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Revision of Louisiana's Code of Criminal Procedure— A Survey of Some of the Problems

*Dale E. Bennett**

The 1928 Louisiana Code of Criminal Procedure was a vast improvement over the then existing hodge-podge of common law and statutory rules, and incorporated some very worthwhile procedural reforms, taken largely from the California and Michigan Codes of Criminal Procedure. Unfortunately, it did not completely cover the field. In the preface to his annotated edition of the Code, St. Clair Adams, Chairman of the Code Commission, stated: "As a Code of Criminal Procedure, it does not embody all of the rules of pleading, practice, and procedure that are applicable to the trial of criminal cases. Many of these rules are not embraced in the Code and will be found in the Revised Statutes, in the Acts of the Legislature, in the common law and in the jurisprudence of the state."¹ Subsequent piecemeal, though well-meaning, amendments have confused rather than clarified the procedural pattern intended by the 1928 draftsmen.

The need for revision of the Louisiana Code of Criminal Procedure can best be appreciated by an analysis of the Louisiana Supreme Court decisions. During a five-year period beginning on April 1, 1952, a total of 218 criminal cases were appealed — involving questions of substantive criminal law, criminal procedure, and evidence. It is significant that 152 of these appeals were based primarily on controversial issues of criminal procedure, with many pointing up inadequacies or ambiguities of the present Code provisions. They touched almost every part of the Code of Criminal Procedure, with particularly difficult issues being presented as to prescription, indictments, and the handling of insanity defenses. Forty-nine decisions were primarily concerned with basic evidence problems (the preparation of a Code

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1. LA. CODE OF CRIM. PROC. ANN. iii (Adams 1929).

of Evidence is a companion project with the criminal procedure revision). Only 18 cases raised serious questions of substantive criminal law, dealing with articles of the Criminal Code and the much litigated narcotics law.

As the Louisiana State Law Institute approaches its task of revising the Code of Criminal Procedure,² it has facilities and assistance which were not available in 1928. These include adequate research assistance, sufficient time to consider carefully all aspects of each problem raised, and a wealth of comparative material which has since become available. Most significant are the American Law Institute's Code of Criminal Procedure of 1930, adopted in its entirety by Arizona and in very substantial measure by Florida, Iowa, North Dakota, and Utah; the Uniform Rules of Criminal Procedure, adopted by the National Conference of Commissioners of Uniform State Laws and approved by the American Bar Association in 1952; the Federal Rules of Criminal Procedure, adopted and promulgated by the United States Supreme Court in 1946; and various uniform and model acts dealing with specific procedural areas, such as extradition, arrest, and probation. The Model Penal Code, which is now in the process of formulation by the American Law Institute, embraces a number of matters, such as lunacy proceedings, arrest, and prescription, which have been included in the Louisiana Code of Criminal Procedure. These subjects, in the twilight zone between substance and procedure, may justifiably be placed in either category. While they probably will be retained in Louisiana's Code of Criminal Procedure, the carefully drafted provisions of the ALI Model Penal Code should prove invaluable. Certain state laws (notably those of California, Massachusetts, Missouri, New York, and Wisconsin) present new procedures in such trouble spots as indictments, lunacy proceedings, and sentencing. All of these materials will be carefully studied.

Dual and somewhat conflicting objectives must be recognized in evaluating any rule of criminal procedure. The rules of criminal procedure must carefully safeguard the rights of the accused by affording him a full opportunity to establish his innocence. At the same time they should not be so hyper-technical as to provide loopholes through which the guilty may escape or delay justice. To these ends the Code of Criminal Procedure must fully and concisely spell out the basic elements of a fair trial, but with-

2. The work is being done pursuant to a legislative mandate under La. Acts 1956, No. 87.

out imposing awkward requirements which may be manipulated to delay and ultimately thwart justice. To the extent that an existing provision meets those objectives, it should be preserved and cherished. To the extent that it does not, it should be supplemented or changed.³

Since arrest is normally the initial step in criminal proceedings, the *arrest* part of the present Code of Criminal Procedure⁴ will be considered first. Here is an area where failure to spell out fully the procedures to be followed has resulted in uncertainty and inconsistency. Such important matters as the nature and amount of force that may be employed to effect an arrest are left entirely to the jurisprudence, which is out of harmony with modern conditions. The arrest chapter of the revised code should provide a full statement of the rules of arrest — to which police officers, and the courts, can look for guidance.⁵ This is essential to sound and consistent law enforcement.

Consideration should be given to making some provision for replacing actual arrest with a *summons* in relatively minor cases. The summons is definitely preferable to arrest in cases where the defendant is charged with a petty offense, is well established in the community, and is not likely to leave the jurisdiction. There is no good reason to inconvenience such a defendant pending trial by an arrest, when a summons will be equally as effective in securing his appearance. To say that the defendant may be released on bail is not a complete answer since the making of bond involves a certain amount of delay and inconvenience and is often beyond the means of a poor but responsible defendant who could be depended upon to appear in answer to a summons. Provisions for extensive use of the summons device are found in the ALI Code of Criminal Procedure,⁶ the Federal⁷ and Uniform Rules,⁸

3. In regard to the scope and nature of the rules of criminal procedure, the Wickersham Crime Commission stated: "Reduced to its lowest terms, the essentials of a criminal proceeding are: (1) to bring the accused before or within the power of the tribunal, (2) a preliminary investigation to insure that the crime is one which should be prosecuted, (3) notice to the accused of the offense charged, (4) opportunity to prepare for trial, procure witnesses, and make needed investigations, (5) a speedy trial, (6) a fair trial before an impartial tribunal, and (7) one review of the case as a whole by a suitable appellate tribunal. Criminal proceedings should be as simple and direct as is consistent with these requirements." NATIONAL COMMITTEE ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON CRIMINAL PROCEDURE 16 (1931).

4. LA. R.S. 15:49-84.2 (1950).

5. The rules governing arrest, both with and without a warrant, are carefully covered in the ALI, CODE OF CRIM. PROC. §§ 1-38 (1930).

6. *Id.* §§ 12-17.

7. FED. R. CRIM. P. 4(b) (2).

8. UNIFORM RULES OF CRIM. PROC. 5(a) (2) (1952).

and in the Uniform Arrest Act.⁹ Limited use of the device is already provided for in minor traffic cases.¹⁰

In recent years, serious thought has been given to providing a legal method for *temporary detention of suspicious persons*. The Uniform Arrest Act authorizes a two-hour detention of such persons, after which they must either be released or arrested.¹¹ It is the practice of many police forces to arrest suspicious persons for some vague, minor crime such as vagrancy. The theory underlying detention provisions is that it is better to legalize a short period of temporary detention and control it than to permit the present system, which is subject to great abuse, to continue. There may be a question as to the constitutionality of this type of provision. While Rhode Island, New Hampshire, and Massachusetts have temporary detention provisions, none of them has as yet been challenged as violative of the United States or state constitutions. The American Law Institute is presently considering the problem in reference to its preparation of a Model Penal Code. Its treatment of this problem will be significant.

The *coroner's inquest* often plays an important part in homicide cases. Under Louisiana's present procedures¹² there is no assurance that this investigation will be made by one who is adequately trained for the task. The coroner is an elective officer and is not required to be a licensed pathologist. Sometimes, especially in the larger cities, a pathologist is employed to perform the actual autopsies in violent death cases, but this is seldom true in rural areas. The dangers of a bungled autopsy, in failing to exculpate an innocent suspect or in failing to find definitely incriminating evidence, should not be underestimated. In criticizing an Illinois procedure very similar to that in Louisiana, Dean Albert J. Harno states: "At this initial stage of the investigation, evidence is often at hand which if competently evaluated can be of extreme importance in subsequent proceedings that may arise over the cause of the death. Here, in this investigation, valuable evidence may be discovered and preserved, or lost, depending on the skill of the individual who makes the investigation. The present law dealing with the coroner affords no assurance of his competence for the duties assigned to him. Indeed, there is concrete and mounting evidence that often he is not

9. UNIFORM ARREST ACT (HANDBOOK ON INTERSTATE CRIME) § 9 (1942).

10. LA. R.S. 32:371 (1950).

11. UNIFORM ARREST ACT (HANDBOOK ON INTERSTATE CRIME) § 2 (1942).

12. LA. R.S. 15:28-40 (1950).

qualified. . . . While it is true that neither the state's attorney nor the grand jury need abide by this verdict of the coroner's jury, in practice that verdict may be an annoying factor in subsequent proceedings. . . . These prejudgments (findings of the coroner's jury as to whether a crime was committed) can be highly disconcerting to the officers of law enforcement who have the responsibility of instituting and supporting causes of action that may flow from the death in question. The Missouri Crime Survey after a careful examination of this question recommended that the office of coroner be abolished and that the principal function of that office be vested in a medical examiner. . . . That also was the conclusion reached by the Illinois Crime Survey. A medical examiner system with a qualified staff has been set up in a number of jurisdictions, including Massachusetts, the City of New York, and the City of Milwaukee."¹³ While a general requirement that the coroner be a licensed pathologist is not feasible, some steps should be taken to provide assurance that the autopsy and coroner's preliminary examination be performed by a well-qualified person.

Interstate extradition of those charged with crime in one state and found in another is provided for by the Federal Constitution and statutory authority. Implementing state legislation has been universally adopted. Since extradition involves the cooperation of two states, the state seeking to extradite and the state of asylum, it is particularly important to have uniform state procedures. The Uniform Criminal Extradition Act,¹⁴ embracing what were considered the best features of the various state laws, has been adopted by forty-one of the forty-eight states, including Louisiana's neighboring states of Alabama, Arkansas, and Texas. Louisiana should consider adoption of the Uniform Act and, in view of the special importance of interstate uniformity, might well heed the Uniform Commissioners' admonition of adoption without change, insofar as the state procedural pattern permits. A number of Uniform Act provisions cover situations which are omitted or inadequately covered by the present Louisiana extradition law. These include extradition of a criminal who is not technically a "fugitive" from the state,¹⁵

13. Harno, *Some Needed Changes in Illinois Criminal Procedure*, ILLINOIS LAW FORUM 425, 427 (1953).

14. Approved by the National Commissioners on Uniform State Laws in 1926 (with a few amendments approved in 1936), and by the Interstate Crime Commission in 1936. These two groups have cooperated in recommending adoption by the several states.

15. Section 6 of the Uniform Act authorizes extradition if an act outside the

or the re-extradition of one who has been voluntarily relinquished for trial in the state of present asylum.¹⁶ The necessary extradition papers are much more clearly and fully specified in the Uniform Act than in Louisiana's present procedures. An important policy question is presented as to whether Louisiana should follow the Uniform Act provision and make it the duty of the Governor to extradite a fugitive,¹⁷ or should retain its present rule that delivery of the fugitive is discretionary with the Louisiana chief executive.¹⁸ Forty of the forty-one states adopting the Uniform Act retain the mandatory duty. This is in accord with the spirit and purpose of the federal extradition provisions which the state laws implement. Complete interstate cooperation is essential if criminal extradition is to be fully effective.

The defendant's right to a *preliminary examination*, although frequently unenforced, is an important protection against high-handed police procedures and third degree methods. It brings defense counsel into the picture — implementing the constitutional privilege against self-incrimination and the right to bail. Other legal rights come into play, placing a check on this likely area of "official lawlessness."¹⁹ The inadequate preliminary examination provisions of the Louisiana Code of Criminal Procedure²⁰ should be supplemented by the clear and complete statement of preliminary examination procedures, as found in the American Law Institute's Code of Criminal Procedure.²¹

In revising the Preliminary Examination Chapter the present basic nature and methods²² should be preserved, but the more complete procedural pattern of the ALI Code should be considered. A number of important rights of the defendant, which are either omitted or only partially covered by the Louisiana provisions, are clearly and simply stated in the ALI Code. A few of these will be briefly mentioned. Under neither Code may the de-

state has resulted in a crime in the state seeking extradition. Here, the traditional notion of a "fugitive from justice," as stated in LA. R.S. 15:160 (1950) is not clearly met.

16. Section 5 of the Uniform Act authorizes extradition of persons who leave the demanding state under compulsion, and also provides for reextradition agreements when a local offender is delivered to another state for trial.

17. Uniform Crim. Extradition Act, 9 U.L.A. § 2 (1951).

18. LA. R.S. 15:160 (1950).

19. Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. CHI. L. REV. 345, 357 (1936).

20. LA. R.S. 15:153-159 (1950).

21. ALL, CODE OF CRIM. PROC. §§ 39-60 (1930).

22. Presently found in clumsily phrased LA. R.S. 15:155 (1950).

defendant be required to testify at the preliminary examination, but the ALI Code is more specific in enunciating the rights of the accused and requiring the committing magistrate to inform him of those rights.²³ The ALI Code limits postponements of the preliminary examination to a total of six days, except for good cause shown.²⁴ The rights of confrontation and cross-examination of witnesses at the preliminary examination are clearly spelled out in the ALI Code²⁵ and the Federal Rules.²⁶ These rights are important, for matters of grave concern to the defendant are determined at this stage of the proceedings. The ALI rules as to the taking of explanatory statements of the accused²⁷ and as to the subsequent admissibility of testimony of witnesses at the preliminary examination,²⁸ provide a much clearer and more flexible procedure than the present Louisiana article.²⁹ The effects of commitment³⁰ or discharge,³¹ after the preliminary hearing, are much more clearly and effectively settled in the ALI Code. The ALI Code includes a special "harmless error" provision, prohibiting the discharge of a defendant on a writ of habeas corpus, and the invalidation of a preliminary examination "because of any informality or error, which does not prejudice the [accused] in the commitment or the proceedings prior thereto."³² In commenting upon this provision, Orfield states: "It would seem that the disregard of technical errors, particularly at a preliminary proceeding is desirable. Non-prejudicial errors should not prevent the holding of a defendant for trial before a jury on the merits."³³ The Louisiana harmless error provision, as to trial irregularities,³⁴ does not apply to prejudicial errors in connection with the preliminary examination.

23. Cf. LA. R.S. 15:155 (1950); ALI, CODE OF CRIM. PROC. § 47 (1930).

24. ALI, CODE OF CRIM. PROC. § 43 (1930); cf. FED. R. CRIM. P. 5(e), requiring that the hearing be held "within a reasonable time."

25. ALI, CODE OF CRIM. PROC. § 46 (1930). Under Sections 287-291 the defendant's presence is not jurisdictional and may be waived.

26. FED. R. CRIM. P. 5(e).

27. ALI, CODE OF CRIM. PROC. § 47 (1930) provides for taking an unsworn statement of the accused, as well as a deposition, where he desires to explain the facts appearing against him.

28. *Id.* § 53(2) broadly provides for admissibility at the trial of testimony of witnesses at the preliminary examination, "if, for any reason the testimony of the witness cannot be obtained at the trial and the court is satisfied that the inability to produce such testimony is not due to the fault of the party offering it."

29. LA. R.S. 15:155 (1950).

30. ALI, CODE OF CRIM. PROC. § 117 (1930).

31. *Id.* § 116.

32. *Id.* § 60.

33. ORFIELD, CRIMINAL PROCEDURE 53 (1947).

34. LA. R.S. 15:557 (1950).

In conformity with the general practice in the United States, Louisiana's *preliminary examination is open to the public*. In Canada the magistrate may exclude the public from a preliminary hearing, but the power is seldom exercised.³⁵ There is much to be said for the Canadian rule which permits exclusion of the public in appropriately delicate situations, thus avoiding harmful publicity and the confusion incidental to a public hearing. It must be remembered that the preliminary examination is not a "trial," but is usually held to determine the propriety of bringing the accused to trial.

Bail is required for the purpose of obtaining reasonable assurance that the accused will appear for trial, but by a method that will avoid the unnecessary incarceration of a person who may ultimately be proven innocent. Subject to the general principles of Louisiana's constitutional guaranty of bail,³⁶ bail procedures are set out in the Code of Criminal Procedure.³⁷ The Louisiana constitutional guaranty of the right to bail expressly excepts capital cases "where the proof is evident or the presumption great,"³⁸ i.e., where a real *prima facie* case of guilt exists. The general American jurisprudence is in conflict as to the effect of an indictment with respect to this exception.³⁹ On this issue, and solely for the purpose of determining whether bail shall be denied, the Louisiana Supreme Court has held that "the fact that the grand jury have found a bill for a capital offense is generally considered a presumption of guilt sufficiently strong to shut out any further inquiry into the merits of his defense, . . . except upon the suggestion of circumstances of the most special and extraordinary character."⁴⁰ The ALI Code provides that after indictment of the accused "the burden is on such person to show that proof is not evident or the presumption not great."⁴¹ Possibly the Louisiana Code should specifically deal with this problem, and the ALI rebuttable presumption may be an appropriate solution.

35. ORFIELD, CRIMINAL PROCEDURE 87 (1947). Orfield suggests that possibly press reports of the evidence at preliminary hearings should be completely forbidden. *Id.* at 88.

36. LA. CONST. art. I, § 12 provides that: "All persons shall be bailable by sufficient sureties, except the following: Persons charged with a capital offense, where the proof is evident or the presumption great. Persons convicted of felonies, provided that where a minimum sentence of less than five years at hard labor is actually imposed, bail shall be allowed pending appeal until final judgment."

37. LA. R.S. 15:85-112 (1950).

38. LA. CONST. art. I, § 12.

39. ORFIELD, CRIMINAL PROCEDURE 107 (1947).

40. *State ex rel. Hunter v. Brewster*, 35 La. Ann. 605, 607 (1883).

41. ALI, CODE OF CRIM. PROC. § 68(2) (1930).

Bail pending sentence is not adequately provided for by the Louisiana Code of Criminal Procedure. Mr. Eugene Stanley has pointed out this hiatus in the law:⁴² "There is no provision in our law which provides for the release of a defendant on bail after conviction and before sentence, and the question which naturally arises is whether the defendant must be remanded in the custody of the sheriff to await sentence, or whether he is entitled to be released on bond. If he is entitled to be released on bond, does the first bond still prevail or must he give a new bond? There has been a difference of opinion amongst judges on this matter." Without purporting to offer a solution for the problem, Mr. Stanley further states that this is a situation "which should be clarified and straightened out by proper legislation." One possible solution would be to specify a right to bail pending sentence, in convictions of minor crimes where the maximum sentence would not result in a denial of bail.

The *fixing of bail is a judicial function*, and the Louisiana Code of Criminal Procedure directs that bail must be specially fixed in each case.⁴³ Recognizing the importance of having bail immediately available for those charged with minor offenses, a special provision authorizes release under bond of those charged with misdemeanors or violations of city ordinances in city courts "by the principal and his surety both waiving the fixing of bond by the presiding judge," or any other irregularities in the bail proceedings.⁴⁴ This enables the city judge to establish a regular list of bonds for minor offenses, which may be administered by the police officers on duty. Possible extension of this provision to those charged with misdemeanors in district courts should be considered.⁴⁵

The *financial responsibility of sureties* on bail bonds is of utmost importance. The "straw" bondsman, such as the surety who was accepted for \$269,500 of bail bonds although his only property was a \$6,750 equity in an apartment building,⁴⁶ provides little assurance that those bonded will appear for trial. At the same time a rigid requirement of cash bail would often work a great hardship. Various requirements, such as a listing and

42. 33 LA. STATE BAR ASS'N REP. 25, 26 (1934).

43. LA. R.S. 15:92 (1950).

44. *Id.* 15:86.2.

45. See Criminal Law Reform Committee, *The Setting of Bail in Minor Criminal Cases*, 17 LAWYERS GUILD REV. 148 (1957), raising a general query as to the propriety of general release without bail in misdemeanor cases, but making no definitive findings or recommendations.

46. OBFIELD, CRIMINAL PROCEDURE 119, n. 71 (1947).

legal description of the bondsman's property, and of other bonds given, would help in determining whether the bond proffered represents real security.⁴⁷ One suggestion is a requirement that the bond be secured by a lien on specific real estate having a net value over other liens sufficient to secure the bond.⁴⁸ This would insure collectibility and would expedite collection of forfeited bonds, but its administration would be fraught with practical difficulties. Probably the most workable device for enhancing enforceability of the surety's obligation is the ALI Code provision that the undertaking shall be a lien on all real property described in the surety's affidavit from the time of its recording in the county (parish) where the property is situated.⁴⁹ This prevents sale of the property as a means of preventing collection. The ALI Code includes other safeguards concerning the financial responsibility of the surety.⁵⁰ It also establishes a procedure for collection of bail bonds,⁵¹ which is somewhat simpler and more direct than Louisiana's present procedure.⁵²

The Louisiana Code of Criminal Procedure deals separately with the *drawing and selecting of jurors* in Orleans Parish⁵³ and in other parishes throughout the state.⁵⁴ This dual classification is subject to serious practical objections. First, many of the differences cannot be rationalized upon the basis of a difference in the size or nature of the communities. For example, a uniform state-wide rule could govern such matters as selection of the jury commissioners,⁵⁵ the method of determining the names to be placed on the grand jury list, and the method of selecting or drawing the grand jury. Other matters, such as the size of jury venires, must necessarily vary according to the size of the parish. Here, population classifications may be the solution but the present dual classification is hardly adequate. There are population differences, presently not fully recognized, between sparsely populated rural parishes and urban areas like East Baton Rouge

47. MINNESOTA CRIME COMMISSION REPORT 35, 65-66 (1927).

48. ORFIELD, CRIMINAL PROCEDURE 121 (1947).

49. ALI, CODE OF CRIM. PROC. § 102 (1930). No such lien is provided by the Louisiana Code or by the Federal Rules.

50. *Id.* §§ 78, 79. *Cf.* LA. R.S. 15:103, 104 (1950), providing less complete protection.

51. ALI, CODE OF CRIM. PROC. §§ 103-105 (1930). *Accord*: FED. R. CRIM. P. 46(f)(3) (1946).

52. LA. R.S. 15:108 (1950).

53. *Id.* 15:191-201.

54. *Id.* 15:175-190.

55. See VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 545, 547 (1949), discussing July 1938 recommendations of the American Bar Association.

and Caddo Parishes. A complete classification, based upon these population differences, would yield more than two classes — possibly three or four. In determining this question the statutes of California,⁵⁶ Illinois,⁵⁷ Massachusetts,⁵⁸ Missouri,⁵⁹ and Utah⁶⁰ will be most helpful. Possibly the best answer to the problem may rest in a flexible rule giving the district judge a blanket discretion to determine the number of names needed on the general venire and petit jury lists.⁶¹

*The time for urging objections to the method of selecting jurors, or irregularities in jury venires is governed by Article 202 of the Louisiana Code of Criminal Procedure.*⁶² This article, apparently aimed at insuring prompt objections to jury lists or venires has been a continuous source of difficulty and confusion. It was first interpreted in *State v. Smothers*⁶³ as requiring a defendant to object to petit jury venires no later than the third judicial day of the term for which it was drawn counting from the beginning of the term. It was there suggested that, where the defendant had been indicted or allegedly committed a crime after that time, Article 202 might not be applicable, and the general articles concerning the motion to quash would control. Later cases, starting with *State v. Wilson*,⁶⁴ have interpreted the article to mean that objections to the jury list or venire must be raised within three judicial days after the expiration of the jury term, or before trial, whichever is sooner. Space does not permit a detailed analysis of these decisions. Suffice it to say that neither has offered a workable solution of the problem. Much of the difficulty in connection with Article 202 stems from the fact that it purports to state a single general rule con-

56. CALIF. CODE OF CIV. PROC. § 204 (Deering 1953). The judges of the various districts recommend the number of veniremen needed for the next year.

57. ILL. ANN. STAT. c. 78, § 1 (Smith-Hurd 1941) requires a list of not less than one-tenth the legal voters of each town or precinct in the county.

58. MASS. ANN. LAWS c. 234, § 4 (1931). Not less than one juror is chosen per hundred inhabitants nor more than one juror per sixty inhabitants.

59. MO. STAT. ANN. §§ 494-498 (Vernon 1950) solves the problem by making three population classifications.

60. UTAH CODE ANN. § 78-46-18 (1953) taking four names for every hundred votes cast in the prior general election, but not less than seventy-five.

61. See note 56 *supra*.

62. "Art. 202. All objections to the manner of selecting or drawing any juror or jury or to any defect or irregularity that can be pleaded against any array or venire must be filed, pleaded, heard, or urged before the expiration of the third judicial day of the term for which said jury shall have been drawn, or before entering upon the trial of the case if it be begun sooner; otherwise all such objections shall be considered as waived and shall not afterwards be urged or heard." (Emphasis added.)

63. 168 La. 1099, 123 So. 781 (1929).

64. 204 La. 24, 14 So.2d 873 (1943).

cerning the proper time to object to both grand and petit jury lists and venires. The timeliness of objections to the members or composition of these two bodies involves special considerations for each. The problem can best be solved by drafting separate articles — one dealing with the time for filing objections to the drawing and selection of grand jurors, and one stating the time for challenging petit jury lists and venires.⁶⁵ The ALI Code treats these matters separately. A challenge of either an individual grand juror or the panel may be made by the state or a "person who has been held to answer" for a crime at any time before the jury or juror is sworn.⁶⁶ This provision for pre-indictment challenge of grand jurors benefits the state as well as the defense. It empowers an alert district attorney to protect his indictments by challenging prospective grand jurors who are disqualified, or challenging an illegally constituted jury panel at an early stage in the proceedings, rather than being forced to wait and have these questions determined by defense counsel's motion to quash. Special provision is made for the defendant who had not been "held to answer at the time the grand jurors were sworn." He may urge a ground for a challenge of the panel or of an individual grand juror by a motion to quash the indictment.⁶⁷ In separate articles dealing with challenges of petit jury panels, the ALI Code simply provides that this objection must be made before any individual juror is examined.⁶⁸

The effect of *subsequent disqualification of one or more of the grand jurors* returning an indictment is not settled in Louisiana law, either by the Code or the jurisprudence. It is very likely that if it is found that one of the grand jurors was "not qualified by law," an indictment returned by the defectively constituted grand jury would be subject to a motion to quash.⁶⁹ This matter should be clarified. Both the Federal Rules⁷⁰ and the Uniform Rules of Criminal Procedure⁷¹ provide that the number of votes in favor of an indictment be endorsed on the indictment, and that in case of subsequent disqualification of one or more of the

65. Comment, *Time for Urging Objections to Jury Lists and Venires*, 15 LOUISIANA LAW REVIEW 749 (1955).

66. ALI, CODE OF CRIM. PROC. §§ 118-120 (1930). *Accord*: FED. R. CRIM. P. 6(b), also allowing the judge discretion to accept the motion for a reasonable time after the plea has been entered.

67. ALI, CODE OF CRIM. PROC. § 210 (1930).

68. *Id.* §§ 268, 269.

69. LA. R.S. 15:203 (last sentence) (1950).

70. FED. R. CRIM. PROC. 6(b)(c).

71. UNIFORM RULES OF CRIM. PROC. 8(b), 9.

grand jurors, the indictment shall not be invalidated if there are still enough positive votes to sustain it.

Proper rules as to the *form of indictments* is a matter which commands high priority in a revision of Louisiana's Code of Criminal Procedure. In early English law the strict construction of indictments was decried by Sir Matthew Hale as a "blemish and inconvenience in the law" which enabled "more offenders [to] escape by the over easy ear given to exceptions in indictments, than by their own innocence."⁷² Despite statutory efforts to minimize this problem, the technical requirements of framing sufficient indictments still present many perplexing and controversial questions.⁷³ The drafting of proper rules as to the form of indictments will call for a careful study of the statutory reforms enacted by other states, and those proposed by the ALI Code and Uniform Rules. It will also necessitate a thorough review of our Louisiana jurisprudence, for it is important to provide indictment forms and rules which will comply with the constitutional right of the accused to "be informed of the nature and cause of the accusation against him."⁷⁴

The *short form indictment*, authorized by Article 235 of the Louisiana Code of Criminal Procedure,⁷⁵ and by Section 188 of the ALI Code, provides effective relief, as to the crimes included, from the technicalities of the old common law indictment rules. The basic function of the "short form" indictment is to inform the accused of the crime charged, reserving a recital of the details of the offense for the bill of particulars which is not subject to the same strict construction as the indictment. This precludes use of the indictment as a vehicle for a battle of wits between the draftsman and defense counsel who seek to checkmate the state by reason of some inadvertent and often highly technical omission. While jurisprudence from other states has almost universally upheld the validity of the short form indictment,⁷⁶ its use is subject to certain constitutional limitations. Consideration of the "short form" indictment problem must include a careful analysis of the Louisiana jurisprudence, and especially Chief Justice Fournet's thorough and scholarly dis-

72. HALE, *HISTORY OF PLEAS TO THE CROWN* 193 (1st American ed. 1847).

73. ORFIELD, *CRIMINAL PROCEDURE* 218-21 (1947).

74. LA. CONST. art. I, § 10.

75. LA. R.S. 15:235 (1950).

76. Comment, *The Short Form Indictment — History, Development and Constitutionality*, 6 *LOUISIANA LAW REVIEW* 78 (1944).

cussion of the problem in *State v. Straughan*.⁷⁷ Prior to that decision the Louisiana Supreme Court had upheld short form indictments for murder,⁷⁸ manslaughter,⁷⁹ theft,⁸⁰ and aggravated rape.⁸¹ It is significant that while all of these offenses could be committed in several ways, they were crimes having a well-understood meaning and scope. A 1944 amendment of Article 235 extended the short forms to all Criminal Code crimes, providing that it would "be sufficient to charge the defendant by using the name and article number of the offense committed." In the *Straughan* case an indictment, drawn pursuant to the 1944 amendment, sought to charge the multifarious and purely statutory crime of gambling by name and article number. This was held to be insufficient. The full import of the *Straughan* decision must be carefully studied, for it is important to provide indictment forms that are reasonably certain to meet the test of constitutionality laid down therein. The Supreme Court has definitely held that purely statutory offenses covering multiple forms of criminal conduct, such as gambling or obscenity, cannot be charged by name and article number. However, the recent case of *State v. Elias*⁸² clearly shows that it will continue to sustain the validity of specific short forms for well-understood crimes.

The formulation of a clear *long-form indictment rule* is essential, regardless of the decision as to short forms. These regular indictment forms will be used for a majority of Criminal Code crimes and for all crimes not found in the Criminal Code, as for violations of the narcotics and election laws. The long-form indictment rule should be so stated as to protect fully the rights of the accused, but without serving as a trap for the prosecution. The requirement of Article 227 of the Louisiana Code that "the indictment must state every fact and circumstance necessary to constitute the offense" has occasionally been interpreted so as virtually to require a spelling out of the details of the crime.⁸³

77. 229 La. 1036, 87 So.2d 523 (1956).

78. *State v. White*, 172 La. 1045, 136 So. 47 (1931).

79. *State v. Nichols*, 216 La. 622, 44 So.2d 318 (1950).

80. *State v. Pete*, 206 La. 1078, 20 So.2d 368 (1944).

81. *State v. Chanet*, 209 La. 410, 24 So.2d 670 (1946).

82. 99 So.2d 1 (La. 1958), upholding short form charge of attempted murder.

83. In *State v. Kelly*, 225 La. 495, 503, 73 So.2d 437, 439 (1954), an indictment for false registration of voters was held insufficient for failure to specify the nature of the false information which formed the basis of the charge. Justice McCaleb's dissent pointed out that the type of false registration had been stated, and that details as to the specific information submitted were obtainable through a bill of particulars.

Possibly the article should be recast in the light of Rule 7(c) of the Federal Rules which states: "The indictment or information shall be a plain and concise written statement of the *essential facts* constituting the offense charged." The English Indictments Act⁸⁴ and the Uniform Rules of Criminal Procedure⁸⁵ similarly stress the idea that the essential facts shall be set out in the indictment, but that the details of the criminal conduct are to be furnished in the bill of particulars.⁸⁶

Allegation of prior convictions under the habitual offender law raises a practical problem which does not appear effectively solved by either the ALI⁸⁷ or Louisiana⁸⁸ Code provisions. The accused is entitled to notice that he is to be charged as a multiple offender, where the state has such information at the time of the trial. At the same time the allegation of prior convictions should not be submitted to the jury before they return their verdict as to the crime presently charged. A study of other recently enacted Codes of Criminal Procedure may suggest an answer to this question.

Citation of the statute alleged to have been violated by the defendant is not required by the ALI or Louisiana rules governing indictment forms. The Federal Rules require a citation of the statute violated, but logically add: "Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice."⁸⁹ Such a provision is rendered desirable by the ever-increasing number and complexity of crimes and penal provisions in general statutes. "To know the statute may be as important as to know the facts intended to be proved."⁹⁰

Joinder of offenses has a rather extensive legislative and judicial history in Louisiana. Article 218 of the 1928 Code of Criminal Procedure provided for mandatory joinder "when two or more crimes result from a single act, or from one continuous unlawful transaction." After considerable litigation concerning its constitutionality, the Louisiana Supreme Court decided that

84. 5 & 6 GEO. V, c. 90, § 3 (1915).

85. UNIFORM RULES OF CRIM. PROC. 16 (1952).

86. The bill of particulars is authorized under LA. R.S. 15:288 (1950) and FED. R. CRIM. P. 7(f).

87. ALI, CODE OF CRIM. PROC. § 172 (1930).

88. LA. R.S. 15:242 (1950).

89. FED. R. CRIM. P. 7(c).

90. ORFIELD, CRIMINAL PROCEDURE 258 (1947).

Article 218 was unconstitutional insofar as it provided for a joinder of offenses triable by different types of juries, but was valid insofar as it authorized the joinder of offenses having the same method of trial and appeal.⁹¹ In 1932, a year later, the Legislature repealed Article 218. The repeal was probably motivated by an objection to the mandatory nature of the provision which stated that where several crimes arise out of a single transaction "only one indictment will lie," (the joinder rule established in prior Louisiana jurisprudence had been permissive), and by a confusion engendered by the partial unconstitutionality of the article. With the repeal of Article 218, the general prohibition of Article 217 is controlling and precludes joinder of crimes arising out of the same transaction, even where they are subject to the same method of trial and appeal.⁹² Most states, either by decision or statute, provide for the joinder of two or more crimes in a single indictment. These rules take various forms—some place stress upon the similarity of the crimes charged⁹³ and others allow joinder of offenses connected together in their commission.⁹⁴ The federal joinder rule includes both elements.⁹⁵ It provides for permissive, rather than mandatory, joinder. The American Law Institute deals with the joinder problem in its Model Penal Code, which provides for mandatory joinder, with only a single prosecution, where two or more offenses are based on the same conduct, based on a series of acts motivated by a single criminal objective, or affect the same person or his property.⁹⁶ The court is specifically empowered to order separate trials when "it is satisfied that justice so requires."⁹⁷ In support of the Model Penal Code provision for mandatory joinder, the ALI Reporter states that it "is designed to prevent the state from bringing successive prosecutions based upon essentially the same conduct, whether the purpose in so doing is to hedge the risk of an unsympathetic jury at the first trial, to place a 'hold' upon a person after he has been sentenced to imprisonment, or simply to harass by a multiplicity of trials."⁹⁸ In favor of a broad joinder rule are the arguments

91. *State v. White*, 172 La. 1045, 136 So. 47 (1931).

92. *State v. Carter*, 206 La. 181, 19 So.2d 41 (1944).

93. *Simmons v. State*, 165 Md. 155, 167 Atl. 60 (1933) (joinder of nine larcenies). Authorization of this type of joinder is strongly recommended in a memorandum written by Judge William O'Hara to the author, dated April 29, 1957.

94. WASH. REV. STAT. § 2059 (Remington 1927).

95. FED. R. CRIM. PROC. 8(a).

96. ALI, MODEL PENAL CODE, Tentative Draft No. 5, § 1.08(2) (1956).

97. *Id.* § 1.08(3).

98. *Id.* at 34.

of trial convenience and that it is best to have a single jury consider the entire picture of the defendant's alleged criminal conduct. In favor of a strict joinder rule that an indictment must charge a single offense is the argument that where several crimes are charged juries are likely to use evidence in support of one charge to convict on another charge not independently or adequately proved. Whether there shall be joinder of common crimes, the grounds for such joinder, and whether joinder shall be permissive or mandatory, present questions of policy which must be determined in advance of the actual drafting of these provisions. In view of Louisiana's constitutional provisions as to different types of tribunals for serious felonies, relative felonies, and misdemeanors, joinder must necessarily be limited to crimes having the same method of trial and appeal.⁹⁹

*Objections to indictments should be waived unless they are raised seasonably. A defendant should not be permitted to delay his objection until after the trial, as a sort of anchor to windward in case of conviction. Article 253 of the Louisiana Code of Criminal Procedure provides, along with many other things, that "no indictment shall be quashed . . . , nor shall any conviction be set aside or reversed on account of any defect in form or substance of the indictment, unless the objection to such indictment, specifically stating the defect claimed, be made prior to the commencement of the trial or at such time thereafter as the court in its discretion permit." (Emphasis added.)*¹⁰⁰ The words "or substance" have been virtually read out of Article 253 by the Supreme Court's holding in *State v. McDonald*,¹⁰¹ that a substantial defect in a burglary indictment, which failed to allege that "a building" had been burglarized, could be raised for the first time by a motion in arrest of judgment. Article 253 might be restated so as to make it doubly clear that defects of substance must be urged "prior to commencement of the trial or at such time thereafter as the court in its discretion permit"; or Louisiana might adopt the ALI Code solution of the delayed objection problem, by providing that no defect or variance can be taken advantage of after verdict "unless it is affirmatively shown that the defendant was in fact prejudiced thereby in his defense upon the merits."¹⁰²

99. Comment, *Joinder of Criminal Offenses in Louisiana*, 4 LOUISIANA LAW REVIEW 127 (1941).

100. LA. R.S. 15:253 (1950).

101. 178 La. 612, 152 So. 308 (1934).

102. ALI, CODE OF CRIM. PROC. § 184(4) (1930).

Louisiana's present statutory provisions as to *process upon the indictment* leave much to be desired. These matters were not covered in the 1928 Code of Criminal Procedure, and the provision that defendants indicted for major felonies shall be furnished with a copy of the indictment and jury list at least two days before trial comes from an unrepealed provision of the Revised Statutes of 1870 which was integrated in the 1950 Revision.¹⁰³ Furnishing a *copy of the indictment* two days before trial does not assure the defendant of an opportunity to study the indictment prior to the arraignment. In this regard the ALI Code provides that a copy of the indictment shall be furnished the defendant "at least twenty four hours before he is required to plead thereto."¹⁰⁴ Fortunately, current Louisiana practices conform with the ALI procedure.

Louisiana's requirement of *delivery of the jury list* to the defendant before trial raises practical difficulties. Judge William J. O'Hara has made a special study of this problem. In a memorandum to the writer¹⁰⁵ he stated, in part: "This provision, which means absolutely nothing to the defendant except to give him a legal cause for a continuance if the personal service is not made, is a serious burden upon the courts and the sheriff's office." After summarizing the laws of other states, Judge O'Hara concluded, "It is my opinion that it would be a great boon to the sheriffs of all the parishes of the state if this law was rewritten to place the burden upon the defendant or his attorney to secure a copy of the jury list if they wished to have one. . . . The law could be kept as it is in capital cases only." The defendant's right to investigate the character and background of prospective jurors is amply protected by the provision for publication of the jury lists.¹⁰⁶ It might be further implemented, as suggested by Judge O'Hara, by giving the defendant a right to secure a copy of the jury list upon request. The ALI Code, which appears very solicitous of the rights of the accused, does not provide for service of the petit jury list upon defendants.

The *names of the witnesses* who will probably be called against him at the trial is information in which the defendant has a legitimate interest. The ALI Code provides that the names

103. LA. R.S. 15:332.1 (1950).

104. ALI, CODE OF CRIM. PROC. § 193 (1930).

105. Dated April 29, 1957.

106. LA. R.S. 15:183 (1950).

of witnesses examined by the grand jury shall be endorsed on the indictment, and further stipulates that court rules may provide for the furnishing of names of such other witnesses as the state proposes to call.¹⁰⁷ Ample safeguards are included, so that the failure to endorse witnesses' names will not invalidate an otherwise sufficient indictment or information. The strongest objection to such a requirement is the fact that the defendant is not under a reciprocal duty to acquaint the state of his witnesses — the proffered information being a one-way proposition. It has also been suggested that there is a possibility of intimidation of witnesses, and that most district attorneys voluntarily furnish such information to reputable defense counsel. On the other hand, the accused can hardly be said to have been fully informed of the nature of the cause against him if the state's witnesses and proof are kept a deep, dark secret. Summarizing persuasive authority in support of the ALI rule forcing the state to put all its cards on the table, Orfield states that the rule is reported to have worked well in most states having it and is favored by the Wickersham Commission. Wigmore considers its omission a great injustice.¹⁰⁸

One of the more significant innovations in the ALI Code is the *all-embrasive motion to quash*.¹⁰⁹ Demurrers and all special pleas, such as pleas of former jeopardy, improper venue, and prescription, are expressly abolished. All defenses formerly available under these pleas are specifically covered by the "motion to quash."¹¹⁰ This simplified handling of preliminary objections to the charge has many advantages over the multi-labeled pleas of the Louisiana Code. Louisiana's "demurrer,"¹¹¹ for example, serves no useful purpose for the same objection may also be raised by a motion to quash for a "defect apparent upon the face of the indictment."¹¹² Prescription and lack of jurisdiction are sometimes raised by special plea. In other cases they are urged as a ground for a motion to quash the indictment. There is no good reason why former jeopardy must be raised by a special plea to the merits.¹¹³ It can best be treated as a

107. ALI, CODE OF CRIM. PROC. § 194 (1930).

108. ORFIELD, CRIMINAL PROCEDURE 257 (1947).

109. ALI, CODE OF CRIM. PROC. §§ 209, 210 (1930). *Accord*: FED. R. CRIM. P. 12(a) (motion to dismiss).

110. ALI, CODE OF CRIM. PROC. § 210 (1930).

111. LA. R.S. 15:285 (1950).

112. *Id.* 15:286.

113. *Id.* 15:261.

preliminary plea, as are prescription and improper venue or lack of jurisdiction. The ALI motion to quash also embraces the situation where the bill of particulars furnishes insufficient information or states facts which "do not constitute the offense charged in the indictment." These situations are not adequately dealt with in the Louisiana Code.¹¹⁴

The time for filing objections to the indictment is confusingly stated in the Louisiana Code of Criminal Procedure. Article 284 states the general rule that "every objection to any indictment shall be taken by demurrer or by motion to quash such indictment, *before* the arraignment." (Emphasis added.) As a practical matter, this provision is interpreted to mean that the motion to quash is a preliminary motion which must be filed before the defendant pleads to the merits *at* the arraignment. Article 288 provides that "defects in indictments can be urged *before verdict* only by demurrer or a motion to quash." (Emphasis added.) This provision contemplates the situation where the court may, in its discretion, permit the defendant to withdraw his plea of not guilty and move to quash the indictment or set up some other plea.¹¹⁵ Articles 284 and 288 should be redrafted so as to provide a clear and complete statement of the time at which the motion to quash is to be filed. The Federal Rules state, in a very direct manner, that the preliminary motion "shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter."¹¹⁶ The ALI Code has a very flexible, and clearly stated, procedure. The defendant may "either move to quash the indictment or information or plead thereto, or do both. If he moves to quash, without also pleading, and the motion is withdrawn or overruled he shall immediately plead."¹¹⁷

The method of urging the defense of *insanity at the time of the crime* has been a source of much legislative and judicial

114. The Louisiana Supreme Court has broadly interpreted the motion to quash so as to afford a measure of relief in such cases. *State v. Masino*, 214 La. 744, 38 So.2d 622 (1949), wherein Justice Moise, being hard put to formulate the precise theory of a very sound decision, aptly declared: "It is easier to find fault with a remedy proposed than to propose a remedy that is faultless." *Id.* at 748, 38 So.2d at 623. The *Masino* decision would have been easily and logically sustained under Section 210(1) (e) of the ALI Code.

115. LA. R.S. 15:265 (1950); *State v. Verdin*, 192 La. 275, 187 So. 666 (1939), holding that it is reversible error for the trial judge to refuse to permit a change of plea where there is a valid basis for the motion to quash and an excuse for the delay in urging it, such as lack of counsel at the arraignment.

116. FED. R. CRIM. P. 12(b)(3).

117. ALI, CODE OF CRIM. PROC. § 207.

concern. Prior to the 1928 Code of Criminal Procedure, Louisiana had followed the common law procedure whereby the insanity defense, along with all other defenses to the merits, could be raised under a general plea of not guilty. This commingling of the insanity issue with other basic guilt issues frequently resulted in jury confusion. The Code of Criminal Procedure sought to avoid this difficulty, by establishing "insanity at the time of the crime" as a separate defense on the merits which must be set up by a special plea.¹¹⁸ It further directed that such defense "shall be filed, tried and disposed of prior to any trial of the plea of not guilty, and no evidence of insanity shall be admissible upon the trial of the plea of not guilty."¹¹⁹ This new procedure contemplated a separate trial of the insanity defense and virtually necessitated the impaneling of two juries. The first jury would determine the insanity plea, that is, whether the defendant was criminally responsible for his action. If they found him sane, a second jury would be impaneled to determine whether he had committed the crime charged. This created a serious problem in the smaller parishes where jury venires were barely adequate to provide one twelve-man jury for sensational murder and rape trials. In an effort to avoid the necessity of dual juries, a 1932 statute¹²⁰ deleted the requirement that the insanity plea be tried and disposed of prior to the plea of "not guilty." However, insanity was still listed as a separate plea, and the amendatory statute provided no substitute for the procedure eliminated — it did not state when the plea of insanity was to be raised or how it was to be handled. During the past twenty-five years the procedure has become rather well set by a series of judicial decisions, but the results remain somewhat anomalous. If the defendant simply pleads "not guilty," evidence of insanity at the time of the crime is inadmissible.¹²¹ However, if he pleads "not guilty by reason of insanity," the door is wide open and all defenses may be urged simultaneously. Evidence is then admissible to show that the defendant did not commit the act, that he was justified as by self defense, and that he was not

118. LA. R.S. 15:261 (1950).

119. LA. CODE OF CRIM. PROC. art. 267 (1928). In explaining this change the Code Commissioners stated: "It is thought that the provisions on this subject will result in determining the issue of insanity *vel non* before the trial on the merits, thereby minimizing the abuses which often arise from the use of the plea of insanity." LA. CRIM. STAT. 562 (Dart 1932).

120. La. Acts 1932, No. 136, amending LA. CODE OF CRIM. PROC. art. 267 (1928).

121. *State v. Gunter*, 208 La. 694, 23 So.2d 305 (1945).

responsible by reason of insanity. Even where defendant wants it, he cannot demand a separate trial of his insanity plea.¹²²

If it is desirable to keep the insanity defense separate from the general "not guilty" plea, a practical solution may be found in the California procedure.¹²³ California reverses the order of trial where insanity is pleaded, and provides that the jury shall first determine if the defendant committed the crime charged. Then, if the defendant is found to have committed the crime, the same jury passes upon the separate insanity defense. With this order of trial the jury's judgment in determining the initial question of guilt or innocence is not colored by the insanity evidence.

Probably the greatest evil of commingling the insanity plea and other defenses is the surprise insanity defense which is raised for the first time during the trial. This may catch the state by surprise and necessitate a continuance of the trial until the next term of court. This is met under Louisiana's present procedures by the requirement of a special plea of insanity. It can be met in a much less confusing manner, assuming that separate trial of the insanity issue is not considered essential or practicable, by simply requiring advance notice of the intention to rely on insanity as a defense. This is the procedure followed by the American Law Institute in its tentatively approved draft of a Model Penal Code¹²⁴ and its Code of Criminal Procedure.¹²⁵

Similarly, notice of the defendant's intent to rely on an alibi defense is presently required, either by statute or rule of court, in fourteen states.¹²⁶ Six of these states require the defendant to furnish the names of his alibi witnesses. These statutes are predicated on the idea that the prosecution should not be required to anticipate a possible alibi defense — a matter which is peculiarly within the knowledge of the defendant. This argument is particularly persuasive if the new code should adopt an

122. *State v. Dowdy*, 217 La. 773, 47 So.2d 496 (1950).

123. CALIF. PEN. CODE § 1016 (Deering 1949).

124. ALI, MODEL PENAL CODE, Tentative Draft No. 4, § 4.03(2) (1955): "Evidence of mental disease or defect excluding responsibility shall not be admissible unless the defendant at the time of entering his plea of not guilty or within ten days thereafter or at such later time as the Court may for good cause permit files a written notice of his purpose to rely on such defense."

125. ALI, CODE OF CRIM. PROC. § 235 (1930).

126. OBFIELD, CRIMINAL PROCEDURE 311-14 (1947). *Accord*: WICKERSHAM CRIME COMMISSION, REPORT ON CRIMINAL PROCEDURE 34, 47 (1931).

“all cards on the table” principle by requiring the state to furnish the defendant a list of its witnesses. The proposed Federal Rules provided for notice of alibi,¹²⁷ but that provision was not adopted by the Supreme Court in the final draft. The Uniform Rules require notice of alibi, under penalty of such evidence being inadmissible “unless the court for good cause shown orders otherwise.”¹²⁸

The Louisiana *prescription* articles have been a source of much difficulty and litigation. This was inevitable in view of the fact that numerous different rules are embraced in two clumsily phrased articles. Even one quite astute in law cannot determine with any degree of certainty the applicability and limitations of the various prescription periods set out in these over-lapping provisions. Under Article 8 of the Louisiana Code of Criminal Procedure the indictment must be found or the information filed within one year after the crime “shall have been made known” to the judge, district attorney, or grand jury having jurisdiction over the case.¹²⁹ The second prescriptive period, confusingly set out in Articles 8 and 9,¹³⁰ is a three-year limitation on bringing felons to trial after they have been charged. In non-felony cases the period is two years. It is generally agreed that a revision of these prescription rules is badly needed, but the procedure to be followed involves a policy decision. Should we retain the basic principles of the present Louisiana prescriptive periods and redraft the articles so as to clarify their operation and remove their inadequacies, *or* should we abandon the present provisions as unworkable and adopt rules similar to those stated in the American Law Institute Model Penal Code¹³¹ or the federal statutes?¹³² The most important difference between the Louisiana and the ALI—Federal approaches to the prescription problem relates to the length of the periods. The Louisiana Code provides for a short (one year) prescription period on bringing the charge, which runs from the time that the offense is known or should have been known to the prosecuting authorities; coupled with a relatively long (3 years) period for bringing the accused to trial. The ALI—Federal rules provide a fairly long period, running from the date of the

127. Proposed Rule 16.

128. UNIFORM RULES OF CRIM. PROC. 26 (1952).

129. LA. R.S. 15:8 (1950).

130. *Id.* 15:8, 9.

131. ALI, MODEL PENAL CODE, Tentative Draft No. 5, § 1.07 (1956).

132. 18 U.S.C. §§ 3281, 3282, 3288-3290 (1948).

crime, within which the accused must be charged, coupled with a relatively short period for bringing the accused to trial. Perhaps the ultimate draft will incorporate the better features of each system. Only a few of the more specific prescription problems will be discussed.

The only *non-prescribable crime* under the ALI Model Penal Code is murder.¹³³ The federal prescription section excepts only capital offenses.¹³⁴ In explaining the single exception of murder as a non-prescribable crime, the ALI reporter stressed the desirability of maintaining "the common police practice never to close the files on an unsolved murder case," and "the long continued impact on the sense of general security of the community."¹³⁵ This argument would appear almost equally applicable to aggravated rape, also a capital crime; but it would scarcely apply to the other felonies listed in the Louisiana exception clause as non-prescribable. There is even less justification for allowing trial and conviction of such lesser crimes as manslaughter or simple rape where murder and aggravated rape have been charged. Louisiana's novel provision, that permits conviction of an otherwise prescribed lesser crime which is included in the charge of a non-prescribable offense,¹³⁶ finds little support either in logic or the law of other states.

The time when *prescription starts to run* upon the bringing of a charge against the offender is a matter where Louisiana differs from the ALI Model Penal Code. Only Louisiana¹³⁷ and Georgia¹³⁸ provide that the period does not start to run until the offense is known, or should have been discovered, by the appropriate authorities. This may partially explain Louisiana's unusually short period of one year. The ALI draft follows the preponderant majority rule that the period of limitation starts to run when the offense "is committed."¹³⁹ The principal objection that can be offered to the ALI rule is the possibility of concealment of the offender's guilt. This is largely offset by the greater length of the ALI and other similar prescription periods. The basic justification of the longer limitation, beginning with

133. ALI, MODEL PENAL CODE, Tentative Draft No. 5, § 1.07 (1956).

134. 18 U.S.C. § 3281 (1948).

135. ALI, MODEL PENAL CODE, Tentative Draft No. 5, at 17 (Reporter's Comment) (1956).

136. LA. R.S. 15:8 (1950).

137. *Ibid.*

138. GA. CODE § 27-601 (1933).

139. ALI, MODEL PENAL CODE, Tentative Draft No. 5, § 1.07(2).

the commission of the crime, rests upon the premise that after a substantial period without further criminal activity, no worthy social interest is served by bringing the offender before the court and trying him for his previous crime. In such a case it may be assumed that the offender has effected a self-rehabilitation which will not be enhanced by his subsequent trial and imprisonment. Also, most offenses can be discovered by adequate and prompt investigation. Realizing that there are certain offenses where the opportunity for prolonged concealment is great, as in fiduciary frauds of various types, special provision for prosecution within one year after discovery of the crime is made for those cases.¹⁴⁰ This represents a compromise of the conflicting considerations underlying the present Louisiana and generally adopted views.

The provisions for *tolling the running* of the prescriptive periods, partly stated in the last paragraph of Article 8 and partly in Article 9 of the Louisiana Code, are confusing both as to their applicability and meaning. The ALI Model Penal Code provision¹⁴¹ may well serve as a pattern for a clear enunciation of the conditions of suspension of prescription.

Louisiana's *three-year prescriptive period upon bringing the accused to trial* after the finding of the indictment is confusingly stated, partly in Article 8 and partly in Article 9. The *Bradley*¹⁴² and *Truett*¹⁴³ decisions pointed up some of the difficulties inherent in these overlapping provisions. In the *Bradley* case the Supreme Court, in order to achieve a fair result, held that two three-year prescriptive periods were created by these articles. The holding was not without logical support from the involved wording of the prescription articles, but achieved a result that probably came as a surprise to the draftsmen of the 1928 Code. The problems posed in the *Bradley* and *Truett* decisions can only be solved by a clearly drafted article providing for a single prescriptive period within which the accused must be brought to trial. When this is done the length of the time limitation should be much shorter than the present three-year period. In Missouri the accused must be brought to trial before the end of the second term of court after the indictment is returned.¹⁴⁴ In

140. *Id.* § 1.07(3).

141. *Id.* § 1.07(6).

142. 227 La. 421, 79 So.2d 561 (1955).

143. 230 La. 955, 89 So.2d 754 (1956).

144. Mo. STAT. ANN. §§ 545.890, 545.900 (Vernon 1950).

Arizona the actual trial must begin within sixty days after the formal charge.¹⁴⁵ The Federal Rules provide for dismissing the indictment "if there is unnecessary delay in bringing the defendant to trial."¹⁴⁶ The ALI Code of Criminal Procedure makes no specific recommendation as to the length of the time limitation upon bringing the accused to trial, leaving this decision to the adopting states.¹⁴⁷ The length of time of this prescriptive period will depend somewhat upon whether a long or short period for bringing the formal charge is adopted.

Former jeopardy partakes of both substantive and procedural law, and no hard and fast line can be drawn between the two. Such questions as identity of crimes arising out of a single act are basically substantive. The method and manner of raising former jeopardy is clearly procedural. Other problems, coming in the twilight zone, may properly be treated as either. The Louisiana Code of Criminal Procedure, in common with those of many other jurisdictions, elected to cover these borderline matters. The American Law Institute has included most of the double jeopardy rules in its Model Penal Code (now in preparation) rather than in its Code of Criminal Procedure (published in 1930). The revision should continue the present Louisiana policy of providing the principal treatment of former jeopardy in the Code of Criminal Procedure, but the carefully and fully drafted provisions of the ALI Model Penal Code¹⁴⁸ should be considered. They clarify a number of problems which are confusingly or inadequately handled under present Louisiana law. These include full statutory coverage of the situations where prosecution is barred by a former prosecution for the same offense.¹⁴⁹ For example, the Model Penal Code¹⁵⁰ is much more specific and complete than the Louisiana Code of Criminal Procedure¹⁵¹ in stating when the termination of a trial is "improper" and will support a plea of former jeopardy. A sound innovation of the Model Code is the provision that prosecution in another state or federal court for the same criminal conduct shall be a bar to a subsequent local prosecution.¹⁵² In the absence of statute,

145. ARIZ. CODE ANN. § 44-1503 (1939).

146. FED. R. CRIM. P. 48(b).

147. ALI, CODE OF CRIM. PROC. § 292 (1930).

148. ALI, MODEL PENAL CODE, Tentative Draft No. 5, §§ 1.08-1.12 (1956).

149. *Id.* § 1.09.

150. *Id.* § 1.09(4).

151. LA. R.S. 15:278 (1950).

152. ALI, MODEL PENAL CODE, Tentative Draft No. 5, § 1.11 (1956).

the rule against double jeopardy does not apply between separate sovereignties.¹⁵³

The *territorial jurisdiction* of Louisiana courts in criminal cases is subject to a very limited control by legislative enactment, for this state cannot, by pure legislative fiat, assume jurisdiction over crimes committed in other states. However, a state may assume jurisdiction of criminal activity transpiring beyond its boundaries where the effects of the action are felt within the state. For example, Article 16 of the Louisiana Code of Criminal Procedure asserts local jurisdiction to prosecute for homicide where the mortal blow is inflicted in another state, and the homicide is consummated by the victim's death in Louisiana.¹⁵⁴ In this situation Louisiana has a sufficient interest in the homicide to punish the defendant for an act committed outside the state.¹⁵⁵ However, a statute is necessary to show that the state intends to exercise its fullest possible jurisdiction. The ALI Model Penal Code, which provides a very comprehensive coverage of this jurisdictional problem,¹⁵⁶ goes further than Louisiana's Article 16. "If the body of the victim is found within the state it is presumed that the victim died in the state."¹⁵⁷ This takes care of the situation where a dead body is found in a thicket or car trunk, but the time and place of the death are impossible to ascertain. The Model Penal Code also makes special provision for an attempt or conspiracy outside the state's territory that is aimed at the commission of a crime within the state.¹⁵⁸ This is a situation where existing statutes and precedents are lacking. Since the security of the state is threatened by such activity, the state has a sufficient interest to control and punish such conduct.

The troublesome *venue problem* relating to the jurisdiction of a particular district court was largely solved by a 1942 amendment of Article 13 of the Louisiana Code of Criminal Procedure, providing "that where the several acts constituting a crime shall have been committed in more than one parish, the offender may be tried in any parish where a substantial element of the crime

153. *United States v. Lanza*, 260 U.S. 377 (1922).

154. LA. R.S. 15:16 (1950).

155. *Tyler v. People*, 8 Mich. 319 (1860), sustaining a similar Michigan statute.

156. ALI, MODEL PENAL CODE, Tentative Draft No. 5, § 1.03 (1956).

157. *Id.* § 1.03(2)(f)(3).

158. *Id.* § 1.03(1)(b), (c).

has been committed."¹⁵⁹ There are still a few situations where, because of the uncertainties of proof, special liberalized venue provisions may be advisable. Where an offense, such as a homicide, is committed on a vehicle which is travelling across several parishes, it will sometimes be impossible to determine in which parish the crime or a substantial element took place. The trial, in such situations, should be authorized in any parish through or over which the vehicle passed during such trip.¹⁶⁰ The local homicide problem presented where the body is found in a parish, but there is no way of determining the place of the fatal blow or the death, should be covered by recognizing venue in the parish where the body is found.¹⁶¹

The procedures for presenting and determining the *insanity defenses* are confusingly handled in three clumsily phrased and much-amended articles of the Louisiana Code.¹⁶² The *composition of the lunacy commission*, which examines the accused as to his present mental condition or as to his mental condition at the time of the crime is probably the most serious inadequacy in those procedures. A 1944 amendment¹⁶³ to the insanity articles provides that the commission shall be composed of "disinterested physicians" whose sole qualification is that they must have practiced medicine for three years. The mandatory inclusion of the coroner added little to the prestige or capability of the commission. Fortunately, psychiatrists from the state mental hospital are usually appointed to serve on the lunacy commission. The 1944 statute, which eliminated the Code's original requirement of trained and qualified psychiatrists, was not prompted by a failure to appreciate the value of such testimony. Rather, it was enacted to relieve parish police juries of the heavy costs of obtaining such professional services. A sound solution

159. *Accord*: ALI, CODE OF CRIM. PROC. § 242 (1930). See Comment, *The Resurrection and Constitutionality of a Liberal Criminal Venue Provision*, 4 LOUISIANA LAW REVIEW 321 (1942).

160. See ALI, CODE OF CRIM. PROC. § 239 (1930), providing for offenses committed in aircrafts, § 245 providing for offenses committed on a railroad train or other vehicle, and § 246 providing for crimes committed on vessels. A single article covering venue of crimes committed during inter-parish transportation would cover the entire problem.

161. CALIF. PENAL CODE § 790 (Deering 1949). See similar provision as to interstate jurisdiction in ALI, MODEL PENAL CODE, Tentative Draft No. 5, § 1.03(2)(f)(3) (1956).

162. LA. R.S. 15:267-269 (1950). Article 267 governs the procedure when the defendant pleads present insanity as a bar to being brought to trial. Articles 268 and 269 set out the procedures to be followed when insanity at the time of the crime is urged as a complete defense.

163. La. Acts 1944, No. 261.

of this problem is suggested by the American Law Institute's Model Penal Code.¹⁶⁴ It provides for a mental examination by "at least one qualified psychiatrist," and that the psychiatrist or psychiatrists may be requested from the state mental hospital. Such a provision would solve the financial problem of the small parishes. It would also insure a report by a competent psychiatrist, specializing in the characteristics of the criminally insane, who would be completely free from either prosecution or defense influence. This would probably necessitate the addition of one or two psychiatrists to the presently overworked staffs of the state mental hospitals, but that would be money well spent. One of the soundest moves that can be made in securing an adequate jury appreciation of the confusing insanity issues is to provide a lunacy commission report which the jury will respect — a report that will stand forth as an unbiased and competent analysis of the mental condition of the accused.¹⁶⁵

The *lunacy commission's report*, where present insanity is urged as a bar to trial under Louisiana's Article 267, covers only the present mental condition of the accused. In this situation the trial judge is not empowered to order a report on the defendant's mental condition at the time of the crime.¹⁶⁶ Where a defendant is found presently insane he is committed to an institution. Later, when he regains his mental powers, he is brought to trial for his alleged crime. If insanity at the time of the crime is then pleaded as a defense, a separate mental examination and report become necessary.¹⁶⁷ This delayed examination as to the defendant's mental condition at the time of the crime may be seriously hampered for the evidence will be sketchy and unreliable where the accused has been in a mental institution for a considerable period of time. The American Law Institute's Model Penal Code avoids this difficulty by providing for a very comprehensive lunacy report.¹⁶⁸ This report is to include the nature of the examination, a general diagnosis of the mental condition of the defendant, an opinion as to his capacity to understand the proceedings and to assist in his defense, and an opinion as to criminal responsibility at the time of the crime

164. ALI, MODEL PENAL CODE, Tentative Draft No. 4, § 4.05(1) (1955).

165. Orfield suggested, in writing of a similar provision of the Massachusetts Briggs Law, that the procedure would largely eliminate the so-called "battle of experts." ORFIELD, CRIMINAL PROCEDURE 281 (1947).

166. *State v. Chinn*, 229 La. 984, 87 So.2d 315 (1955).

167. The procedures for this examination are set out in LA. R.S. 15:268 (1950).

168. ALI, MODEL PENAL CODE, Tentative Draft No. 4, § 4.05(3) (1955).

if notice of the intention to rely on the insanity defense has been filed. Another solution might be to redraft the present articles so as to empower the trial judge to order a report on the defendant's mental condition at the time of the crime in any case where it appears that the insanity defense may subsequently be urged. The Massachusetts Briggs Law goes even further and provides for routine mental examination before trial of all defendants charged with capital crimes, or previously convicted of a felony.¹⁶⁹

The ALI Model Penal Code insanity procedures, proposed after thorough discussion by a committee of leading trial lawyers, judges, district attorneys, and psychiatrists, set out a number of *other rules which are worthy of careful consideration*. Where the lunacy report shows extreme mental disease or defect at the time of the crime, clearly excluding responsibility, the trial judge is empowered to enter a judgment of acquittal and order the defendant's commitment.¹⁷⁰ This provision avoids the necessity of a trial in cases where the defendant's mental irresponsibility is clear. The right of the defense to have a psychiatrist of its own choosing examine and have reasonable access to the defendant is clearly spelled out.¹⁷¹ The court may also permit the defense psychiatrist to witness and participate in the examination by the court-appointed psychiatrists.¹⁷² Full benefit of expert testimony is assured by a flexible rule whereby a psychiatrist who has examined the defendant will be afforded an unrestricted opportunity to state and explain his diagnosis of the defendant's mental condition at the time of the conduct in question.¹⁷³ He will, of course, be subject to cross examination as to the basis of his opinion.

Space limitations of a law review article have not permitted a survey of all revision problems. Equally perplexing, and interesting, questions are presented in other parts of the Code. These relate to such important matters as recusation or absence of the district attorney or the judge,¹⁷⁴ entry of a *nolle prosequi* and its effect,¹⁷⁵ setting the case for trial and continuance,¹⁷⁶ the

169. MASS. ANN. LAWS c. 123, § 100A (1931).

170. ALI, MODEL PENAL CODE, Tentative Draft No. 4, §§ 4.07(1), 4.08 (1955).

171. *Id.* § 4.07(2).

172. *Id.* § 4.05(1).

173. *Id.* § 4.07(4).

174. LA. R.S. 15:302-313 (1950).

175. *Id.* 15:327-331.

176. *Id.* 314-326.

trial jury and its selection,¹⁷⁷ presence of the defendant at various stages of the trial,¹⁷⁸ the conduct of the trial with its multiplicity of problems,¹⁷⁹ the conduct of the jury after the case is submitted and its verdict,¹⁸⁰ the motions for a new trial and in arrest of judgment,¹⁸¹ sentencing procedures, including such antipodal matters as probation and the habitual offender law,¹⁸² appeal,¹⁸³ and execution of sentences.¹⁸⁴ A mere recounting of these phases of the criminal proceedings brings to mind many problems which must be carefully considered in the contemplated revision. Each procedure must be judged in the light of its practical operation. The rules must be complete, clearly stated and fair — to the end that they will afford full protection to the innocent and will, at the same time, facilitate the expeditious trial and conviction of the guilty. It is easier to state than to achieve these objectives. Fortunately, the practical benefits of local experience will be available through an advisory committee of judges, defense counsel, and district attorneys. The benefits of nation-wide experience and research is obtainable through such carefully prepared projects as the American Law Institute's Code of Criminal Procedure and Model Penal Code, the Federal Rules of Criminal Procedure and the Uniform Rules. An added, and very important step, in the revision process will be careful and objective review of each rule by the Council of the Louisiana State Law Institute — a body which is free from any appreciable "defense" or "prosecution" leanings and whose sole interest is in the improvement of Louisiana laws.

177. *Id.* §§ 337-362.

178. These rules are distributed throughout the Louisiana Code, but are treated as a unit in the ALI Code.

179. LA. R.S. 15:332-397, 405, 406 (1950).

180. *Id.* 15:394-421.

181. *Id.* 15:505-520.

182. *Id.* 15:521-538.

183. *Id.* 15:539-564.

184. *Id.* 15:565-571.12.