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It had been a great treat to escape into the green coolness of the country for an all-day picnic, thought Sheriff Tom Bash peacefully as he, his wife, her friend, and a deputy were driving back to Kansas City on that hot August night. Two sharp revolver shots suddenly interrupted his peacefulness.

Bash pushed hard on the brakes. Before the car had come to a stop, the deputy, gun in hand, was running across to an alley from which the gunshots seemed to have come. Grabbing a riot gun from the rear of the car, Bash sprinted after his deputy.

Ahead of them two men were trotting down the street. An automobile swung out of the darkness. Its two occupants opened fire on the officers. The gangsters in the street joined in.

The officers, advancing, swung their riot guns into action. The gangsters' car wobbled crazily across the street and bumped to a stop against the curb—its driver and passenger dead.

One of the men in the street dodged between the houses and disappeared. The other threw his empty automatic to the ground and raised his hands.

"For God's sake, don't shoot," he pleaded. "I'm a friend of Johnny Lazia."

"I don't care whose friend you are, Charley Gargotta," replied Bash, "but I don't shoot unarmed men."

After handcuffing Gargotta, the deputy picked up the gangster's gun. Both officers examined it carefully, making mental notes by which they could identify it in court.

Gargotta was indicted for the murder of Ferris Anthon, rival gangster. Tremendous pressure began to be exerted mysteriously to bring freedom. Johnny Lazia, king of Kansas City's underworld, was alleged to be close to the political powers in that city.

In April when the state presented its case, Bash and the deputy told their story and identified the death weapon. A local ballistics expert stated that bullets found in the body of Anthon came from the identified

gun. The city detective who had investigated the killing then came to the stand.

He gave some startling evidence. There was a mistake, he said. The real death weapon he had picked up between the houses where the unknown gangster had fled.

"I made out a tag for it," he testified. "I forgot to put it on. Let's see, I've got the tag somewhere. Yes, here it is."

The detective handed over a police identification tag to the amazed district attorney. Shortly afterwards a woman testified for the defense that Gargotta on that August night had been at her apartment, which was near the scene of the murder.

According to her story, Charley left the apartment a few minutes after they heard the shooting, to see what was occurring. Gargotta claimed that he was an innocent bystander. Because of this perjured alibi, a jury freed him.

This Kansas City case presented a type of alibi very frequently used. Recently I made a survey of all the reported criminal cases of the last twenty years involving an alibi. In approximately 85 per cent of those cases, alibi testimony was offered by relatives, sweethearts, or friends; and of that percentage, alibi testimony was given by members of the family in two-thirds of the cases. In other words, alibi testimony is supplied by witness related by blood or affinity to the defendant in better than 50 per cent of the criminal cases.

These figures become more significant when it is realized that under our criminal procedure the state must prove its case beyond a reasonable doubt. If the defendant's alibi raises any question as to his guilt, the jury, under its instructions, must free him. It seems a relatively simple thing for a defendant to create a doubt in the minds of the jurymen by bringing to them sworn testimony of his family or friends that he was elsewhere than at the scene of the crime. Perhaps no better illustration of this fact had been brought so forcibly to the attention of the public than the attempt which was made in the Hauptmann case.

It was essential that Hauptmann be able to establish three different alibis. A shocking array of psychopathics, convicted criminals, and dope fiends paraded to the stand to establish alibis in the closing days of that trial. But the main items of the alibis were testified to by Hauptmann and his wife. Mrs. Hauptmann swore that her husband was in Christian Fredricksen's bakery waiting for her until nine o'clock the night of the kidnapping. She also stated that her husband was at home enjoying

music with friends on the evening when the ransom money was paid. These alibis were vigorously asserted by Hauptmann, who added that on the November night when the ransom bills were passed, he was many miles from the place where they were circulated. Many persons swore to similar facts. This barrage of perjury has resulted in four perjury indictments.

While the Hauptmann case was more theatrical than most criminal cases, one does not have to search long to find families deliberately falsifying testimony in an attempt to liberate some member from the law. An ex-convict by the name of Reilly robbed Arthur Heisman of his car and his companion of some valuables. The car, stripped, was found by the Chicago police in a private garage which Reilly had rented previously. In spite of the fact that Heisman, his companion, and the owner of the garage positively identified Reilly, he claimed an alibi, which, as the judge observed, was supported entirely by witnesses related to him by blood or affinity.

The gangster's "moll"—in fact, wives and sweethearts from any stratum of life—frequently establish faked alibis. One of the main parts they play in modern criminal gangs is to furnish hideouts, such as Evelyn Frechette did for Dillinger or Helen Gillis did for "Baby Face" Nelson; or to supply alibis, as Vi Mathis did for Verne Miller.

There is the case of Willie Stanley's girl, a negress living in a small southern town. A large number of state's witnesses had said that Willie Stanley had fatally stabbed Willie Sadler, who had testified against the Stanleys in a civil suit. But Willie Stanley's girl swore that he was at her place when the stabbing occurred.

The lies of friend and family frequently swear a defendant out of trouble. In a large percentage of the cases, faked documents are relied on for an alibi. This is the second favorite variation of the alibi theme. It occurred in approximately ten per cent of the cases studied.

This type of alibi is found in three general forms. Post cards or letters mailed from some far-away place on the day the crime was committed. A hotel register showing that the defendant was registered at a hotel in another city during the period in question. Miscellaneous dated receipts, generally for garage repairs or storage, tending to prove the defendant's presence elsewhere than at the scene of the crime.

The post card alibi is a favorite trick. It was used, along with alibis supplied by relations, as one item of the defense of the Touhy gang in the Hamm kidnapping case. The defense introduced in evidence a

postal card written by one of the defendants and postmarked from a western city about the time the kidnapping occurred. This post card, together with depositions of relatives and employees of the defendants claiming that the defendants were elsewhere, constituted the defense. A jury acquitted the Touhy gang for this crime, but they were promptly convicted in Chicago for the Factor kidnapping.

The government postmark apparently carries considerable weight with juries. But a jury frequently fails to realize that alibis may be arranged for in advance, and that some member of the gang, and not the defendant, might have dropped the postal card in the letter box in another city according to a pre-arranged plan. In fact, a legitimate commercial concern in New York will guarantee to mail letters from any part of the world.

Another frequently used form of the document alibi is a forged hotel register. A Seattle case illustrates this criminal technique. The Paulsen Building in Seattle had been robbed on July 24th by an experienced burglar. Because of the manner by which the job was accomplished, police suspected Edelstein, a noted West Coast safe breaker. When Edelstein was arrested in San Francisco, he said he had an alibi, but refused to divulge it. To be on the safe side, however, Edelstein attempted to bribe the guards with large amounts of money and jewels to obtain his freedom.

On the day of the trial a register from a Lincoln, Nebraska, hotel was introduced in evidence, showing that Edelstein had been a guest of the hotel on July 20th and for several days thereafter. Unfortunately for Mr. Edelstein, the forgery was not a very good job, for it was apparent to the judge and the jury that some other signature had been erased before Edelstein had signed his name.

The third general form of the document alibi is forged receipts. To illustrate, while robbing a Chicago cafe on June 20th, Lenhardt killed the proprietor. During his trial, he produced a receipt dated June 20th from a garage in Cleveland. The garage proprietor testified that the work was done on the date shown on the bill. If it had not been that the district attorney had been able to locate quickly an employee who stated that the car was actually repaired the following February, a jury would probably have acquitted another murderer.

One other type of alibi defense which is fairly common depends upon faked medical records or testimony, and perhaps upon both. To illustrate, O'Connor was on trial for the robbery in October of a Louis-

ville tobacco company payroll. He claimed that his knee had been badly fractured in September and that he had been confined to the bed for several months. Certain medical testimony tended to substantiate this statement. O'Connor, however, overlooked the fact that a short time after the robbery he had been booked on a breach of peace charge. When an appellate court judge affirmed a sentence of conviction, he remarked dryly, "Men so crippled do not usually figure in breaches of peace."

Day after day, perjury to substantiate these various alibis occurs in our courts. Students of criminal procedure have variously estimated that perjury is present in 75 to 90 per cent of criminal cases. Indeed, certain persons are infamous for their ability to present alibis.

Louise Gebardi, wife of "Machine Gun Jack," has been dubbed the "Blonde Alibi" by newspaper reporters in Chicago. Jack "Legs" Diamond quickly abandoned his first crude habit of murdering potential witnesses in order to perfect perjured alibis. Diamond was credited by the police with twenty murders, but New York was unable to prove even a simple case of assault against him because of faked alibis.

Criminals have learned well the advice Deputy Sheriff Nardi gave Tony Coletto. Tony, after being arrested in Cleveland, asked the deputy what to do.

"Well," said Nardi, "you'd better set up an alibi."

"What do you mean by alibi?" asked Tony.

"Why a story—telling lies," replied the deputy.

Telling lies—that is perhaps the definition that most judges in criminal courts would give. A judge who has been on the bench in Baltimore for over ten years says an alibi is so often palpably false that most judges are likely to disbelieve perfectly truthful evidence for that purpose.

What, then, is the solution to this flood of perjury? The approach toward solving the problem has been much clouded by a lot of romantic twaddle about constitutional rights and self-incriminating evidence. The solution is simple. Defendants who plan to rely on an alibi should be required to give the prosecution advance notice of the alibi.

Surprise plays an important part in the use of the alibi. After the prosecution has presented its case, there will come a dramatic succession of evidence toward the close of the defense to prove that the defendant was not at the scene of the crime, but was somewhere else. If we eliminate this surprise element and say to the defense, "It's time you played square," fewer known criminals will escape their just punishment.

So far we have placed all the protection about the criminal and none about society. We permit the defendant to know in advance exactly what the state intends to prove, and who the witnesses are. But society knows neither the defense nor the defense witnesses until they appear in court. The cases which I have cited, cases which, incidentally, are the common run of any criminal court, illustrate well the necessity of making faked alibis impossible.

A perjured alibi not only aborts justice, it also creates a popular sense of cynicism of and disrespect for the courts. What person reading of the Potter murder case is not painfully aware that our criminal procedure encourages perjury?

Hymie Martin was indicted for the murder in Cleveland of William Potter on February 3, 1931. Ohio authorities sought to extradite Martin from Pittsburgh, where he was arrested. Martin caused a habeas corpus writ to be issued for his release. At the hearing on this writ, he produced witnesses who swore that he had come into a store in Pittsburgh and paid them a bill on the night of February 3rd.

The writ was refused and Martin was sent to Ohio to stand trial for murder. At this trial, none of the Pittsburgh witnesses was produced. Instead, other witnesses swore that Martin was in Akron, Ohio, on the night of February 3rd.

Without being prepared, without any notice, a district attorney must be ready instantly to combat such bald face lies as occurred in that case. If he fails, and the chances are that it is seldom he can succeed, a criminal has escaped the law once again.

The advance notice of alibi law is designed to give society an equal chance. By requiring the defendant to give notice in advance of any alibi he intends to claim, the prosecution is able to check on the alibi and the witnesses just as the defense has been able to check on the indictment and the state's witnesses.

If the advance notice of alibi law had been in effect in Kansas City when the Gargotta case, mentioned at the first of this article, occurred, the verdict would undoubtedly have been vastly different. After the state trial, Gargotta was charged with possession of stolen army guns.

When the detective repeated his tale about the mistaken tagging of guns, a federal grand jury promptly indicted him for perjury, and the court sentenced him to four years in the penitentiary. Federal agents investigated the life of the woman in the case so thoroughly that she

failed to appear as a witness in the federal trial. Gargotta received a five thousand dollar fine and three years in prison.

At the time, if Gargotta had been compelled to give advance notice of alibi in the state case, the district attorney would have been able to check the facts before trial. Gargotta would have been sentenced for murder, not for possession of stolen army guns.

Michigan and Ohio have had the advance notice of alibi law for a number of years. Has it proved practical there? Has perjury been reduced? Michigan reports that since the enactment of the law, alibi defenses are very few. A great increase of convictions where alibis have been offered has been noticed. Police and prosecuting officials attribute this increase to the fact that an inquiry is now permitted into the alleged alibi prior to trial, which inquiry makes possible the refutation of false alibis.

The experience in Ohio is in accord. After this act became effective, the number of alibi defenses was reduced to a minimum and the popularity of this mode of defense waned. Criminals and lawyers were impressed with the fact that an alibi defense refuted in open court is worse than no defense at all. The requirement of advance notice, moreover, took away the most valued aspect of this defense—the surprise element. With no opportunity to check on the truth or falsity of the claim, the prosecution is little able to combat this surprise attack. No longer was there a sudden popping up of witnesses to swear the defendant out of his troubles. No longer was the state thrown into confusion by the defense claiming an alibi near the close of trial.

The advance notice of alibi law has been urged for adoption of all of the states by the American Bar Association and by the Association of Grand Jurors of New York County. Prior to the 1935 session of the state legislatures, four states had this law on their statute books. Urged by the American Bar Association, state and local bar associations caused the introduction of this act into fourteen state legislatures in 1936. And at this time at least six more states have passed an advance notice of alibi defense act. Congress recently enacted such a statute. Some progress has been made, but more is essential before perjury in criminal cases will be at a minimum.

You suggest that perjury prosecutions will be the cure? Not at all. Less than one per cent of all the criminal cases in New York in one year were for perjury; yet perjury undoubtedly occurred in 75 per cent of the criminal trials. Of 300 persons charged with perjury in New York over a ten year period, 225 were discharged, 16 acquitted, and 59 convicted, a large percentage of the convictions resulting from guilty pleas. This percentage seems to follow more or less generally throughout the country.

The reasons why perjury is so infrequently punished is the hesitancy of judges to convict persons suspected of perjury; the apathy of prosecuting attorneys; the technicalities of the law; the refusal of grand juries to indict and of petit juries to convict; the severe but ineffective punishment provided by law.

No, indictment for perjury is not the solution to this problem. In the first place, it is much better to prevent perjury than deliberately to encourage it and then punish the offender. In the second place, as has been indicated, it is hopeless to eradicate it by prosecution. Whenever self-interest interjects itself into a case, perjury, if unrestrained, will likewise be interjected. That is the natural thing.

Eliminate the invitation to perjury by making falsification virtually impossible and perjury will, to a large extent, likewise be eliminated. No doubt that there are many cases where the alibi is sincere and honest. In that event, a defendant need have no fear. The checking of his story will inure to his benefit, either resulting in a lack of prosecution or in strengthening, not weakening, his case.

The alibi defense is moth-eaten. Dickens poked fun at it in his "Pickwick Papers." When poor Pickwick was helplessly attempting to defend suit brought by Widow Bardwell's barristers, Sam Weller, in his efforts to be helpful, suggested to Pickwick's lawyers that they have recourse to the last ditch of an "allebye." In Samuel Warren's classic novel, "Ten Thousand a Year," the benevolently fraudulent Mr. Quirk of the London law firm of Quirk, Gammon & Snap lived in a suburban mansion named Alibi House. Mark Twain has amused thousands of his readers with his broadsides at the alibi. Even judges on the bench cannot resist the temptation to joke about it.

In one of the western states during the Volstead era, an extensive bootleg outfit, with counterfeit labels of the most expensive brands of whisky was found on the defendant's place. The whisky produced, however, was made from raw alcohol, flavoring, and coloring matter. The defendant pleaded an alibi.

Said the judge: "The defendant furnished some testimony having an appearance of genuineness about equal to that of his brands of liquor, which, if accepted as genuine, would authorize a verdict of not guilty."

Is it not time to accept the recommendation of the American Bar Association and similar organizations and introduce a little genuineness into criminal evidence? The alibi defense law is not intended as a panacea for all ills of criminal law. But it will reduce perjury. It will permit the state to be prepared as well as the defense. And, most important of all, it will aid criminal procedure in recapturing the respect due it.