwillingness to dismiss in-

Estepa merely expressed the court's pique with federal prosecutors who continued to violate the minimal obligations placed on them by *Leibowitz*. The ironic result is a rule that accomplishes little⁴¹⁷ but is nonetheless inconsistent with *Costello*. Before an indictment can be dismissed under *Leibowitz*, a court must determine whether the grand jury would have indicted the defendant had it heard the government's trial witness instead of a hearsay account. That inquiry requires the trial judge to evaluate the sufficiency and quality of the other evidence presented to the grand jury. Yet, *Costello* suggested that "dismissal of the indictment is not required by the court's interests in reliable fact finding,"⁴¹⁸ and Justice Black specifically rejected *Costello's* request that the Court use its supervisory powers to promote judicial inquiry into the evidentiary bases of indictments.⁴¹⁹ Indeed, the Second Circuit has recently suggested that cases like *Calandra* may have undermined *Estepa's* validity.⁴²⁰

2. Indictments Based in Part on Perjured Testimony

Since most federal courts understood *Costello* to bar judicial inquiry into the sufficiency or quality of evidence relied upon by the indicting grand jury, they have usually refused to dismiss indictments based in part on perjured testimony, as long as the grand jury heard some other competent evidence. For example, in *Coppedge v.*

dictments because of the prosecutor's undue reliance upon hearsay testimony before the grand jury. See, e.g., *United States v. Harrington*, 490 F.2d 487 (2d Cir. 1973):

Estepa was thus not intended to modify broadly the rule recognizing the acceptability of hearsay evidence in grand jury proceedings. See *Costello v. United States*, 350 U.S. 359 Rather, it was intended as manifest warning that it is impermissible to have law enforcement officers who have no first-hand knowledge of the subject the grand jury is investigating testify as if they possessed that knowledge. 490 F.2d at 489.

417. Under *Leibowitz*, the defendant must demonstrate that there was a high probability that the grand jury would not have returned an indictment had it heard the government's trial evidence. See text at note 409 *supra*. In cases where the grand jury did not request the government's best evidence from the prosecutor after being notified of the "shoddy merchandise" it was getting, a district court judge will probably conclude that the grand jury would have indicted the defendant even if it had considered the government's best evidence. At the appellate level, this prejudice requirement imposes an insurmountable burden on a defendant whose legal guilt has been convincingly demonstrated at trial. How can an appellate court say that the grand jury would not have indicted the defendant if it had received the government's trial evidence when that evidence convinced the trial's fact-finder to convict the defendant? Obviously, at this stage any defect in the presentation of evidence before the grand jury could be considered harmless error. See note 521 *infra* and accompanying text. For the vast majority of criminal defendants who plead guilty after indictment, *Estepa* offers little protection besides insuring that the grand jurors were not misled about the quality of evidence they were considering.

418. *United States v. Mackey*, 405 F. Supp. 854, 863 (E.D.N.Y. 1975).

419. 350 U.S. at 364.

420. See *United States v. Marchand*, 564 F.2d 983, 1001 n.29 (2d Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978).

*United States*⁴²¹ then Circuit Judge Burger relied on *Lawn v. United States*,⁴²² an early progeny of *Costello*, in affirming a district court judge's refusal to dismiss an indictment that was based in part on perjured testimony. Judge Burger interpreted the unbiased-grand jury requirement to mean only that a grand jury would be tainted if "it was improperly constituted, or . . . its members were necessarily biased."⁴²³ Apparently, the grand jury's consideration of some competent evidence apart from the perjured testimony indicated that it was not "necessarily biased."⁴²⁴ While Judge Burger conceded that the prosecutor should not present unreliable witnesses to the grand jury, he concluded that *Costello's* progeny precluded invalidation of the indictment because "the critical and final place to detect perjury is the trial."⁴²⁵

Increasing judicial discomfort over *Costello's* reliance on the trial to cure errors before the grand jury has prompted some federal courts to reject *Coppedge's* approach.⁴²⁶ Thus, a Ninth Circuit panel ruled in *United States v. Basurto*⁴²⁷ that the "Due Process Clause of the Fifth Amendment is violated when a defendant has to stand trial

421. 311 F.2d 128 (D.C. Cir. 1962), *cert. denied*, 373 U.S. 946 (1963).

422. 355 U.S. 339 (1958), discussed in text at notes 154-57 *supra*.

423. 311 F.2d at 132.

424. 311 F.2d at 131-32.

425. 311 F.2d at 132.

426. In *United States v. Serubo*, 604 F.2d 807 (3d Cir. 1979), the court vacated the judgments of sentence and remanded the case to the district court for determination of whether prosecutorial misconduct before the first grand jury tainted the second grand jury's consideration of the case. The prosecutor in *Serubo* did not present perjured testimony to the first grand jury. Instead, he badgered witnesses who were uncooperative, commented unfavorably about some witnesses' credibility, tried to connect the defendants with organized crime without presenting any evidence to support the charge, and attacked the testimony of witnesses who did not link the defendants with organized crime. 604 F.2d at 815. In commenting on the appropriateness of dismissing indictments, the court noted that the trial itself was not a sufficient deterrent to curb prosecutorial abuse before the grand jury.

We recognize that dismissal of an indictment may impose important costs upon the prosecution and the public. At a minimum, the government will be required to present its evidence to a grand jury unaffected by bias or prejudice. But the costs of continued unchecked prosecutorial misconduct are also substantial. This is particularly so before the grand jury, where the prosecutor operates without the check of a judge or a trained legal adversary, and virtually immune from public scrutiny. The prosecutor's abuse of his special relationship to the grand jury poses an enormous risk to defendants as well. For while in theory a trial provides the defendant with a full opportunity to contest and disprove the charges against him, in practice, the handing up of an indictment will often have a devastating personal and professional impact that a later dismissal or acquittal can never undo. Where the potential for abuse is so great, and the consequences of a mistaken indictment so serious, the ethical responsibilities of the prosecutor, and the obligation of the judiciary to protect against even the appearance of unfairness, are correspondingly heightened.

We suspect that dismissal of an indictment may be virtually the only effective way to encourage compliance with these ethical standards, and to protect defendants from abuse of the grand jury process.

604 F.2d at 817.

427. 492 F.2d 781 (9th Cir. 1974).

on an indictment which the Government knows is based partially on perjured testimony, when the perjured testimony is material, and when jeopardy has not attached."⁴²⁸ Writing for the majority, Judge Ferguson rejected Judge Burger's reasoning in *Coppedge* that the trial could cure any error made by the grand jury.⁴²⁹ Indeed, the facts in *Basurto* strongly support Judge Ferguson's point because the perjured testimony caused Basurto to be indicted for violating a statute with a mandatory minimum sentencing provision. Without that perjured testimony, he would have been indicted under a newer statute with far more flexible sentencing provisions.⁴³⁰ As in *Coppedge*, the prosecutor did not learn of the perjury until after the return of the indictment.⁴³¹ He immediately informed the defense attorney who promptly moved to dismiss the indictment. The trial court denied the motion and Basurto was convicted by a jury that knew of the witness's perjury before the grand jury.⁴³²

In reversing Basurto's conviction, the court insisted that its ruling was consistent with *Costello* because it rested on prosecutorial misconduct before the grand jury that violated due process, and not on the quality of evidence received by the grand jury.⁴³³ The court held that the prosecutor had a constitutional duty to inform the grand jury of the perjured testimony immediately, so that an accurate superseding indictment could have been returned before jeopardy attached.⁴³⁴ Relying on a series of Supreme Court decisions that had established the prosecutor's constitutional duty not to use perjured testimony knowingly at trial to obtain a tainted conviction,⁴³⁵ the *Basurto* panel concluded that this duty implied a concomitant obligation not to allow a defendant to "stand trial . . . based in part upon perjured testimony."⁴³⁶ To say the least, that implication is strained. The *Basurto* conviction, where the prosecutor alerted the defense attorney before trial about the perjured grand jury testimony and revealed the perjury to the trial jury in his open-

428. 497 F.2d at 785.

429. The consequences to the defendant of perjured testimony given before the grand jury are no less severe than those of perjured testimony given at trial, and in part may be more severe. The defendant has no effective means of cross-examining or rebutting perjured testimony given before the grand jury, as he might in court.
497 F.2d at 786.

430. 497 F.2d at 784.

431. 497 F.2d at 784.

432. 497 F.2d at 784.

433. 497 F.2d at 785.

434. 497 F.2d at 785.

435. See, e.g., *Napue v. Illinois*, 360 U.S. 264 (1959); *Mooney v. Holohan*, 294 U.S. 103 (1935).

436. 497 F.2d at 786.

ing remarks,⁴³⁷ hardly reflects the injustice promoted by a prosecutor who knowingly used perjured trial testimony to obtain a conviction.⁴³⁸

The Ninth Circuit's analysis is striking for its refusal to acknowledge in theory what it was doing in practice. The court unconvincingly distinguished *Costello* by emphasizing that its ruling in *Basurto* rested on prosecutorial misconduct and not on the quality of the evidence presented to the grand jury. Subsequent Ninth Circuit decisions, however, have indicated that the prosecutor's duty to inform the grand jury that it had considered perjured testimony only arises when, as in *Leibowitz*, that testimony impairs the grand jury's factual guilt screening function.⁴³⁹ To limit judicial review of the evidence presented to the grand jury, post-*Basurto* decisions have authorized dismissal of an indictment only in flagrant cases⁴⁴⁰ where the perjured testimony "creates a reasonable doubt of guilt that did not otherwise exist."⁴⁴¹ If the perjured testimony does not meet that narrow definition of materiality, the prosecutor has no obligation to inform the grand jury of the perjury or to seek a dismissal of the

437. 497 F.2d at 784-85.

438. Indeed, Circuit Judge Hufstедler could not accept the majority's strained due process analysis. In her concurring opinion, she justified the panel's decision as an appropriate exercise of the court's supervisory power to protect the integrity of the administration of justice. 497 F.2d at 793. She argued that the court could impose a duty on the prosecutor to inform the grand jury that it had considered material perjured testimony to promote the grand jury's ability "to stand between the prosecutor and the accused, and to determine whether the charge was founded on credible testimony." 497 F.2d at 794 (quoting *Hale v. Henkel*, 201 U.S. 43, 59 (1906)). So informed, the grand jury could take corrective action, but Judge Hufstедler observed that the prosecutor should specifically request that the tainted indictment be dismissed. 497 F.2d at 794.

439. See *United States v. Kennedy*, 564 F.2d 1329, 1338 (9th Cir. 1977), cert. denied, 425 U.S. 944 (1978); *United States v. Bowers*, 534 F.2d 186, 193 (9th Cir.), cert. denied, 429 U.S. 942 (1976). See also *United States v. Bracy*, 566 F.2d 649 (9th Cir. 1977), cert. denied, 439 U.S. 818 (1978). "[W]e believe that [*Basurto's*] requirement that the prosecutor has an obligation to immediately inform the court and opposing counsel is weakened if not destroyed by the Supreme Court decision in *United States v. Agurs*, 427 U.S. 97 [1976] . . ." 566 F.2d at 655. The panel noted that *Agurs* had held that the prosecutor's failure to disclose exculpatory evidence at trial did not constitute constitutional error unless "the omitted evidence creates a reasonable doubt that did not otherwise exist." 566 F.2d at 656. The *Bracy* panel applied the *Agurs* standard to the prosecutor's failure to disclose perjured testimony before the *Bracy* grand jury and concluded that the prosecutor had not violated that standard "where incomplete disclosure of the perjured testimony before the grand jury in no way suggested an absence of guilt on the part of the appellants." 566 F.2d at 656.

440. See, e.g., *United States v. Kennedy*, 564 F.2d 1329, 1338 (9th Cir. 1977), cert. denied, 435 U.S. 944 (1978) ("[O]nly in a flagrant case, and perhaps only where knowing perjury, relating to a material matter, has been presented to the grand jury should the trial judge dismiss an otherwise valid indictment returned by an apparently unbiased grand jury. To hold otherwise would allow a mini-trial as to each presented indictment contrary to the teaching of Mr. Justice Black in *Costello*.").

441. *United States v. Bracy*, 566 F.2d 649, 656 (9th Cir. 1977), cert. denied, 439 U.S. 818 (1978). Since the perjured testimony in *Bracy* did not meet this standard, the court refused to find constitutional error.

indictment. In other words, the propriety of the prosecutor's conduct depends upon whether it impaired the grand jury's screening function.⁴⁴² Thus, like the Second Circuit's attempt to regulate the prosecutor's use of hearsay, the ironic result is a rule that accomplishes very little but is nevertheless inconsistent with *Costello*.⁴⁴³

3. *The Duty To Disclose Exculpatory Evidence*

The grand jury cannot possibly screen out unwarranted prosecutions when the prosecutor fails to present exculpatory evidence that, if believed, would negate the defendant's guilt. Despite that obvious truth, most courts have refused to dismiss indictments when the prosecutor did not disclose exculpatory evidence to the grand jury. Relying on Supreme Court decisions like *Costello*, *Blue*, *Holt*, and *Calandra*, the lower courts initially ruled that the prosecutor had no obligation to disclose such evidence to the grand jury.⁴⁴⁴ Those courts assumed that the duty to disclose exculpatory evidence was triggered by the adversarial context of trial.⁴⁴⁵ Therefore, they found no prosecutorial duty to present exculpatory evidence to the grand jury because its sole function is to determine ex parte "whether criminal proceedings should be instituted against any person."⁴⁴⁶

Even those courts that have recognized a duty to disclose exculpatory evidence have emphasized the difficulty of implementing such a rule. Some courts have examined the problem of what evidence should be deemed exculpatory at this early stage of the pro-

442. As one commentator noted, "[b]ecause the federal courts, in addressing the issue of grand jury abuse, have typically weighed evidence demonstrating guilt against the nature of the prosecutorial misconduct, the decisions establish no consistent standard for dismissal." Holderman, *Preindictment Prosecutorial Conduct in the Federal System*, 71 J. CRIM. L. & CRIMINOLOGY 17 (1980). Compare *United States v. Scheuffer*, 599 F.2d 893, 895-97 (9th Cir. 1979), and *United States v. Cathey*, 591 F.2d 268, 272 (5th Cir. 1979), with *United States v. Asdrubal-Herrera*, 470 F. Supp. 939, 943 (N.D. Ill. 1979), and *United States v. Sousley*, 453 F. Supp. 754, 758 n.1 (W.D. Mo. 1978).

443. For example, the panel in *Bracy* noted that "if the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." *United States v. Bracy*, 566 F.2d 649, 656 (9th Cir. 1977), cert. denied, 439 U.S. 818 (1978). Yet *Costello* rejected the argument that the court should use its supervisory power to regulate the character of the evidence presented to the grand jury.

444. See, e.g., *United States v. Y. Hata & Co.*, 535 F.2d 508 (9th Cir.), cert. denied, 429 U.S. 828 (1976); *Loraine v. United States*, 396 F.2d 335 (9th Cir.), cert. denied, 393 U.S. 933 (1968) (prosecution not obligated to disclose evidence in its possession that would have undermined the credibility of three of its grand jury witnesses).

445. See, e.g., *United States v. Y. Hata & Co.*, 535 F.2d 508, 512 (9th Cir.), cert. denied, 429 U.S. 828 (1976); *United States v. Ruyle*, 524 F.2d 1133, 1135-36 (6th Cir. 1975), cert. denied, 425 U.S. 934 (1976); *Loraine v. United States*, 396 F.2d 335, 339 (9th Cir.), cert. denied, 393 U.S. 933 (1968).

446. *United States v. Y. Hata & Co.*, 535 F.2d 508, 512 (9th Cir.), cert. denied, 429 U.S. 828 (1976) (quoting *United States v. Calandra*, 414 U.S. 338, 343-44 (1974)).

ceedings.⁴⁴⁷ Others have expressed concern about how to assess the significance of the withheld evidence without reviewing the quality and sufficiency of the other evidence considered by the grand jury,⁴⁴⁸ an inquiry that *Costello* prohibited. Finally, some courts have suggested that *Costello* precludes the lower courts from using their supervisory powers to regulate the prosecutor's discretion over grand jury evidence absent some extraordinary situation where judicial action is required "to preserve the integrity of the judicial process and to avoid any fundamental unfairness."⁴⁴⁹

The first major departure from the consensus view came in a state decision, *Johnson v. Superior Court*.⁴⁵⁰ The facts in *Johnson* starkly illustrate the grand jury's inability to act as a protective screen when the prosecutor has complete control over what evidence it considers. Johnson and his codefendant, Sherman, were arrested for a series of drug offenses. Johnson had agreed to cooperate with Sherman in a sale to two undercover agents and then had followed him to a motel where Sherman had made the sale.⁴⁵¹ At his preliminary hearing, Johnson testified that he had agreed with a local district attorney to provide information concerning narcotic deals and he had accompanied Sherman only to gather such information.⁴⁵² If believed, that exculpatory evidence would have negated the requisite mens rea for the offenses. The magistrate dismissed all charges against him when the state offered no evidence to rebut his claim.⁴⁵³ The district attorney then asked a grand jury to indict Johnson on the same charges. In presenting his case to that grand jury, the district attorney did not reveal Johnson's exculpatory testimony at the preliminary examination. Instead, he presented the testimony of the arresting officers and gave the grand jury the erroneous impression that Johnson had refused to comment on the charges upon the order of his attorney.⁴⁵⁴ The grand jury indicted Johnson on all three charges.

447. See *United States v. Mandel*, 415 F. Supp. 1033, 1040 (D. Md. 1976), *aff'd.*, 602 F.2d 653 (4th Cir. 1979) (*en banc*); *cert. denied*, 48 U.S.L.W. 3662 (1980).

448. 415 F. Supp. at 1041-42.

449. *United States v. Chanen*, 549 F.2d 1306, 1313 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977). See also note 440 *supra*.

450. 38 Cal. App. 3d 977, 113 Cal. Rptr. 740 (1974), *aff'd. on statutory grounds*, 15 Cal. 3d 248, 539 P.2d 792, 124 Cal. Rptr. 32 (1975) (*en banc*) (there is no published court of appeals opinion at 38 Cal. App. 3d 977 because the Supreme Court of California granted a hearing on the case).

451. 113 Cal. Rptr. at 742.

452. 113 Cal. Rptr. at 742-43.

453. 113 Cal. Rptr. at 743.

454. 113 Cal. Rptr. at 743.

Although the magistrate's dismissal did not bar the prosecutor from seeking an indictment for the same offense,⁴⁵⁵ the Third District California Court of Appeals ruled that the prosecutor's failure to disclose Johnson's exculpatory testimony precluded the grand jury from independently evaluating Johnson's guilt.⁴⁵⁶ In a sweeping opinion, Associate Justice Friedman argued that the absence of the adversarial safeguards that courts often associate with due process does not "exclude a special institutional variety of due process, indigenous to the grand jury, imparted to it by 'the law of the land' and investing it with a fundamental fairness peculiar to itself."⁴⁵⁷ Justice Friedman then identified the grand jury's protective function of safeguarding accused persons against unfounded charges "an attribute of due process inherent in grand jury proceedings."⁴⁵⁸ Thus, the court concluded that the prosecutor violated Johnson's due process right to a fair and independent grand jury evaluation of probable cause when he made a "twisted presentation"⁴⁵⁹ of evidence.

The Court of Appeals opinion in *Johnson* recognizes that the grand jury's ex parte nature imposes special responsibilities on the prosecutor to ensure "that justice shall be done."⁴⁶⁰ Unlike some of the earlier federal cases that had assumed that the prosecutor's duty to disclose exculpatory evidence was triggered by the adversarial context of trial,⁴⁶¹ *Johnson* recognized that the *absence* of adversarial safeguards in grand jury proceedings provided the most compelling reason for imposing a duty on the prosecutor to disclose exculpatory evidence. As Justice Friedman observed, "if the prosecutor does not produce the evidence, no one will. The grand jury can perform its central function as an independent adjudicator of probable cause only if the prosecutor's duty . . . includes an affirmative obligation to produce evidence in his possession or control which tends to negate guilt."⁴⁶²

455. 113 Cal. Rptr. at 745 (citing *People v. Uhlemann*, 9 Cal. 3d 662, 666, 511 P.2d 609, 611, 108 Cal. Rptr. 657, 659 (1973)).

456. 113 Cal. Rptr. at 750.

457. 113 Cal. Rptr. at 746.

458. 113 Cal. Rptr. at 749.

459. 113 Cal. Rptr. at 749.

460. *United States v. Ciambrone*, 601 F.2d 616, 628-29 (2d Cir. 1979) (Friendly, J., dissenting) (citing *Berger v. United States*, 295 U.S. 78 (1935)).

461. See note 445 *supra*. But cf. *United States v. Ciambrone*, 601 F.2d 616, 622-23 (2d Cir. 1979) (prosecutor not obligated to search for and submit evidence negating guilt when not requested to do so by the grand jury; but if "aware of any substantial evidence negating guilt he should . . . make it known to the grand jury, at least where it might reasonably be expected to lead the jury not to indict").

462. 113 Cal. Rptr. at 749 (citations omitted). The court concluded that the prosecutor must disclose exculpatory evidence even if his other evidence establishes sufficient proof of

The California Supreme Court accepted the lower court's duty analysis, but rested its holding on statutory grounds.⁴⁶³ Justice Clark interpreted a statute requiring a grand jury to consider "evidence within its reach that will explain away the charge"⁴⁶⁴ as imposing a duty on the prosecutor to disclose such exculpatory evidence to the grand jury.⁴⁶⁵ Justice Clark refused to construe the statute as a mere admonition to the grand jury to consider such evidence if it so desired,⁴⁶⁶ because such an interpretation would undermine the statute's purpose of promoting the grand jury's protective function. Since the "grand jury cannot be expected to call for evidence of which it is kept ignorant,"⁴⁶⁷ the court held that "when a district attorney seeking an indictment is aware of evidence reasonably tending to negate guilt, he is obligated under section 939.7 to inform the grand jury of its nature and existence, so that the grand jury may exercise its power under the statute to order the evidence produced."⁴⁶⁸

Despite the absence of an analogous federal statute, several federal courts have used *Johnson's* reasoning to support their conclusion that the federal prosecutor must disclose exculpatory evidence to the grand jury.⁴⁶⁹ Whether those decisions will improve the quality of

probable cause because the "reviewing court cannot know what the grand jury might have decided had the prosecutor set out the complete array of available evidence."

463. 15 Cal. 3d 248, 255, 539 P.2d 792, 796, 124 Cal. Rptr. 32, 36 (1975) (en banc). However, the California Supreme Court accepted Judge Friedman's constitutional analysis in a later decision, *People v. Backus*, 23 Cal. 3d 360, 392-93, 590 P.2d 837, 856, 142 Cal. Rptr. 710, 729 (1979) (defendants have a due process right to an independent evaluation of the evidence by the grand jury that is violated if prosecutor's presentation of the evidence substantially impairs the grand jury's ability to reject unfounded charges).

464. CAL. PENAL CODE § 939.7 (West 1970).

465. 15 Cal. 3d at 255, 539 P.2d at 796, 124 Cal. Rptr. at 36.

466. 15 Cal. 3d at 254, 539 P.2d at 795-96, 124 Cal. Rptr. at 35-36.

467. 15 Cal. 3d at 251, 539 P.2d at 794, 124 Cal. Rptr. at 34.

468. 15 Cal. 3d at 255, 539 P.2d at 796, 124 Cal. Rptr. at 36.

469. See, e.g., *United States v. Provenzano*, 440 F. Supp. 561 (S.D.N.Y. 1977). Provenzano, a reputed Mafia boss, was charged with conspiracy to offer kickbacks to influence trustees of a labor pension fund. 440 F. Supp. at 562. The government's only evidence of Provenzano's participation in the conspiracy was the eyewitness testimony of a government informer, Goldfarb, who testified before the grand jury that he was present at a meeting between the defendants and heard Provenzano make an allegedly incriminating statement about the need to offer some kickbacks. 440 F. Supp. at 563-64. The government's case against Provenzano rested on Goldfarb's testimony because its own surveillance of the building where the alleged meeting occurred did not produce any evidence that Provenzano was in the building. 440 F. Supp. at 566.

Events after Goldfarb's grand jury testimony raised serious questions about the reliability of his identification and his general credibility. After the original grand jury indicted Provenzano, Goldfarb told the prosecutor he had not actually looked at Provenzano but had just heard the statement. 440 F. Supp. at 563. Goldfarb had never seen or met the defendant before this meeting. Moreover, he was not sure that the statement about the alleged kickbacks related to the proposed mortgage loan noted in the indictment. 440 F. Supp. at 564. Finally, Goldfarb was the government's chief witness at an unrelated trial where all the defendants

prosecutorial and grand jury screening depends in part on how courts define the prosecutor's duty. Because the courts have failed to specify what screening functions should be served by the grand jury, there is considerable confusion in the case law as to what constitutes exculpatory evidence for purposes of grand jury screening. Does the duty extend to evidence that suggests that the defendant did not commit the proscribed act?⁴⁷⁰ Should the duty encompass any evidence that creates a reasonable doubt about the defendant's guilt, regardless of whether it negates a material element of the crime⁴⁷¹ or establishes some affirmative defense?⁴⁷² Must the prosecutor be personally aware of this exculpatory evidence before the duty attaches?⁴⁷³ Must the prosecutor actually present the evidence or merely notify the grand jury of its existence?⁴⁷⁴ Once notified, is the

were acquitted, suggesting that the trial jury had entertained some doubts about his credibility. 440 F. Supp. at 565. Despite Goldfarb's doubts about the accuracy of his testimony, the prosecutor submitted the transcript of his grand jury testimony to a new grand jury that returned a superseding indictment against Provenzano. The government did not call Goldfarb to testify before this second grand jury and did not inform the grand jurors that Goldfarb had expressed doubts about the validity of his identification. 440 F. Supp. at 565.

Judge Bonsal dismissed the superseding indictment because the prosecutor's failure to disclose the exculpatory material prevented the second grand jury from making "an independent evaluation of the case." 440 F. Supp. at 565. He dismissed the original indictment because the prosecutor's failure to disclose Goldfarb's substantial recantation of his testimony to the original grand jury precluded it from screening out unwarranted prosecutions. Judge Bonsal explicitly rejected *Costello's* assumption that the trial was the only proper forum to cure such evidentiary defects and concluded that it would make little sense to hold Provenzano for trial on the basis of evidence which would not support a conviction. 440 F. Supp. at 566.

See also United States v. Ciambrone, 601 F.2d 616, 622-23 (2d Cir. 1979), discussed at note 461 *supra*; United States v. Samango, 450 F. Supp. 1097 (D. Hawaii 1978), *aff'd.*, 607 F.2d 877 (9th Cir. 1979); United States v. Phillips Petroleum Co., 435 F. Supp. 610 (N.D. Okla. 1977) (indictment for intentional failure to report taxable income dismissed in part because prosecutor failed to disclose exculpatory testimony that, if believed, negated intent); United States v. Braniff Airways, Inc., 438 F. Supp. 579, 586 (W.D. Tex. 1977). *But see* United States v. Lasky, 600 F.2d 765, 768 (9th Cir. 1979) (rejecting duty to disclose exculpatory evidence).

470. *See, e.g.*, United States v. Provenzano, 440 F. Supp. 561 (S.D.N.Y. 1977), which is discussed in note 469 *supra*.

471. *See, e.g.*, United States v. Phillips Petroleum Co., 435 F. Supp. 610 (N.D. Okla. 1977).

472. *See, e.g.*, United States v. Braniff Airways, Inc., 438 F. Supp. 579, 586 (W.D. Tex. 1977) (suggesting that the prosecutor is not required to inform a grand jury of possible defenses to be asserted at trial). *See also* People v. Snow, 72 Cal. App. 3d 950, 956-59, 140 Cal. Rptr. 427, 430-32 (1977), *overruled on other grounds*, People v. Wetmore, 22 Cal. 3d 318, 583 P.2d 1308, 149 Cal. Rptr. 265 (1978) (evidence suggesting defendant's insanity does not constitute exculpatory evidence for purposes of grand jury screening).

473. Most federal courts have not required the prosecutor to seek out exculpatory evidence. *See* United States v. Ciambrone, 601 F.2d 616 (2d Cir. 1979), discussed in note 461 *supra*; United States v. Ruyle, 524 F.2d 1133, 1135-36 (6th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976). However, the prosecutor may have a duty to disclose exculpatory evidence in the possession of his investigative agents. *See* People v. Trolia, 69 Ill. App. 3d 439, 388 N.E.2d 35 (1979).

474. Most courts simply require the prosecutor to inform the grand jury of its existence. *See* United States v. Ciambrone, 601 F.2d 616 (2d Cir. 1979); People v. McAlister, 54 Cal. App. 3d 918, 926, 126 Cal. Rptr. 881, 886, *cert. denied*, 429 U.S. 850 (1976).

grand jury obligated to call for that evidence?⁴⁷⁵ And finally, how will violations of this duty be detected⁴⁷⁶ and what remedies should apply?

Whether *Johnson* will improve grand jury screening depends on how the courts answer those questions. An overly broad definition of exculpatory evidence may impose impossible administrative burdens on the prosecution and elongate the grand jury proceedings into a mini-trial.⁴⁷⁷ An unduly narrow definition may eliminate the rule's practical force. Even if those difficult questions are resolved, implementing the *Johnson* duty and detecting its violation will be exceedingly difficult unless other grand jury reform measures are approved. I shall suggest some tentative answers to those questions in Subsection B.

4. *Resubmission of Cases to Subsequent Grand Juries*

Problems concerning perjured testimony, exculpatory evidence, and the excessive use of hearsay testimony often arise when the prosecutor presents a new grand jury with transcripts of testimony given to another grand jury that had been previously involved in the case. Resubmission often occurs when the prosecutor requests a superseding indictment from the second grand jury to cure defects that tainted the first grand jury's indictment.⁴⁷⁸ Recently, a few federal courts have considered whether a prosecutor who presents the second grand jury with hearsay testimony (the transcripts) or fails to inform it of the evidentiary problems that tainted the first grand jury's proceedings is guilty of misconduct justifying dismissal of the superseding indictment.

*United States v. Gallo*⁴⁷⁹ and *United States v. Chanen*⁴⁸⁰ exemplify the varied outcomes engendered when courts use the prosecutorial misconduct doctrine to circumvent *Costello*. In *Gallo*, a crucial witness, Jerome Buckley, admitted during his second ap-

475. See *People v. McAlister*, 54 Cal. App. 3d 918, 926-27, 126 Cal. Rptr. 881, 886, *cert. denied*, 429 U.S. 850 (1976) (interpreting CAL. PENAL CODE § 939.7 (West 1970), the court concluded that a grand jury is not obligated to pursue potential exculpatory evidence once notified of its existence).

476. Unless defendants are given greater access to the grand jury's transcript, detection of prosecutorial misconduct before the grand jury will be haphazard at best. See Holderman, 71 J. CRIM. L. & CRIMINOLOGY 1, 18, 30 (1980).

477. See *United States v. International Paper Co.*, 457 F. Supp. 571 (N.D. Texas 1978) (prosecutor need not disclose all evidence that could be characterized as exculpatory).

478. Alternatively, the first grand jury may have been acting solely in its inquisitorial capacity to gather evidence of alleged criminal activity. In such cases, the prosecution may submit the transcripts of testimony given to the first grand jury to a second, accusatory grand jury.

479. 394 F. Supp. 310 (D. Conn. 1975).

480. 549 F.2d 1306 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977).

pearance before a grand jury that part of his original testimony was untrue.⁴⁸¹ That grand jury returned an indictment, but the prosecutor sought a superseding indictment to correct technical defects in the first that were unrelated to Buckley's retracted perjury. The prosecutor presented the transcript of Buckley's complete testimony to the second grand jury⁴⁸² and told them that the new indictment merely cured the technical defects of the first.

District Judge Zampano dismissed the superseding indictment on grounds of prosecutorial misconduct. The judge held that the prosecutor's use of the Buckley transcripts prevented the second grand jury from making "the charge on its own judgment"⁴⁸³ because it could not personally evaluate Buckley's credibility. Citing both *Umans*⁴⁸⁴ and *Estepa*,⁴⁸⁵ Judge Zampano found that the prosecutor should have: (1) alerted the grand jury to the hearsay quality of the evidence it was considering;⁴⁸⁶ (2) informed the grand jurors that Buckley was available for live testimony if they wanted to evaluate his credibility for themselves;⁴⁸⁷ (3) alerted the grand jurors to the perjurious portions of Buckley's testimony⁴⁸⁸ (citing *Basurto*);⁴⁸⁹ and (4) presented the second grand jury with available corroborating evidence from the first grand jury proceedings.⁴⁹⁰ Judge Zampano's analysis of what evidentiary duties the prosecutor owes the grand jury far exceeds *Estepa*'s minimal obligation not to mislead the grand jury.⁴⁹¹ In effect, the court dismissed the superseding indictment because the prosecutor had not given the second grand jury his best evidence.

In *Chanen*, the Ninth Circuit considered similar resubmission problems but concluded that they did not demonstrate prosecutorial

481. 394 F. Supp. at 312.

482. 394 F. Supp. at 313.

483. 394 F. Supp. at 314 (quoting *Stirone v. United States*, 361 U.S. 212, 219 (1960)). *But cf.* *United States v. Schlesinger*, 598 F.2d 722, 726 (2d Cir. 1979) (Because of a defect in the first indictment, the prosecutor sought a superseding indictment from a second grand jury that was unfamiliar with the case. The prosecutor gave a hearsay account of the allegations in the first indictment, summarized the testimony of witnesses before the grand jury, and then offered to have transcripts of their testimony read to the second grand jury. Relying on *Costello*, the court refused to dismiss the superseding indictment).

484. 368 F.2d 725 (2d Cir. 1966), *cert. dismissed as improvidently granted*, 389 U.S. 80 (1967). *See* text at notes 398-400 *supra*.

485. 471 F.2d 1132 (2d Cir. 1972). *See* text at notes 410-20 *supra*.

486. 394 F. Supp. at 315.

487. 394 F. Supp. at 315.

488. 394 F. Supp. at 315.

489. 497 F.2d 781 (9th Cir. 1974). *See* text at notes 427-43 *supra*.

490. 394 F. Supp. at 315.

491. *See* text at notes 419-20 *supra*.

misconduct justifying dismissal of the resulting indictment. The prosecutor in *Chanen* had presented the first grand jury with the live testimony of five witnesses but had not sought an indictment.⁴⁹² Four months after the first grand jury was discharged, the government requested and received an indictment from a second grand jury, which heard an FBI agent's summary of the witnesses' testimony before the first grand jury.⁴⁹³ A district court judge dismissed that indictment because only hearsay testimony had been offered and no court reporter had transcribed it.⁴⁹⁴ Six months later, with a court reporter present, the government obtained another indictment by reading the first grand jury's transcript to a third grand jury. These transcripts contained references that the witnesses had submitted false affidavits and the prosecutor advised the third grand jury that these witnesses had made prior inconsistent statements.⁴⁹⁵ The district court again dismissed the indictment because the third grand jury did not have the same opportunity as the first to evaluate live testimony.⁴⁹⁶

The Ninth Circuit reversed that last dismissal. Unlike *Gallo*, the *Chanen* panel believed that both *Costello* and the separation of powers doctrine should usually preclude the courts from interfering with the prosecutor's decision as to "what evidence to present to the grand jury and how to present it."⁴⁹⁷ Accordingly, the court held that it could not use its supervisory power to dismiss an indictment where the prosecutor failed to present the government's best evidence to the grand jury unless such a sanction was necessary "to preserve the integrity of the judicial process and to avoid any fundamental unfairness."⁴⁹⁸ Unfortunately, the court failed to articulate any standard to identify when prosecutorial conduct jeopardized these interests. It reviewed earlier prosecutorial misconduct cases⁴⁹⁹ and found that

492. 549 F.2d at 1308.

493. 549 F.2d at 1308.

494. 549 F.2d at 1308.

495. 549 F.2d at 1311.

496. 549 F.2d at 1308-09.

497. 549 F.2d at 1313.

498. 549 F.2d at 1313. The court insisted that this caveat was not inconsistent with *Costello* because the court would only dismiss indictments because of prosecutorial misconduct and not because of concern about the qualitative or quantitative sufficiency of the evidence presented to the grand jury. 549 F.2d at 1309 n.3. However, the court's discussion and application of the prosecutorial misconduct doctrine to the facts before it demonstrated that one of the primary criteria for determining improper prosecutorial conduct is whether the prosecutor's evidentiary presentation impaired the grand jury's screening function.

499. "Almost every court dealing with the issue raised here has confronted a novel set of facts. The range of prosecutorial conduct capable of inspiring allegations of unfairness appears unlimited. Indeed, the facts of this case are unlike those of any other we have been able to find." 549 F.2d at 1309. *But see* note 502 *infra*.

they provided no clear standard to distinguish permissible from impermissible conduct. Nevertheless, it concluded:

Although the holdings of all these cases may be difficult to reconcile, we believe that they make it plain that the manner in which the prosecution secured the indictment in the present case cannot serve as the basis for a dismissal. Reading transcripts of sworn testimony, rather than presenting live witnesses, simply does not constitute, on the facts of the case, "fundamental unfairness" or a threat to "the integrity of the judicial process."⁵⁰⁰

The court buttressed this question-begging conclusion by noting that the prosecutor had alerted the third grand jury about possible credibility problems.⁵⁰¹

What seems clear from the preceding analysis of prosecutorial misconduct cases is that the doctrine does not offer any intelligible, principled way of deciding whether a prosecutor's conduct is inimical to the integrity of the judicial process. Federal courts often use the doctrine to circumvent *Costello* and dismiss indictments when they are convinced that the prosecutor's presentation of evidence has produced a miscarriage of justice. Defining such a miscarriage in this setting depends largely upon the particular court's view of the grand jury's screening functions. Because the courts have been unable to agree on those purposes or on how they are impaired by the types of evidence presented to the grand jury, the prosecutorial misconduct cases do not establish a consistent standard for dismissal.⁵⁰² Courts which assume that the grand jury should screen factual guilt will find misconduct only in those rare cases where the prosecutor deliberately biases the grand jury's determination of factual guilt by flagrantly abusive conduct.⁵⁰³ Thus, the *Chanen* panel, after citing

500. 549 F.2d at 1311.

501. 549 F.2d at 1311.

502. For example, compare *Chanen* with *United States v. Samango*, 607 F.2d 877 (9th Cir. 1979), a case involving quite similar resubmission problems. In both cases, the superseding indictments were based solely on hearsay evidence: the transcripts of testimony given by witnesses to previous grand juries. In both cases, the prosecutor was aware of information that raised serious questions about the credibility of the witnesses. In *Chanen*, a government agent read the transcripts to the indicting grand jury. The transcripts themselves revealed that some of the witnesses had filed false affidavits and the prosecutor advised the grand jury that two of the witnesses whose transcripts were read had made prior inconsistent statements. In *Samango*, the prosecutor left the transcripts with the grand jurors so they could read them. 607 F.2d at 881. The Ninth Circuit found no prosecutorial misconduct justifying dismissal of the indictments in *Chanen* but affirmed a district court's dismissal of a superseding indictment in *Samango*. While the *Chanen* panel found that the grand jury had received sufficient notice of the witnesses' questionable credibility, 549 F.2d at 1311, the *Samango* court concluded that the prosecutor should have presented the live testimony of a witness whose veracity was in question so that the grand jury could "observe [his] demeanor and determine on its own whether [he] was a credible witness." 607 F.2d at 882.

503. See *United States v. Kennedy*, 564 F.2d 1329, 1338 (9th Cir. 1977), cert. denied, 435 U.S. 944 (1978).

cases that emphasized the trial as the proper forum to resolve credibility questions, concluded that the grand jury probably would have indicted Chanen if it had considered live testimony.⁵⁰⁴ Courts which assume that the grand jury should receive sufficient evidence to assess the likelihood of conviction will find misconduct when the prosecutor precludes the grand jury from *personally* assessing the credibility of an important government witness whose veracity is in doubt.⁵⁰⁵

Thus, despite its label, the courts have used the prosecutorial misconduct doctrine in many cases to determine whether the prosecutor's evidentiary presentation impaired the grand jury's screening functions. As one district court judge observed:

Although the concept of prosecutorial conduct which deprives the defendant of an unbiased grand jury is a useful one . . . the label "prosecutorial misconduct" is not. The term suggests uncharacteristic, extraordinary, and reprehensible conduct. Usually, the indiscreet prosecutor is just acting like all prosecutors.⁵⁰⁶

Since *Costello* prohibits courts from imposing an obligation on the prosecutor to present the grand jury with reliable proof of a defendant's factual and legal guilt, the prosecutorial misconduct doctrine is at best a stopgap measure. It can mitigate the worst excesses generated by *Costello* but it does not acknowledge that *Costello* is the source of the problem. The next Subsection presents a series of reform proposals that address the disease instead of its symptoms.

B. Reform Proposals

Congress should repudiate *Costello* and require federal prosecutors to present the grand jury with admissible evidence that would support a conviction at trial. Specifically, prosecutors should not present hearsay testimony to a grand jury absent some special justification. They should not present evidence that they know was obtained in violation of a defendant's constitutional rights. A prosecutor who is aware of evidence that, if believed, negates one of the material elements of the crime or undermines the credibility of one of the government's critical trial witnesses should present that

504. 549 F.2d at 1311-12. However, the *Chanen* panel did note the prosecutor had alerted the grand jury to possible credibility problems.

505. In effect, *Gallo* and *United States v. Samango*, 607 F.2d 877 (9th Cir. 1979), discussed in note 502 *supra*, require the grand jury to make its own credibility judgment by evaluating the live testimony of a witness with credibility problems. In contrast, *Chanen* does not mandate such first-hand evaluation of the witness's veracity as long as the prosecutor has not misled the grand jury about the quality of evidence it was considering.

506. *United States v. Samango*, 450 F. Supp. 1097, 1102 (D. Hawaii 1978), *affd.*, 607 F.2d 877 (9th Cir. 1979).

evidence to the grand jury. If aware of evidence that, if believed, would preclude conviction at trial (such as a possible affirmative defense), the prosecutor should alert the indicting grand jurors to its existence and inform them of their right to call for such evidence.

These evidentiary requirements would promote a fairer ex parte evaluation of the government's case. Accordingly, the grand jury should be instructed that its most important function is to screen out cases where it believes a jury would not find the government's case strong enough to support a conviction. Specifically, it should be told that the prosecutor must introduce sufficient legally admissible evidence of each element of the crime to carry the case to a trial jury (directed-verdict screen) and to justify a conviction (predictive screen). To implement that standard, the grand jury should be told not to indict unless it finds clear and convincing evidence of the defendant's guilt.⁵⁰⁷

These reforms will not work unless sanctions are provided for their violation. The grand jury is a lay body that will naturally turn to the prosecutor for advice about the applicable legal guilt requirements. While it is the most appropriate body to perform a predictive screening function, it does not have the legal expertise to know whether the prosecutor is actually presenting legally admissible evidence. Accordingly, reform of the grand jury's accusatory function should include some limited, post-indictment judicial review to ensure that the prosecutor has complied with the applicable legal guilt requirements. Therefore, I propose that the federal rules be amended to permit a motion to dismiss an indictment that is not supported by legally sufficient evidence. The court's review would be limited to examining the indicting⁵⁰⁸ grand jury's transcript⁵⁰⁹ to

507. See note 538 *infra*.

508. Judicial review of voluminous grand jury transcripts from a prolonged grand jury investigation could impose a serious burden on the courts. For this as well as other reasons, I believe that the inquisitorial and accusatorial functions should be performed by different grand juries. See notes 553-57 *infra* and accompanying text. Accordingly, the judge would review the shorter transcript of the indicting grand jury.

509. Federal rule of criminal procedure 6(e)(1) has been amended to require mandatory recordation of all proceedings before a federal grand jury except its private deliberations and voting. The amendment added a new provision 6(e)(1) that took effect August 1, 1979. See 25 CRIM. L. REP. (BNA) 2255-56 (June 13, 1979). This mandatory recording requirement should improve the fairness of grand jury proceedings. First, it precludes prosecutors from circumventing the Jencks Act by failing to record a witness's grand jury testimony. Second, it should deter prosecutors from making improper comments about any grand jury witness that might bias the grand jury. See 1977 *Hearings*, pt. 1, *supra* note 108, at 845 (prepared statement of Rodney Sager, former United States Attorney for Virginia). Third, it promotes the trustworthiness of the testimony given before grand juries because "the restraint of being subject to prosecution for perjury . . . is wholly meaningless . . . if the testimony is unrecorded . . ." *United States v. Cramer*, 447 F.2d 210, 222 (2d Cir. 1971) (Oakes, J., dissenting), *cert. denied*, 404 U.S. 1024 (1972). Fourth, it supports the prosecution's case at trial because a grand jury

determine whether the prosecutor presented sufficient legally admissible evidence to satisfy the directed-verdict standard. That review would ensure that prosecutors present the grand jury with a prima facie case of legal guilt.⁵¹⁰ It intentionally duplicates the grand jury's directed-verdict screen because lay persons cannot determine the legal admissibility of the evidence presented to them. However, the court's review of the transcript will not duplicate the grand jury's more important predictive function.⁵¹¹ The grand jury's assessment of the credibility of the government's witnesses should not be disturbed if the directed-verdict standard is met.⁵¹² Accordingly, the court should examine the evidence in the light most favorable to the government.⁵¹³

Judicial review could operate as follows: after indictment, the defendant would receive a transcript of the entire grand jury proceedings.⁵¹⁴ The defendant can then use that transcript to prepare a motion to dismiss. Given access to the grand jury transcript, the defendant would have no valid reason for delaying the motion until after the trial has started and jeopardy has attached. Accordingly, failure to challenge the grand jury proceedings in a pretrial motion should waive those claims. If the defendant moves to dismiss, the court should evaluate the grand jury transcript to determine whether the prosecutor presented a prima facie case of legal guilt, measured by the directed-verdict standard. In making that determination, the trial court can consider hearsay evidence presented to the grand jury only if it falls within a specific statutory exception authorizing its use

witness's testimony may be admitted at trial when the witness is unavailable to testify. *See* United States v. Garner, 574 F.2d 1141 (4th Cir.), *cert. denied*, 439 U.S. 936 (1978) (court held that grand jury testimony of a witness unavailable to testify at trial may be admitted at trial under federal rule of evidence 804(b)(5) without violating the defendant's right of confrontation where that grand jury testimony possessed strong indicators of reliability). *But see* United States v. Gonzales, 550 F.2d 1271 (5th Cir. 1977). Finally, if my reforms for the indicting grand jury are adopted, the government could satisfy the factual basis requirement at the plea hearing by submitting a copy of the indicting grand jury's transcript. *But see* note 585 *infra*.

510. I rejected the use of a post-indictment preliminary hearing to perform this function at the federal level because the hearing would require a second presentation of the government's evidence and its adversarial procedures would generate significant administrative costs and pretrial delay. Judicial review of the indicting grand jury's transcript will impose an administrative burden on the courts that could foster some pretrial delay, but those costs are not comparable to those that would be generated by a mini-trial, adversarial proceeding.

511. Moreover, judicial review of the transcript does not require the time-consuming duplication of another evidentiary presentation.

512. *See* People v. Eckert, 2 N.Y.2d 136, 138 N.E.2d 794, 157 N.Y.S.2d 551 (1956).

513. *See* People v. Backus, 23 Cal. 3d 360, 391, 590 P.2d 837, 855, 152 Cal. Rptr. 710, 728 (1979) ("A reviewing court may not substitute its judgment for that of the grand jury . . . in determining the sufficiency of the evidence and must draw all reasonable inferences in support of the indictment or information.").

514. *See* notes 563-79 *infra* and accompanying text.

or if the grand jury transcript reveals a compelling reason for its presentation.⁵¹⁵ However, the grand jury's consideration of such incompetent evidence, including hearsay or illegally seized evidence, will not invalidate the indictment if there is sufficient competent evidence to satisfy the directed-verdict standard.⁵¹⁶

If the court denied the motion to dismiss, its order would be appealable only if the defendant subsequently pleaded guilty.⁵¹⁷ The government would be permitted to appeal a pretrial order dismissing the indictment,⁵¹⁸ but a dismissal without prejudice would permit the government to cure any evidentiary defect by simply resubmitting⁵¹⁹ its case with additional competent evidence to a new⁵²⁰ grand jury. After conviction at trial, the defendant should not be allowed to appeal a pretrial order sustaining the indictment because a valid trial verdict establishes the defendant's legal guilt.⁵²¹

To implement these reforms without causing undue administrative burdens or pretrial delay, Congress should enact statutes⁵²² em-

515. See notes 523-29 *infra* and accompanying text.

516. One possible exception to this rule is where "the extent of incompetent and irrelevant evidence before the grand jury is such that . . . it is unreasonable to expect that the grand jury could limit its consideration to the admissible, relevant evidence. . . ." *People v. Backus*, 23 Cal. 3d 360, 393, 590 P.2d 837, 856, 152 Cal. Rptr. 710, 729 (1979). See *United States v. Asdrubal-Herrera*, 470 F. Supp. 939 (N.D. Ill. 1979) (court dismissed an indictment for immigration offenses despite sufficient evidence of probable cause because a government agent erroneously informed the grand jury that the defendant was involved in illegal transportation of firearms).

517. As Professor Robert Dawson has pointed out to me, several alternatives are possible here. First, the defendant might be given the right to immediate appeal because denial of the defense motion arguably raises the collateral issue of the power of the government to place the defendant on trial at all. See *Abney v. United States*, 431 U.S. 651 (1977) (Court held that under 18 U.S.C. § 1291 (1976), a defendant could appeal a denial of a pretrial motion to dismiss on double jeopardy grounds). Such a proposal, however, would foster serious additional pretrial delay and its chances of being enacted are remote. Second, a defendant could be authorized to appeal following conviction by plea or trial. One could argue that the trial verdict does not render the pretrial motion's denial harmless because the defendant never should have been brought to trial on charges that were not supported by legally sufficient evidence at the time of the indictment. While an error has occurred, I do not believe it to be of sufficient magnitude to justify the reversal of a trial verdict that demonstrates sufficient proof of legal guilt at the time of conviction. I have chosen the third option of allowing appeal after a guilty plea because I believe some appellate review is necessary to ensure honest application of the directed-verdict standard at the trial court level.

518. See 18 U.S.C. § 3731 (1976).

519. Of course, federal courts could still dismiss indictments with prejudice when they find serious prosecutorial misconduct that justifies such a stringent sanction. See note 426 *supra*. See also *United States v. Gallo*, 394 F. Supp. 310 (D. Conn. 1975). But see *United States v. Chanen*, 549 F.2d 1306 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977).

520. Resubmitting the case to the same grand jury that returned the first indictment would not ensure an unbiased and fresh evaluation of the prosecution's case. See *United States v. Hinton*, 543 F.2d 1002 (2d Cir. 1976).

521. See N.Y. CRIM. PROC. LAW. 210.30(6) (McKinney 1971).

522. For examples of model grand jury statutes implementing these reform proposals, see Appendix.

bodily the following principles.

1. Hearsay Evidence

Absent statutory authorization or a compelling justification for its use, the grand jury should not receive evidence that would be inadmissible at trial. Justification for the use of inadmissible evidence should be made on the record at the time of its presentation. However, the fact that the grand jury received inadmissible evidence should not void an indictment if it also received sufficient competent evidence to establish a prima facie case of legal guilt.

This principle would force the prosecutor to present the government's best evidence unless some special justification warrants the presentation of hearsay testimony. Thus, the prosecutor could not prevent the grand jury from judging the credibility of available⁵²³ witnesses.⁵²⁴ However, the rule does not preclude all use of hearsay because a complete prohibition might stretch some grand jury proceedings into a mini-trial. New York's experience suggests that grand juries can function efficiently while allowing only legally admissible evidence, as long as suitable exceptions are permitted.⁵²⁵

523. See ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION AND THE DEFENSE FUNCTION § 3.6(a) (Approved Draft 1971) [hereinafter cited as ABA STANDARDS — PROSECUTION FUNCTION] These standards preclude the use of hearsay except "in appropriate cases the prosecutor may present witnesses to summarize admissible evidence available to him which he believes he will be able to present at trial"). The Commentary suggests that the use of hearsay should be avoided unless "cogent reasons" justify its use. Examples of such compelling justifications are the need to summarize available evidence in cases involving voluminous records, the written statement of a witness who is not available under circumstances requiring prompt grand jury action, and the hearsay statement from a seriously injured victim or from a witness whose safety requires concealed identity. For example, when the government has reasonable grounds to believe that a witness's safety may be jeopardized by personally appearing before the grand jury, a transcript of the witness's statement could be read to the grand jury. See *United States v. Russo*, 413 F.2d 432 (2d Cir. 1969); *United States v. Carella*, 411 F.2d 729 (2d Cir.), *cert. denied*, 396 U.S. 860 (1969).

However, mere inconvenience in calling a witness does not justify the use of hearsay testimony. See *United States v. Narciso*, 466 F. Supp. 252, 299 n.6 (E.D. Mich. 1977). If the prosecutor presents hearsay testimony, he should alert grand jurors to this fact and tell them that they can call the original source of information if they have any doubts about the testimony's validity.

Adoption of this proposal would also prevent prosecutors from circumventing the Jencks Act requirement that the grand jury testimony of prosecution trial witnesses be disclosed after the close of their testimony. Prosecutors have sometimes undercut the Act's intent by giving the grand jury hearsay accounts of their trial witnesses' expected testimony. See 8 MOORE'S FEDERAL PRACTICE ¶ 16.10[2], at 16-149 to 150 (rev. 2d ed. 1979).

524. Several states have adopted statutes that require the grand jury to receive only evidence that would be admissible at trial. See N.M. STAT. ANN. § 31-6-11 (Supp. 1979). *But see* *Maldonado v. State*, 604 P.2d 363 (N.M. 1979) (statute does not authorize post-indictment judicial review of the legal sufficiency of the evidence presented to the grand jury).

525. N.Y. CRIM. PROC. LAW § 190.30(2) (McKinney Supp. 1979), permits admission of reports of a physicist, chemist, coroner, medical examiner, firearms identification expert, fingerprint technician, "or an expert or technician in some comparable scientific or professional field, concerning the results of an examination, comparison or test performed." Section 190.30(3) permits hearsay admission of perfunctory types of testimony involving true ownership of stolen property, qualification of a dealer or expert who evaluated property, the expert

For example, New York prosecutors can present a hearsay report of expert findings or a hearsay summary of voluminous records like those in *Costello*.⁵²⁶

Although the prosecutor should not use hearsay evidence absent statutory authorization or special justification, the legal admissibility of some evidence may remain uncertain until trial.⁵²⁷ Therefore, the rule does not invalidate indictments based in part on inadmissible evidence if the remaining evidence satisfies the directed-verdict standard.⁵²⁸ Moreover, a court could consider hearsay evidence in determining whether the prosecutor presented a prima facie case of legal guilt if it found a compelling justification for its presentation to the grand jury and if it determined that legally admissible evidence would be available at trial to establish the same facts.⁵²⁹

2. Illegally Seized Evidence

Prosecutors should not present grand juries with evidence that they know was obtained in violation of the target defendant's constitutional rights.⁵³⁰ Before ruling on a defendant's motion to dismiss an indictment because of insufficient proof of legal guilt, the trial court should rule on any motions to suppress evidence. Should the court grant a motion to suppress evidence, it should not consider that evidence as part of the prosecution's proof of legal guilt when evaluating the grand jury transcript.

opinion of its value, and the basis for the opinion. This type of evidence may be introduced by either written or oral statements under oath. N.Y. CRIM. PROC. LAW § 190.30(3) (McKinney Supp. 1979).

526. See N.Y. CRIM. PROC. LAW § 190.30(3) (McKinney Supp. 1979).

527. See Note, *Exclusion of Incompetent Evidence from Federal Grand Jury Proceedings*, 72 YALE L.J. 590, 596-97 (1963).

528. See *People v. Leary*, 305 N.Y. 793, 113 N.E.2d 303 (1953); *People v. Briggs*, 50 Misc.2d 1062, 272 N.Y.S.2d 211 (Rensselaer County Ct. 1966); N.Y. CRIM. PROC. LAW § 190.65(1) (McKinney 1971), construed in *People v. Dunleavy*, 41 A.D.2d 717, 341 N.Y.2d 500, *aff'd.*, 33 N.Y.2d 573, 301 N.E.2d 432, 347 N.Y.S.2d 448 (1973). *Contra*, *People v. D'Andrea*, 26 Misc.2d 95, 207 N.Y.S.2d 215 (Kings County Ct. 1960). The one possible exception to this rule would be in those cases where the nature, extent, and prejudicial effects of the incompetent evidence presented to the grand jury indicates that the grand jury may not have indicted the defendant if it had only considered the competent evidence presented to it. See note 516 *supra*.

529. See generally MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 330.4(4) (1975).

530. The Justice Department has issued a series of internal regulations applicable to all federal prosecutors who conduct grand jury proceedings. Because the guidelines are designed primarily for internal administrative purposes, federal courts have held that their violation does not confer judicially enforceable rights on trial parties. See *United States v. Shulman*, 466 F. Supp. 293 (S.D.N.Y. 1979). See also *United States v. Caceres*, 440 U.S. 741 (1979) (failure of I.R.S. agent to follow internal regulations before recording conversations between taxpayer and agent not grounds for suppression of recordings). These guidelines prohibit prosecutors from presenting evidence to the grand jury that the prosecutor knows was unconstitutionally obtained. See *1977 Hearings*, pt. 1, *supra* note 108, at 712 (statement of Asst. Attorney General Benjamin R. Civiletti). See also *Gelbard v. United States*, 408 U.S. 41 (1972).

*Calandra's*⁵³¹ refusal to apply the exclusionary rule to grand jury proceedings rested to some degree upon the Court's concern that litigation over fourth amendment questions raised by grand jury witnesses would disrupt and delay continuing grand jury investigations. Moreover, permitting grand jury witnesses to raise fourth amendment objections to questions asked by the prosecutor would promote "extended litigation of issues only tangentially related to the grand jury's primary objective."⁵³² Justice Powell's conclusion is defensible if the grand jury screens only factual guilt, because most evidence seized in violation of the defendant's fourth amendment rights has probative value. But if the accusatory grand jury's primary objective is to screen legal guilt, it should not consider evidence that would be excluded at the defendant's trial.

Attributing the latter objective to the grand jury, some proposed reform statutes require that an indictment be dismissed if a court finds that it was based in part on evidence seized in violation of the defendant's constitutional or statutory rights.⁵³³ My objection to those proposals is that they penalize what may have been a prosecutor's good faith belief that the submitted evidence was legally obtained. Given the complexity of the constitutional principles involved, dismissal of an indictment seems too high a price for the prosecutor's error, especially if the other evidence presented to the grand jury provides sufficient proof of the defendant's legal guilt.

My principle would impose an ethical obligation on prosecutors not to present evidence to the grand jury that they know was procured in violation of the putative defendant's constitutional rights.⁵³⁴ In the rare case where a prosecutor knowingly presents illegally seized evidence, the resulting indictment should be dismissed regardless of any independent proof of legal guilt. However, in the more typical case where legitimate doubt exists about the constitutionality of some government evidence-gathering procedure, the grand jury's consideration of that evidence should not automatically invalidate the indictment. Instead, the court should disregard that evidence when it determines whether the government has presented the grand jury with sufficient proof of legal guilt. To implement this rule, the

531. 414 U.S. 338 (1974).

532. 414 U.S. at 349.

533. See S. 1449, 95th Cong., 1st Sess. § 3330C(d)(4) (1977), reprinted in *1977 Hearings*, pt. 2, *supra* note 108, at 1169-70 (providing that the district court shall dismiss an indictment if it finds that the prosecutor has submitted to the grand jury "evidence seized or otherwise obtained by an unlawful act or in violation of the witness' constitutional right or of rights established or protected by any statute of the United States").

534. See note 530 *supra*.

court should rule on the defendant's suppression motion before it reviews the grand jury's transcript.

Admittedly, this principle will not save all defendants from indictment based on illegally seized evidence, because it does not permit suppression motions to be considered before indictment. However, when prosecutors realize that courts will dismiss indictments based on insufficient proof of legal guilt, they will have more incentive to evaluate honestly the admissibility of evidence they present to the grand jury.

3. Exculpatory Evidence

If the prosecutor is aware of exculpatory evidence that, if believed, would negate a material element of the crime or undermine the credibility of a crucial government witness, the prosecutor should present that evidence to the grand jury. Failure to do so should invalidate any indictment, even if the grand jury received sufficient evidence to meet the directed-verdict standard. If the prosecutor is aware of any exculpatory evidence (such as a possible affirmative defense) that, if believed, would raise a reasonable doubt about the defendant's guilt, the prosecutor should alert the grand jury to its existence and inform them of their right to call for its presentation. If the prosecutor fails to do so, the subsequent indictment should not be dismissed unless the omitted exculpatory evidence is so compelling that it probably would have led the grand jury to return a no bill. Absent special circumstances, the prosecutor should notify putative defendants that a grand jury is considering indictments against them and that they have a right to testify before it and to present the prosecutor with any evidence they consider exculpatory.

As *Johnson*⁵³⁵ clearly demonstrated, the grand jury cannot eliminate unwarranted prosecutions if the prosecutor does not present exculpatory evidence that negates the defendant's guilt. Thus, the American Bar Association has recognized that the prosecutor should disclose exculpatory evidence to the grand jury⁵³⁶ and the Justice Department has amended its manual for U.S. Attorneys to include such a duty.⁵³⁷ But, like the *Johnson* decision itself, the significance of these standards is muddled by the failure of the drafters to define what they mean by "exculpatory" or to suggest what sanctions should be triggered by a violation of this duty.⁵³⁸

535. 38 Cal. App. 3d 977, 113 Cal. Rptr. 740 (1974), *affid. on statutory grounds*, 15 Cal. 3d 248, 539 P.2d 792, 124 Cal. Rptr. 32 (1975) (en banc). See text at notes 450-59 *supra*.

536. ABA STANDARDS — PROSECUTION FUNCTION, *supra* note 523, § 3.6(b).

537. See U.S. ATTORNEY'S MANUAL § 9-11.334 (1978) ("when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person").

538. Congress has considered some grand jury reform bills that bear the same defects. Former Congressman Eilberg's comprehensive grand jury reform bill required the prosecutor

Confusion over the proper scope of the duty and what sanctions should be imposed for its violation stems from the failure of both courts and commentators to evaluate the grand jury's screening functions carefully. I have suggested that the grand jury should screen both factual and legal guilt. Since post-indictment judicial review of the transcript will ensure that the prosecutor has presented the grand jury with sufficient evidence to warrant conviction (the directed-verdict screen), the grand jury's most important function is to predict whether a jury would find that evidence sufficiently credible and compelling to convict the defendant. Requiring the grand jury to find clear and convincing evidence of the defendant's guilt ensures a reliable pretrial adjudication of a defendant's factual and legal guilt by a lay body for all felony prosecutions.

Viewed from that perspective, any evidence that, if believed, raises a reasonable doubt about the defendant's guilt could be considered exculpatory for purposes of grand jury screening. But, such a broad standard might force prosecutors to present all evidence that undermines the reliability or credibility of the government's case or supports a possible affirmative defense. Imposing such a broad mandatory duty of disclosure would transform prosecutors into surrogate defense counsel in the grand jury room because they would be required to anticipate the defense's objections to the state's case. Forcing the prosecutor to present all evidence that might possibly defeat conviction at trial would also transform the grand jury's *ex parte* inquiry into a prolonged mini-trial. Moreover, the broader the scope of the duty, the more difficult it will be for prosecutors to determine what evidence in their possession is exculpatory. The government already faces a dilemma when it examines its files to determine what *Brady*⁵³⁹ material it possesses that must be disclosed to the defendant. As Judge Mansfield observed:

[I]n the absence of a preview of the defendant's proposed defenses before trial, [the government] may often be insufficiently appraised to

to "periodically advise the grand jury of the nature and existence of evidence, as yet not received, which might tend to materially affect the credibility of any witness or tend to negate the guilt of any prospective defendant." H.R. 94, 95th Cong., 1st Sess. § 3329(c) (1977), *reprinted in 1977 Hearings*, pt. 2, *supra* note 108, at 978. Although the bill defined exculpatory evidence broadly, it was completely silent as to what sanction, if any, should result from its violation. Former Senator Abourezk introduced a bill that required the district court to dismiss an indictment if "the attorney for the Government has not presented to the grand jury all evidence in his or her possession which the attorney knows will tend to negate the guilt of the person indicted." S. 1449, 95th Cong., 1st Sess. § 3330(c)(d)3 (1977), *reprinted in 1977 Hearings*, pt. 2, *supra* note 108, at 1169-70. While the sanction is clear, the bill does not define the scope of this duty.

539. *Brady v. Maryland*, 373 U.S. 83 (1963), requires the prosecutor to disclose exculpatory evidence to defense counsel before trial. 373 U.S. at 87-88. *See also United States v. Agurs*, 427 U.S. 97 (1976).

be able to select all exculpatory materials from its files. Indeed, the question of whether certain evidence is "exculpatory," like that of what evidence is "relevant," is frequently a matter of opinion, which can be resolved only in the light of all other evidence introduced at trial.⁵⁴⁰

Judge Mansfield's point applies with even greater force to the prosecutor's evaluation of the files before presenting a case to the grand jury. For example, Judge Lacey argued that House Resolution 94's broad exculpatory evidence standard,⁵⁴¹ which required the prosecutor to disclose evidence that might materially affect the credibility of any witness, would be "vague and impossible to interpret"⁵⁴² in the grand jury context. "Every complex fact pattern includes inconsistencies, varying observations, differences in recollection or ability to narrate, and credibility considerations . . . which are not susceptible to easy analysis at the grand jury stage."⁵⁴³ If the prosecutor chose not to disclose all possible inconsistencies, the courts would be forced to examine all of the government's evidence that might have been presented to the grand jury and speculate about how that evidence might have altered the grand jury's deliberations. Thus, adoption of a broadly defined exculpatory evidence standard could spawn a great deal of time-consuming and administratively burdensome litigation.

Describing the problem is far easier than suggesting a solution that accommodates the conflicting interests of efficiency and fairness. Those who oppose a broad definition of exculpatory evidence argue that such a broad duty to present evidence would duplicate the trial's function at the grand jury stage. But duplication would rarely occur since most defendants never receive a trial. On the other hand, if we had sufficient resources to support a mini-trial proceeding during the pretrial process, it might make more sense to rely on the preliminary hearing rather than the grand jury as the appropriate forum because of its adversarial safeguards.

Accordingly, one must define the exculpatory evidence standard in a manner that gives the grand jury sufficient information to adjudicate the defendant's guilt reliably without transforming its proceedings into a mini-trial. My tentative suggestion is a standard that distinguishes between evidence that directly negates a material element of the crime and evidence that suggests a possible affirmative

540. *United States v. Cobb*, 271 F. Supp. 159, 163 (S.D.N.Y. 1967).

541. *See* note 538 *supra*.

542. 1977 *Hearings*, pt. 1, *supra* note 108, at 206 (statement of Frederick B. Lacey, U.S. District Judge, District of New Jersey, representing the Judicial Conference of the United States).

543. *Id.*

defense. The prosecutor should be obligated to present the grand jury with evidence that suggests either that the defendant lacked the requisite criminal intent⁵⁴⁴ or that someone other than the defendant might have committed the act.⁵⁴⁵ For example, if aware of witnesses who would testify to an alibi defense, the prosecutor should present their testimony to the grand jury. If the government's sole eyewitness to a crime has identified someone other than the defendant or given a description of the perpetrator that varies significantly from the defendant's special features, the prosecutor should present that information to the grand jury.⁵⁴⁶ If the prosecutor is aware of reliable information that raises substantial doubt about the credibility of a material witness whose testimony is essential to show that the defendant committed the crime,⁵⁴⁷ that information should go to the grand jury. If the prosecutor fails to present the grand jury with evidence that, if believed, would negate one of the material elements of the crime, the court should dismiss the indictment.⁵⁴⁸ Conversely, if aware of evidence that suggests grounds for an affirmative defense⁵⁴⁹

544. See *Johnson v. Superior Court*, 38 Cal. App. 3d 977, 113 Cal. Rptr. 740 (1974), *affid. on statutory grounds*, 15 Cal. 3d 248, 539 P.2d 792, 124 Cal. Rptr. 32 (1975); *United States v. Phillips Petroleum Co.*, 435 F. Supp. 610 (N.D. Okla. 1977).

545. See *United States v. Provenzano*, 440 F. Supp. 561 (S.D.N.Y. 1977), discussed in note 469 *supra*.

546. See *United States v. Provenzano*, 440 F. Supp. 561 (S.D.N.Y. 1977). *But cf.* *People v. Filis*, 87 Misc. 2d 1067, 386 N.Y.S.2d 988 (Sup. Ct. 1976). In *Filis*, the prosecutor failed to inform the grand jury that the eyewitness, who identified the defendant as one of the men who shot her husband in her grand jury testimony, had previously stated only that she saw "a man" shoot her husband. The court refused to dismiss the indictment because this prior inconsistent statement was not so important that its introduction would have possibly caused the grand jury to change its findings. 87 Misc. 2d at 1069, 386 N.Y.S.2d at 990.

547. See *United States v. Provenzano*, 440 F. Supp. 561 (S.D.N.Y. 1977).

548. This is not a completely satisfactory standard for several reasons. First, the government might have sufficient evidence to reach a jury even if the exculpatory evidence is considered. Accordingly, the court should be given the discretion to dismiss an indictment where the omitted exculpatory evidence would probably have led the grand jury to return a no bill. See *United States v. Mandel*, 415 F. Supp. 1033, 1041-42 (D. Md. 1976); *People v. Filis*, 87 Misc. 2d 1067, 1069, 386 N.Y.S.2d 988, 989 (Sup. Ct. 1976).

Second, in jurisdictions that use the diminished capacity defense, psychiatric evidence of defendant's mental abnormality is relevant to dispute the defendant's specific intent for certain crimes. I have argued elsewhere that in most cases, psychiatric testimony introduced under this partial defense does not really negate the requisite intent as much as it explains why the defendant entertained it. See Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 826 (1977). Accordingly, I believe the prosecutor should not be obligated to present such expert testimony to the grand jury because in most cases it raises questions about mitigating the defendant's culpability which are more appropriately resolved by the ultimate trier of fact after a complete adversarial presentation of the evidence.

549. See *People v. Snow*, 72 Cal. App. 3d 950, 956-57, 140 Cal. Rptr. 427, 430 (1977), *overruled on other grounds*, *People v. Wetmore*, 22 Cal. 3d 318, 583 P.2d 1308, 149 Cal. Rptr. 265 (1978) (in dicta, the *Snow* court observed that *Johnson v. Superior Court*, 38 Cal. App. 3d 977, 113 Cal. Rptr. 740 (1974), *affid. on statutory grounds*, 15 Cal. 3d 248, 539 P.2d 792, 124 Cal. Rptr. 32 (1975), did not require prosecutors to disclose evidence concerning a possible insanity defense to grand jury).

or raises credibility issues about one of the government's witnesses,⁵⁵⁰ the prosecutor need not present such evidence to the grand jury, but he should alert the grand jurors of its existence so they can request its production if they desire. Even if the prosecutor fails to alert the grand jury about this type of evidence, indictments based on a prima facie case of legal guilt should not be dismissed.

This compromise proposal will have little effect on grand jury screening in many cases because the prosecutor may not be aware of exculpatory evidence in the defendant's exclusive possession. To cure that defect without transforming the grand jury into an adversarial proceeding, the prosecutor should give target defendants⁵⁵¹ an opportunity to testify before the grand jury and to present the prosecutor with exculpatory evidence before the grand jury is asked to return an indictment.⁵⁵²

550. However, if the evidence seriously questions the credibility of an essential witness whose testimony is needed to establish one of the material elements of the crime, the prosecutor should be obligated to disclose it. See *United States v. Samango*, 450 F. Supp. 1097 (D. Hawaii 1978), *aff'd.*, 607 F.2d 877 (9th Cir. 1979).

551. See H.R. 94, 95th Cong., 1st Sess. § 3329(b)(2)(B) (1977), *reprinted in 1977 Hearings*, pt. 2, *supra* note 108, at 977. This provision would require the prosecutor to take "reasonable steps to notify" target defendants of their opportunity to testify or present evidence before their indictment unless the prosecutor can demonstrate to the court that "notice would result in the flight of the person, would endanger other witnesses, or would unduly delay the investigation and prosecution." *Id.* While federal prosecutors often notify target defendants of their opportunity to testify in white collar and political corruption cases, see *United States v. Mandel*, 415 F. Supp. 1033, 1040 (D. Md. 1976), the Justice Department opposes mandating such notice because it believes notice is unnecessary in most cases. Furthermore, it argues that a mandatory requirement with special exceptions would impair the government's flexibility in recognizing when notice was appropriate and would spawn unnecessary litigation. *1977 Hearings*, pt. 1, *supra* note 108, at 717 (statement of Asst. Attorney General Benjamin R. Civiletti). See also U.S. ATTORNEY'S MANUAL § 9-11.252 (1978) (emphasis added):

Where a target is not called to testify pursuant to 9-11.251, *supra*, and does not request to testify on his own motion (see 9-11.252, *supra*), the prosecutor, in appropriate cases, is encouraged to notify such person a reasonable time before seeking an indictment in order to afford him an opportunity to testify [subject to the conditions that the witness (1) explicitly waived his privilege against self-incrimination and (2) is represented by counsel or voluntarily and knowingly appears without counsel and consents to full examination under oath] of course, notification would not be appropriate in routine clear cases . . .

While it is beyond the scope of this Article, I believe that putative defendants who elect to testify before the indicting grand jury should have the right to have counsel accompany them. Many of the arguments against permitting counsel into the grand jury room stress how such a procedure might endanger the investigatory grand jury's effectiveness, especially where multiple representation by house counsel is involved. See Silbert, *Defense Counsel in the Grand Jury — The Answer to the White Collar Criminal's Prayers*, 15 AM. CRIM. L. REV. 293 (1978). If the inquisitorial and accusatorial functions are performed by different grand juries as I have proposed, these objections no longer apply. Even if the same grand jury performs both functions, the experience of those states that permit the witness's counsel in the grand jury room suggests that counsel's presence has not disrupted or delayed the proceedings. See *1977 Hearings*, pt. 1, *supra* note 108, at 142; Hixson, *Bringing Down the Curtain on the Absurd Drama of Entrances and Exits — Witness Representation in the Grand Jury Room*, 15 AM. CRIM. L. REV. 307, 318-20 (1978). See Appendix for a model grand jury statute which provides for presence of counsel in the grand jury room.

552. Cf. U.S. ATTORNEY'S MANUAL 9-11.252 (1978) (leaving to the "sound discretion of

4. *Bifurcating the Grand Jury's Accusatorial and Inquisitorial Functions*

Separate grand juries should perform the investigatory and accusatory functions so that those reforms designed to improve the quality of grand jury screening will not unduly restrict the grand jury's investigatory powers.

One of the major obstacles to reform of the grand jury's accusatorial function is that such a reform might interfere with the grand jury's capacity to investigate criminal activity. As Justice Powell noted in *Calandra*, the grand jury's investigatory function requires that its operation be "unrestrained by the . . . procedural and evidentiary rules governing the conduct of criminal trials."⁵⁵³ Congress could improve the quality of grand jury screening without limiting its investigatory powers by precluding the same grand jury from performing both functions.⁵⁵⁴ Thus, an investigatory grand jury could still operate free of evidentiary restraints. Once it had uncovered sufficient evidence to warrant indictment of particular individuals, the prosecutor could then sift out the legally admissible evidence and present it to a second grand jury that would perform only an accusatory function.

Admittedly, this proposal would require some duplication of labor. Some witnesses who testified before the inquisitorial grand jury would have to testify again before the accusatorial grand jury. Moreover, the prosecutor would have to explain the nature of the government's preceding investigation to the second grand jury. However, the advantages of such a separation clearly outweigh its costs.

First, a purely accusatory grand jury can screen guilt more independently. We simply cannot expect the same grand jurors who have spent months ferreting out criminal activity to suddenly shift roles and exercise their protective function.⁵⁵⁵ During a prolonged

the grand jury" whether to consider testimony of the witnesses suggested by the putative defendant).

553. 414 U.S. at 338, 343 (1974).

554. Professor Leroy Clark has suggested that the prosecutor alone could perform the grand jury's inquisitorial function if granted the power to subpoena witnesses outside the grand jury's presence. Accordingly, he would restrict the grand jury to its accusatorial function. See L. CLARK, *supra* note 383, at 142. However, he would grant the grand jury investigative power to "initiate investigations into criminal offenses by any officer of the government." *Id.* at 145 (emphasis in original).

555. As California Supreme Court Justice Mosk recently observed, the grand jury suffers from "institutional schizophrenia" because "it is expected to serve two distinct and largely inconsistent functions — accuser and impartial fact-finder. It seems self-evident that to the extent it succeeds at one function, it must fail at the other." *Hawkins v. Superior Court*, 22 Cal. 3d 584, 591, 586 P.2d 916, 920, 150 Cal. Rptr. 435, 439 (1978).

investigation into alleged criminal activity, grand jurors often grow to respect and trust the prosecutor who guides their activities.⁵⁵⁶ Moreover, the first grand jury might consider inadmissible evidence that convinces it of the defendant's factual guilt. Under such circumstances, one can hardly expect grand jurors to admit that their labors have proved fruitless by refusing to indict. Presenting whatever legally admissible evidence is uncovered by the first grand jury to a second grand jury removes those defects. The accusatory grand jury will not be prejudiced by incompetent evidence against the accused nor will it identify as readily with the prosecutor's investigative efforts.

Second, my proposal calling for judicial review of the indicting grand jury's transcript could impose a serious administrative burden on the courts if they had to wade through the transcript produced by a prolonged grand jury investigation. Concise presentation of the prosecutor's legally admissible evidence to an accusatory grand jury should reduce the courts' burden by producing far shorter transcripts.⁵⁵⁷

5. Redrafting Judicial Charges

Judicial charges to the indicting grand jury should emphasize the grand jury's duty to screen out prosecutions where conviction at trial is unlikely.

Courts should instruct the grand jurors not to return an indictment unless the prosecutor presents them with clear and convincing⁵⁵⁸ evidence of the defendant's guilt. The instructions should also

556. See *United States v. Gramolini*, 301 F. Supp. 39, 41 (D.R.I. 1969).

557. A subsequent proposal will call for disclosure to the defendant of the indicting grand jury's transcript. See notes 563-80 *infra* and accompanying text. By separating the inquisitorial and accusatorial functions, the prosecutor can limit the defendant's discovery to testimony that directly relates to the alleged criminal activities, thereby preserving the secrecy of any confidential background information whose disclosure could prejudice any continuing investigations.

558. Some courts already instruct the grand jury that it should not return a true bill unless it is "satisfied from the evidence which is submitted to it that a conviction would be warranted if the evidence were presented to a trial jury where there was no evidence to rebut it." *United States v. O'Shea*, 447 F. Supp. 330, 331 (S.D. Fla. 1978), *affd. per curiam*, 588 F.2d 199 (5th Cir. 1979). Alternatively, grand jurors are sometimes told that they should return an indictment *when* and *if* they determine that the evidence, "if unexplained or uncontradicted, would carry the case to a trial jury and justify the conviction of the accused." *1977 Hearings*, pt. 1, *supra* note 108, at 350 (quoting the New Jersey Grand Jury Manual for Prosecutors, Final Draft, 1977). However, grand jurors are rarely told that to justify a conviction at trial the factfinder must be convinced beyond a reasonable doubt.

Logically, therefore, the grand jury should apply a reasonable doubt standard to the government's presentation. If the government cannot convince the grand jurors beyond a reasonable doubt in an *ex parte* presentation, how can it convince a petit jury in an adversarial trial? However, the application of a proof-beyond-a-reasonable-doubt standard to the indicting grand jury might convert this *ex parte* proceeding into a mini-trial. If the grand jurors apply the standard rigorously, they might call for additional testimony to resolve any doubts they might have. The prosecutor might feel compelled to present the entire government case to

emphasize their power to judge credibility⁵⁵⁹ and to call additional witnesses,⁵⁶⁰ including the putative defendant,⁵⁶¹ if they have any doubts about the prosecutor's case. They should also be told of their right to submit their own questions to witnesses after the prosecutor has screened them to weed out improper inquiries.⁵⁶² Finally, they should be advised of their power to request the presentation of less serious charges if they believe that the petit jury would not convict the accused of the requested charge.

6. *Transcripts for Defendants*

*After indictment, the defendant should receive a copy of the transcript of all recorded proceedings of the indicting grand jury that relate to the offenses charged, subject to such reasonable limitations, including protective orders, as the court may impose to prevent abuses.*⁵⁶³

ensure that this standard is met. Accordingly, I have selected the clear and convincing standard as a compromise burden of proof because it protects the accusatorial norm that compelling evidence of the defendant's factual guilt be presented to some independent adjudicator before the state induces a plea. Whether one views the grand jury as predicting how a trial jury would act or as providing a substitute lay adjudication in a system with few trials, the grand jurors should return a true bill only when they are personally convinced of defendant's factual guilt.

559. *See, e.g.*, United States v. Gallo, 394 F. Supp. 310, 314 (D. Conn. 1975).

560. *See, e.g.*, N.Y. CRIM. PROC. LAW § 190.50(3) (McKinney 1971). When presenting hearsay testimony under the compelling justification exception, the prosecutor should tell the grand jurors of their right to call the primary source of the testimony.

561. If the target defendant declines to appear, the grand jury should be instructed not to draw an inference of guilt from the defendant's decision.

562. Because grand jurors are dependent on the prosecutor for their legal advice, some reformers have called for the appointment of independent counsel to advise the grand jury. *See 1977 Hearings*, pt. 1, *supra* note 108, at 659 (statement of Professor Leon Friedman on behalf of the American Civil Liberties Union); *id.* at 47 (statement of Doris Petersen on behalf of the Center for Constitutional Rights). I believe this reform is unnecessary because once prosecutors realize that their legal advice is recorded and subject to judicial review, it is unlikely that they would deliberately give erroneous legal advice to the grand jury. Even independent counsel are capable of making good faith errors in their legal instructions.

563. If the inquisitorial and accusatorial functions of the grand jury are not separated, I favor adoption of H.R. 94 § 3334(c) and (d), which provide:

(c) A reasonable time prior to trial, and after the return of an indictment or the filing of an indictment or the filing of an information, a defendant shall, upon request and under such conditions and limitations as the court deems reasonable, be entitled to examine and copy a transcript or electronic recording of —

- (1) the grand jury testimony of all witnesses to be called at trial;
- (2) all statements to the grand jury by the court and the attorney for the Government or special attorney, relating to the defendant's case;
- (3) all grand jury testimony or evidence which in any manner could be considered exculpatory; and
- (4) all other grand jury testimony or evidence which the court may deem material to the defense.

(d) Upon a showing of good cause, the court may, at any time, order that the disclosure of the recorded proceedings of a grand jury be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the Government, the court shall permit the government to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such a showing, the entire text of the party's statement shall be sealed and pre-

Judicial and legislative deference to the need for grand jury secrecy initially prevented defendants from gaining access to grand jury transcripts. However, the Supreme Court has significantly weakened the secrecy rationale's applicability to post-indictment disclosure requests. As the Court observed in *Dennis v. United States*,⁵⁶⁴ grand jury secrecy does not justify a per se rule barring a defendant's access to relevant grand jury testimony that may aid the defense. "In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations."⁵⁶⁵

Decisions like *Dennis*, as well as critical commentary about the reduced need for grand jury secrecy after indictment,⁵⁶⁶ prompted Congress to relax rules that had restricted defendants' access to grand jury minutes. Defendants are now entitled to minutes of their own testimony under rule 16(a)(1)(A).⁵⁶⁷ Under the 1970 amendments to the Jencks Act, defendants can inspect the grand jury testimony of the government's trial witnesses for purposes of impeachment at the close of the witnesses' direct examination.⁵⁶⁸ Otherwise, disclosure of grand jury minutes in criminal cases is regulated by rule 6.⁵⁶⁹ Interpreting an earlier version of that provision⁵⁷⁰ in *Pittsburgh Plate Glass Co. v. United States*,⁵⁷¹ the Supreme Court concluded that disclosure is committed to the discretion of the trial judge and the "burden . . . is on the defense to show that 'a particularized need' exists for the minutes which outweighs the policy of secrecy."⁵⁷²

served in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

H.R. 94, 95th Cong., 1st Sess. § 3334(c), (d) (1977), reprinted in *1977 Hearings*, pt. 2, *supra* note 108, at 90-91.

564. 384 U.S. 855 (1966).

565. 384 U.S. at 873 (footnote omitted).

566. See Knudsen, *Pretrial Disclosure of Federal Grand Jury Testimony*, 48 WASH. L. REV. 423 (1973); Sherry, *Grand Jury Minutes: The Unreasonable Rule of Secrecy*, 48 VA. L. REV. 668 (1962).

567. FED. R. CRIM. P. 16(a)(1)(A) reads in part, "[u]pon request of a defendant the government shall permit the defendant to inspect and copy . . . recorded testimony of the defendant before a grand jury which relates to the offense charged."

568. 18 U.S.C. § 3500(b), (e)(3) (1976) required disclosure of the trial witness's prior statements that relate to the witness's testimony. A 1970 amendment to subsection (e)(3) defined "statements" to include the witness's grand jury testimony. See 8 MOORE'S FEDERAL PRACTICE ¶ 16.10[1], at 16-139 (rev. 2d ed. 1979).

569. FED. R. CRIM. P. 6(e)(2)(C).

570. FED. R. CRIM. P. 6(e), 327 U.S. 837-38 (1946).

571. 360 U.S. 395 (1959).

572. 360 U.S. at 399-400. See also *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S.

Most commentators who have evaluated the doctrine of grand jury secrecy have concluded that the rule's purposes do not apply with much force once the defendant has been indicted.⁵⁷³ Defenders of grand jury secrecy have argued that disclosure of transcripts may prompt some defendants to tamper with the government's witnesses before trial and may deter future grand jury witnesses from testifying freely.⁵⁷⁴ However, some prosecutors from jurisdictions that grant defendants an automatic right to disclosure have conceded that those fears have not been borne out.⁵⁷⁵ There is simply no evidence to suggest any higher incidence of obstruction of justice or subornation of perjury in those jurisdictions.⁵⁷⁶ Moreover, any rule mandating automatic disclosure of the entire grand jury transcript to an indicted defendant could alleviate such concerns by permitting the prosecutor to seek a protective order denying, restricting, or deferring disclosure when an abuse may occur.⁵⁷⁷

Giving the defendant access to the grand jury's transcript soon after indictment will improve the administration of justice in several respects. First, it will save court time that is presently wasted on litigation about whether the defendant has shown a particularized need that outweighs any concern for grand jury secrecy. Second, it will allow defendants to determine whether they have grounds to challenge the legal sufficiency of the evidence presented to the grand jury (my first proposal). Automatic disclosure of the grand jury tran-

211 (1979)(applying a reinvigorated particularized-need standard to civil litigant's request for transcripts of federal criminal grand jury proceedings).

573. See note 566 *supra*. The secrecy doctrine is designed to (1) prevent the escape of target defendants before their indictment; (2) protect the grand jurors' ability to deliberate freely by preventing target defendants and their associates from influencing their decision; (3) prevent subornation of perjury; (4) encourage full disclosure by persons who have information relating to criminal activity; (5) protect the reputation of exonerated target defendants by not publicizing that they were under investigation. See *United States v. Rose*, 215 F.2d 617, 628-29 (3d Cir. 1953). With the exception of (3) and (4), these considerations do not apply once the grand jury has completed its investigation and returned an indictment.

574. See *1977 Hearings*, pt. 1, *supra* note 108, at 722 (statement of Asst. Attorney General Benjamin R. Civiletti).

575. *Id.* at 331-38 (statement of William F. Hyland, Attorney General of New Jersey, and Robert J. DelTufo, Asst. Attorney General of New Jersey and Director of the Division of Criminal Justice).

New Jersey's criminal discovery rules are probably the most liberal in the nation. We have totally rejected the notion that the criminal trial is a contest. Accordingly, grand jury minutes are available to all defendants subsequent to a routine discovery request. Discovery of grand jury minutes provides an important check on any possible abuses in the grand jury process. Moreover, full discovery of grand jury minutes provides the basis for legal challenges to the sufficiency, weight, competency and admissibility of the evidence presented.

Id. at 343.

576. *Id.*

577. H.R. 94, 95th Cong., 1st Sess. § 3334(d) (1977), *reprinted in 1977 Hearings*, pt. 2, *supra* note 108, at 990-91. See note 563 *supra*.

script will remove any incentive for the defendant to raise unfounded motions to dismiss in the hope of gaining a glimpse of the prosecution's case.⁵⁷⁸ Moreover, if it is true that most prosecutors will not seek indictments unless they already possess sufficient evidence to defeat a motion for directed acquittal, giving defendants access to the grand jury transcript will cause them to file fewer motions to dismiss than if they had to file the motion before knowing what evidence the grand jury actually received. Defense access to the transcript should also improve the motions themselves by fostering specific allegations of evidentiary defects. Thus, the court's review of the grand jury transcript will be eased because both defense and prosecution memoranda will point to the critical portions of the grand jury testimony needed to establish a prima facie case of legal guilt. Third, automatic disclosure of the grand jury transcript will grant the defendant increased discovery of the prosecution's case and will do so in a far more expeditious manner than a prolonged adversary proceeding such as a post-indictment preliminary hearing. Fourth, access to the grand jury transcript will also enable the defense attorney to judge the desirability of plea-negotiations with the prosecutor because the defense will now have enough information to predict the likelihood of conviction at trial.⁵⁷⁹ Finally, disclosure of the grand jury's transcript is necessary to ensure detection of any prosecutorial misconduct before the grand jury.⁵⁸⁰

CONCLUSION

All of the proposals in Section V promote greater protection of our system's legal guilt requirements during the pretrial process without unduly burdening an already overtaxed criminal justice system. Their desirability depends in part on one's view of the purposes served by the pretrial process. Those who believe that the criminal trial provides adequate protection of our system's legal guilt requirements will dismiss them as misconceiving the grand jury's basic charging function. They will argue that these reforms transform the grand jury's ex parte inquiry into a preliminary mini-trial proceeding that adjudicates the defendant's guilt and thereby duplicates the trial's function.⁵⁸¹ As Sections I, II, and III have indicated, I believe that objection rests on a theoretical model of our criminal justice system that no longer comports with reality. Since pretrial proce-

578. *But see* note 582 *infra*.

579. *See* notes 241-49 *supra* and accompanying text.

580. *See* Holderman, *supra* note 442, at 18-19.

581. *See* Silbert, *supra* note 551, at 294.

cedure is the only procedure most defendants get, the preliminary adjudication of legal guilt fostered by my reforms will be the only trial-like proceeding most defendants will receive.

A second objection to these reforms is that they will spawn time-consuming pretrial litigation that will increase the courts' administrative burdens and generate significant pretrial delay.⁵⁸² Under my proposals, the grand jury's *ex parte* evaluation of the government's case might be slower because, absent some compelling justification, the prosecutor will be obligated to present the government's chief trial witnesses to the grand jury.⁵⁸³ Courts will spend some additional time evaluating the indicting grand jury's transcript to determine whether the prosecutor presented a *prima facie* case.⁵⁸⁴ No matter how narrowly the exculpatory duty standard is defined, it is reasonable to expect litigation over subsidiary questions, such as whether the prosecutor was aware of exculpatory evidence not

582. See 1976 Hearings, *supra* note 43, at 229-30 (statement of Russell E. Smith, U.S. District Judge, Montana):

There is another consideration which should be weighed. Those looking on the administration of criminal law but not participating in it may tend to think that points are raised and argued because, in the mind of the lawyer, the points have some real basic merit. If that was ever true, it is not true today. The modern American lawyer acting in a criminal case feels compelled to explore a case to determine if there has been any violation of any right of a defendant (regardless of guilt or innocence), and to urge a denial of the right in any case in which arguments can be made which are not patently silly. Today it is standard procedure to test each confession, each piece of evidence obtained as a result of a search, each piece of identification evidence. Create a right to test the sufficiency of an indictment and it will become standard operating procedure to test it. Why? Under *Gideon v. Wainwright*, 372 U.S. 355 (1963), a defendant may not be tried for a crime without an opportunity to have counsel. Under the post-*Gideon* developments, the sixth amendment requirements are not met unless the representation has been adequate. See *United States v. DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973), which perhaps expresses the outer limits of the rule. There is in the minds of most lawyers who defend criminal cases the thought that one day a Section 2225 (the federal equivalent of habeas corpus) petition may be filed claiming that the lawyer was not adequate. One ground which could be claimed would be, given the enactment of H.R. 1277 or the bills similar to it, the failure of the lawyer to test the sufficiency of the indictment. We are not talking, therefore, about an occasional review of a grand jury indictment: we are talking about a routine review of grand jury indictments at the district court level and a review of the district court action at the court of appeals level.

I believe Judge Smith is mistaken in several respects. First, recent studies suggest that defense counsel do not act as adversarially as he suggests. See notes 231-40 *supra* and accompanying text. While defense counsel in white collar, political corruption, and organized crime cases often have the resources to raise a host of procedural objections, the majority of defense counsel do not. See Section III *supra*. Moreover, the directed-verdict standard will easily be met in most federal prosecutions. If the defense attorney already has access to the transcript, little would be gained by filing a motion to dismiss where it is obvious that a directed-verdict standard has been met. I would anticipate that motions testing the legal sufficiency of the charges would be filed most frequently when the prosecutor has presented some hearsay testimony to the grand jury under the compelling justification exception.

583. However, my reform proposals do not duplicate the trial's protections at the grand jury stage. To ensure efficient grand jury review, the prosecutor may present hearsay testimony under certain specified circumstances and need not present all evidence that would be considered exculpatory at trial to the grand jury.

584. *But see* note 557 *supra* and accompanying text.

presented to the grand jury. Disclosure of the indicting grand jury's transcript may generate litigation concerning prosecutorial requests for protective orders and increase defense claims of prosecutorial misconduct before the grand jury.

On the other hand, these reforms may save some court time later in the process. Disclosure of the transcript removes the defense counsel's incentive to file frivolous motions based on what may have occurred before the grand jury in the hope of gaining some incidental discovery of the prosecution's case. Courts will no longer have to determine whether the defendant has shown a particularized need to see grand jury testimony. Moreover, a judicial determination that the prosecutor presented a prima facie case to the grand jury should save time at a subsequent plea hearing because the transcript can be used to demonstrate the factual basis of those pleas.⁵⁸⁵

Despite those savings, one must concede that any serious attempt to provide greater protection of our system's legal guilt requirements will inevitably decrease the efficiency of our present system. However, the experience of those states that have imposed similar requirements on their grand juries suggests that the costs are tolerable.⁵⁸⁶ Moreover, one cannot examine these additional burdens in a vacuum: they must be compared to the costs of alternative reforms, like the proposal to mandate preliminary hearings for all federal prosecutions. As Sections IV and V suggested, requiring the

585. See note 301 *supra* and accompanying text. In *Alford* plea situations, the court might wish to make its own credibility judgment by personally considering the live testimony of the government's critical trial witnesses. See note 293 *supra*.

586. California presently permits defendants to challenge the sufficiency of the evidence considered by the grand jury. See CAL. PENAL CODE § 995 (West 1970). While California does not define "probable cause" to require a high likelihood of conviction, see *Cotton v. Superior Court*, 56 Cal. 2d 459, 462, 364 P.2d 241, 242, 15 Cal. Rptr. 65, 66 (1961) ("[p]robable cause is shown if a man of ordinary caution or prudence could entertain a strong suspicion of the guilt of the accused, and if some rational ground exists for an assumption of guilt, the indictment will not be set aside"), it does require the prosecution to present the grand jury with evidence that would be legally admissible at trial. See CAL. PENAL CODE § 939.6(b) (West 1970). Like my proposal, the grand jury's consideration of incompetent evidence does not void the indictment where it also received sufficient competent evidence to support the indictment. However, the California system does not provide a very useful analogy because most of its prosecutions commence by information followed by a preliminary hearing so its judiciary does not deal with many post-indictment review motions.

New York also permits dismissal of indictments based on insufficient proof of legal guilt. See Y. KAMISAR, W. LAFAYE & J. ISRAEL, *supra* note 43, at 909. New York's experience is more analogous to the federal system because its state constitution guarantees the right to grand jury indictment in "capital or otherwise infamous" crimes. N.Y. CONST. art. I, § 6. However, one would need to know much more about the number, types, and frequency of post-indictment judicial inquiries into evidence sufficiency and prosecutorial misconduct before drawing any compelling analogy between New York and the federal system. At this juncture, all that can be said is that New York has adopted a series of requirements somewhat similar to those proposed here and the resulting pretrial delay and administrative burden generated by such procedures have not devastated its criminal justice system.

prosecutor to present a prima facie case of legal guilt to the grand jury and permitting judicial review to test the legal sufficiency of the government's evidence are far more efficient reforms than a proposal requiring the prosecutor to present that case twice: once to the grand jury and once to the magistrate at the preliminary hearing. First, requiring two dress rehearsals of the prosecution's case would cause greater inconvenience for the government's trial witnesses. Second, the adversarial presentation of the prosecutor's case at the preliminary hearing would be far more time-consuming than judicial review of the indicting grand jury's transcript. While my reforms might lengthen some grand juries' proceedings, they would remain essentially ex parte, whereas mandating preliminary hearings would foster the adversarial mini-trial that *Costello* sought to avoid.

Finally, some observers might question the necessity of system-wide reforms to deal with a problem that only arises in a few "hard" cases. According to this view, the government possesses compelling evidence of factual guilt that can satisfy the trial's formal proof requirements in most cases. Thus, little would be achieved by lengthening the grand jury's review of the case or by subjecting the prosecution's screening of legal guilt to post-indictment judicial review. While the prosecutor might indict defendants despite questionable legal guilt in a small percentage of cases, these observers argue that we can rely on defense counsel and the court's application of the prosecutorial misconduct doctrine to check those isolated abuses. Therefore, these critics would conclude that the application of my system-wide reforms to deal with the exceptional case misconceives the scope of the problem and ignores existing and far more efficient judicial remedies.

This objection falters in defining the problem.⁵⁸⁷ First, the distinction between hard and routine prosecutions is somewhat suspect because some cases that appear routine might become less so if the defense counsel had the time and resources to conduct a proper factual and legal investigation. One of the dangers in distinguishing between routine and hard cases in an adversarial system of justice is that the characterization depends in part on the quality of the defense attorney. Criminal prosecutions involving white collar crime, organized crime, and corporate crime may prove difficult because the defendant will have the resources to deal with the government on

587. Indeed, some commentators have minimized the importance of our system's legal guilt requirements by equating them with the trial's procedural protections, thereby ignoring how they protect a fair accusatorial process before conviction. See note 71 *supra*.

an equal footing. Criminal prosecutions against indigent defendants may well appear routine for opposite reasons.

However, even assuming that most criminal prosecutions do not raise the danger that a legally innocent defendant might be convicted, this objection to systemic reform misunderstands the problem these reforms are trying to remedy. The problem involved is not simply one of outcome,⁵⁸⁸ but of the process by which that outcome is reached. While some of my reforms are designed to ensure that the government will not secure the conviction of a defendant who could not possibly be convicted at trial, most of them are designed to protect a fair accusatorial process before conviction. Regardless of whether the prosecution is routine or hard, the criminal process should ensure that

- (1) the government shoulders its burden of independently developing reliable, legally admissible evidence of the defendant's factual guilt before it encourages the defendant to plead;
- (2) someone other than law-enforcement officials independently adjudicates the defendant's legal guilt;
- (3) the community participates in the adjudication of the defendant's legal guilt so that the disposition of society's most serious sanction is not left exclusively in the hands of professionals.⁵⁸⁹

All of these values will be fostered if we require the prosecutor to present the federal grand jury with a *prima facie* case of legal guilt, strengthen the grand jury's capacity to make a reliable *ex parte* adjudication of guilt, and provide greater judicial safeguards against prosecutorial misconduct before the indicting grand jury. Plea-bargaining shall remain the dominant form of guilt determination; but these pretrial safeguards⁵⁹⁰ will ensure that a reliable preliminary adjudication of guilt will be made before the state applies its considerable pressures to induce a guilty plea.

588. *See id.*

589. *See* Kipnis, *Plea-Bargaining: A Critic's Rejoinder*, 13 LAW & SOC. REV. 555, 556-57 (1979).

590. Obviously, any comprehensive effort to promote a fair accusatorial process before conviction must go far beyond the proposals suggested in this Article. For example, my reforms do not directly address the vitally important question of how to improve the quality of criminal defense representation. For an interesting examination of this problem, see Tague, *The Attempt to Improve Criminal Defense Representation*, 15 AM. CRIM. L. REV. 109 (1977). Tague argues that the courts cannot improve the quality of defense representation through post-conviction review of counsel's effectiveness. Accordingly, he suggests that the courts should monitor defense counsel's performance before conviction by requiring counsel to complete a checklist which would indicate and explain what counsel has and has not done and what he expects to do. *But cf.* *United States v. Decoster*, No. 72-1283 (D.C. Cir. July 10, 1979) (plurality opinion arguing that "extensive supervision by the trial judge through a pretrial checklist to ensure that counsel has met his duties of preparation" would disrupt adversary system by "increasing intrusion into the development and presentation of the defense case by the trial judge, and (out of self protection) by the prosecution." Slip op. at 40).

APPENDIX

In 1974, the American Bar Association's Criminal Justice Section created a committee on the grand jury. This committee, whose members included federal and state prosecutors, judges, public and private defense counsel, law professors, and law students, was asked to evaluate pending grand jury reform legislation and to offer "legislative principles" to guide such reform efforts. Under the careful leadership of Mr. Richard Gerstein, an attorney with over twenty years of prosecutorial experience, this committee proposed twenty-five grand jury reform principles which were then approved by the Criminal Justice Section, a body whose members represent every segment of the criminal justice system. In August, 1977, the American Bar Association's House of Delegates enacted a resolution that supported grand jury reform legislation consistent with these twenty-five principles.¹

In 1979, the Grand Jury Committee began work on a Model Grand Jury Reform Act to implement its reform principles. As chairperson of the subcommittee responsible for drafting this Act, I wrote several statutes that would effect some of the reforms I have advocated in this Article. On February 29, 1980, the Grand Jury Committee approved the following model statutes.

DRAFT STATUTE § 100: GRAND JURY RULES OF EVIDENCE²

1. The prosecutor should not present the grand jury with evidence against a putative defendant which he knows was obtained in violation of that putative defendant's constitutional rights.

2. Except as provided in sections 3 and 4, the prosecutor should not present the grand jury with hearsay evidence which would not be admissible at trial absent some compelling justification for its use. [Such justification must be stated on the record at the time of its admission. Examples of such compelling justifications include:

(a) the admission of a written or oral statement made by a seriously injured victim of the crime who is presently unavailable to testify where circumstances require prompt grand jury action;

(b) the admission of a written or oral statement, taken under oath, from a witness who will be available to testify at trial, when that witness' safety would be jeopardized if he or she were required to make a personal appearance before the grand jury;

1. See *1977 Hearings*, pt. 1, *supra* note 108, at 173-74.

2. On May 9, 1980, the Grand Jury Committee deleted the bracketed segment of section 2 and redrafted sections 3 and 4 into a more condensed format. Several states presently require the grand jury to receive only evidence that would be admissible at trial: Alabama, Alaska, Arkansas, California, Idaho, Iowa, Louisiana, Minnesota, Mississippi, Montana, Nevada, New Mexico, New York, North Dakota, Oregon, South Dakota, Utah. For a listing of the specific statutes and rules imposing this requirement, see *1976 Hearings*, *supra* note 43, at 723 n.51.

(c) the admission of a hearsay summary of the contents of voluminous business or financial records.]

3. A report or a copy of a report made by a public servant or by a person employed by a public servant or agency who is a physicist, chemist, coroner or medical examiner, firearms identification expert, examiner of questioned documents, fingerprint technician, or an expert or technician in some comparable scientific or professional field, concerning the results of an examination, comparison or test performed by him in connection with a case which is the subject of a grand jury proceeding, may, when certified by such person as a report made by him or as a true copy thereof, be received in such grand jury proceeding as evidence of the facts stated therein.

4. A written or oral statement, under oath, by a person attesting to one or more of the following matters may be presented to the grand jury as evidence of the facts stated therein:

(a) that person's ownership of premises and of the putative defendant's lack of license or privilege to enter or remain thereupon;

(b) that person's ownership of, or possessory right in, property, the nature and monetary amount of any damage thereto and the putative defendant's lack of right to damage or tamper with the property;

(c) that person's ownership of property, its value and the putative defendant's lack of superior or equal right to possession thereof;

(d) that person's ownership of a vehicle and the absence of his consent to the putative defendant's taking, operating, exercising control over or using it;

(e) that person's qualifications as a dealer or other expert in appraising or evaluating a particular type of property, his expert opinion as to the value of a certain item or items or property of that type, and the basis for his opinion;

(f) that person's identity as an ostensible maker or drafter of a written instrument and of its falsity.

5. Nothing in subdivisions 2(b), 3, or 4 of this section shall be construed to limit the power of the grand jury to cause any person to be called as a witness where the grand jurors entertain doubts about the validity of said testimony.

6. Whenever a court presiding at a jury trial would be required to instruct the jury with respect to the significance, legal effect or evaluation of evidence, the prosecutor, in an equivalent situation in a grand jury proceeding, may so instruct the grand jury.³

DRAFT STATUTE § 101: MOTION TO DISMISS INDICTMENT ON GROUND OF INSUFFICIENCY OF GRAND JURY EVIDENCE⁴

1. After arraignment upon an indictment, the court may upon motion

3. Sections 3, 4, and 6 were taken from N.Y. CRIM. PROC. LAW § 190.30 (McKinney Supp. 1979). See note 525 *supra*.

4. Many states, including some that require the grand jury to consider only legally admissible evidence, refuse to examine the quality, sufficiency, or competency of the evidence underlying the indictment. See 1976 *Hearings, supra* note 43, at 723 n.50. In the minority of

of the defendant made [within 30 days] after the entry of a not guilty plea, dismiss such indictment or any count thereof upon the ground that the evidence before the grand jury was not legally sufficient to establish the offense charged or any lesser included offense.

2. The evidence presented to the grand jury is legally sufficient if, viewed in the light most favorable to the State, it would support a conviction at trial.⁵

3. In evaluating the legal sufficiency of the evidence presented to the grand jury, the court can only consider evidence which would be admissible at trial except for hearsay testimony admitted under § 100(a)(2)-(4). The fact that the grand jury considered evidence which would have been excluded at trial does not invalidate the indictment as long as the remaining competent evidence is legally sufficient to warrant a conviction at trial; except in those cases where the nature, extent, and prejudicial effect of the incompetent evidence presented to the grand jury provides strong grounds for believing that the grand jury would not have indicted the defendant if it had only considered the legally admissible evidence presented to it.

4. The validity of an order denying any motion made pursuant to this section is not reviewable upon an appeal from a judgment of conviction following trial based upon legally sufficient evidence.⁶

DRAFT STATUTE § 102: PROSECUTOR'S DUTY TO DISCLOSE EXCULPATORY EVIDENCE TO THE GRAND JURY⁷

1. If the prosecutor is aware of exculpatory evidence which, if believed, negates one of the material elements of the crime, he must disclose⁸

jurisdictions (Alaska, California, Minnesota, Nevada, and New York) that permit courts to quash indictments based on insufficient evidence, the grand jury's consideration of incompetent as well as competent evidence will not automatically invalidate the indictment. *See 1976 Hearings, supra* note 43, at 724 & n.54.

Judicial review of the legal sufficiency of the evidence underlying the indictment is only necessary where the jurisdiction does not use its preliminary hearing to screen legal guilt. Thus, to avoid duplicated screening, the defendant's election to receive a preliminary hearing which screens legal guilt should automatically waive his right to grand jury screening. In those jurisdictions where indictment is a jurisdictional requirement that cannot be waived, the defendant's election to receive a preliminary hearing that screens legal guilt should waive his right to judicial review under this statute. *See* note 358 *supra*.

5. While a majority of states do not identify an evidentiary standard to measure probable cause to indict, a substantial minority require that the evidence would support a conviction at trial if unexplained or uncontradicted. *See* ARK. STAT. ANN. § 43-920 (1977); CAL. PENAL CODE § 939.8 (West 1970); IDAHO CODE § 19-1107 (1979); IOWA CODE ANN. § 813.2, Rule 4(3) (1979); ALASKA R. CRIM. P. 6(9) (Supp. 1966). *See also 1976 Hearings, supra* note 43, at 724 n.55.

6. *See* notes 517 & 521 *supra*.

7. A number of states have statutes like CAL. PENAL CODE § 939.7 (West 1970), *see* text at notes 473-86 *supra*, which advise the grand jury to consider any evidence that would explain away the charge. *See 1976 Hearings, supra* note 43, at 722 n.45. New Mexico has recently amended its statute to impose a mandatory duty on the prosecutor to *present* exculpatory evidence "that directly negates the guilt of the target where [the prosecutor] is aware of such evidence." N.M. STAT. ANN. § 31-6-11 (Supp. 1979).

8. My original proposal in this subsection contained a stronger requirement that the prosecutor *present* the grand jury with exculpatory evidence that, if believed, "negates one of the material elements of the crime or seriously undermines the credibility of a prosecution

and, if feasible, present such evidence to the grand jury.

2. If the prosecutor is aware of exculpatory evidence which bears upon a possible affirmative defense that, if believed, raises a reasonable doubt about the defendant's guilt, he should alert the grand jury to its existence and inform them of their right to call for such evidence.

3. After arraignment upon an indictment, the court, upon motion of the defendant made [within 30 days] after the entry of a not guilty plea, must dismiss any indictment where the prosecutor failed to disclose exculpatory evidence of the type defined in section 1. The court should not dismiss an indictment because of the prosecutor's failure to disclose exculpatory evidence of the type defined in section 2 unless the court determines that such omitted exculpatory evidence was so compelling that indictment by the grand jury was not justified upon the evidence presented.

DRAFT STATUTE § 103: DISCLOSURE OF GRAND JURY
TRANSCRIPT TO AN INDICTED DEFENDANT⁹

1. A reasonable time prior to trial, and after the return of an indictment or the filing of an information, a defendant shall, upon request and under such conditions and limitations as the court deems reasonable, be entitled to examine and when appropriate and necessary copy a transcript or electronic recording of:

- (a) the grand jury testimony of all witnesses to be called at trial;
- (b) all statements to the grand jury by the court and the attorney for the Government relating to the defendant's case;
- (c) all grand jury testimony or evidence which in any matter could be considered exculpatory, and
- (d) all other grand jury testimony or evidence which the court may deem material to the defense.

2. Upon a showing of good cause, the court may, at any time, order that the disclosure of the recorded proceedings of a grand jury be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the government, the court shall permit the government to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such a showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the

witness whose testimony is necessary to support a conviction." The Grand Jury Committee eliminated the credibility segment of this provision.

9. There is a growing movement in the states to liberalize pretrial discovery procedures. *See* VT. R. CRIM. P. 16(a)(1) (requiring disclosure of all witnesses known to the prosecution and access to their statements, whether or not the witnesses are to be used at trial); FLA. R. CRIM. P. § 3.220 (3.220(d) permits the defendant to take "the disposition upon oral examination of any person who may have information relevant to the offense charged"). This movement has prompted some state courts and legislatures to provide the indicted defendant with far greater access to the grand jury's transcript than that provided formally by the federal system. *See, e.g.*, CAL. PENAL CODE § 938.1 (West 1979) (automatic disclosure of transcript to indicted defendant); NEV. REV. STAT. § 172.225 (1975); N.D. CENT. CODE § 29-10.1-38 (1974) (if an indicted defendant's petition for transcript of grand jury proceeding is denied, the defendant has a right to a preliminary examination); MINN. R. CRIM. P. 18.05(2); VT. R. CRIM. P. 16(a)(2)(B).

appellate court in the event of an appeal by the defendant.¹⁰

DRAFT STATUTE § 201: RIGHTS OF GRAND JURY WITNESSES

A. *Counsel:*

- (1) Every witness subpoenaed to appear and testify before a grand jury or to produce books, papers, documents, or other objects before such grand jury shall be entitled to the assistance of counsel, including assistance during such time as the witness is questioned in presence of the grand jury. Such counsel may be retained by the witness or shall be appointed in the case of any person financially unable to obtain legal representation.
- (2) Counsel shall be allowed to be present in the grand jury room only during the questioning of the witness and shall be allowed to advise the witness. Such counsel shall not be permitted to address the grand jurors, raise objections, make arguments, or otherwise disrupt proceedings before the grand jury. Counsel is authorized to disclose matters which occur before the grand jury to the same extent as is permitted to the client.
- (3) If the court determines that counsel for a grand jury witness has violated Subsection (2), then the court may take such measures as are necessary to ensure compliance with this rule.

DRAFT STATUTE § 202: RIGHTS OF THE TARGET OF A GRAND JURY INVESTIGATION¹¹

Except as hereinafter provided, the prosecutor shall advise a target of the grand jury either personally, through counsel, or by mail at his last known address that:

- (1) he is a target of the grand jury investigation;
- (2) he shall be afforded a reasonable opportunity to testify before the grand jury, provided he signs a waiver of immunity; and
- (3) he has the right to present the prosecutor with exculpatory evidence; including the names and addresses of witnesses who possess exculpatory information.

Such notice need not be given if the prosecutor is unable with reasonable diligence to notify said person, or if on representation of the prosecutor, the court *in camera* concludes that there are reasonable grounds to believe that to give such notice would create an undue risk of danger to other persons, flight of the target, or other obstruction of justice. Absent these circumstances justifying a failure to give notice, an indictment that issues without the notice required by this provision shall be dismissed.

The Grand Jury Committee's acceptance of these proposals does not constitute official American Bar Association approval. The Committee must first complete a comprehensive Model Grand Jury

10. This proposal was taken verbatim from H.R. 94, 95th Cong., 1st Sess. § 3334(c), (d) (1977), reprinted in *1977 Hearings*, pt. 2, *supra* note 108, at 990-91.

11. Professor George Pugh drafted this proposal.

Act and then the entire Act must be accepted by the Criminal Justice Section's Council before it can be presented to the American Bar Association's House of Delegates for final approval.