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CONSTITUTIONAL LAW - FEDERAL CRIMINAL PROCEDURE - SHORT FORM INDICTMENT

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CONSTITUTIONAL LAW — FEDERAL CRIMINAL PROCEDURE — SHORT FORM INDICTMENT — The old common-law indictment with its unintelligible verbiage and its susceptibility to technical errors and objections has long been recognized as an unnecessary stumbling block to criminal justice.[1] Efforts have been made by the legislatures of

[1] See GLUECK, CRIME AND JUSTICE 77-78 (1936); CHITTY, CRIMINAL LAW, 3d ed., 169-176 (1836); WICKERSHAM COMMISSION ON LAW OBSERVANCE, REPORT No. 8, pp. 21-23 (1931); Perkins, "Short Indictments and Informations," 15 A. B. A. J. 292 (1929); 39 LAW SER. UNIV. MO. BUL. 37-42 (1928).

It should be noted, however, that according to the report of the AMERICAN LAW INSTITUTE, BUSINESS OF THE FEDERAL COURTS, Part 1, p. 71 (1934), the

some of the states to remedy this obvious defect in the machinery of criminal procedure.[2] The American Law Institute has recommended a simplified indictment form, which is as follows:

> "The grand jurors of the County of ——— accuse A.B. of (here charge the offense in one of the ways mentioned in section 154, e.g. murder, [assault with intent to kill, poisoning an animal contrary to section 31 of the Penal Code]) and charge that (here the particulars of the offense may be added with a view to avoiding the necessity for a bill of particulars)."

Other sections of the Institute *Code of Criminal Procedure* provide:

> "(1) The indictment or information may charge, and is valid and sufficient if it charges, the offense for which the defendant is being prosecuted in one or more of the following ways:
>
> "(a) By using the name given to the offense by the common law or by a statute.
>
> "(b) By stating so much of the definition of the offense, either in terms of the common law or of the statute defining the offense or in terms of substantially the same meaning, as is sufficient to give the court and the defendant notice of what offense is intended to be charged.
>
> "(2) The indictment or information may refer to a section or subsection of any statute creating the offense charged therein, and in determining the validity or sufficiency of such indictment or information regard shall be had to such reference.
>
> "When an indictment or information charges an offense in accordance with the provisions of section 154, but fails to inform the defendant of the particulars of the offense sufficiently to enable him to prepare his defense, or to give him such information as he is entitled to under the constitution of this state, the court

idea that our criminal process is delayed by technicalities has been greatly overemphasized, at least in so far as procedure in federal courts is concerned. This report indicates that in the thirteen federal districts studied, the defendants in criminal cases filed pleadings other than guilty or not guilty pleas in less than six per cent of the cases, and that only about fourteen per cent of such pleadings raised an objection to the indictment or information. The report points out that indictments are used much more often than informations in federal criminal procedure, and so the figures seem to say that in only about seven-tenths of one percent of the federal criminal cases is the sufficiency of the indictment ever questioned; and the report indicates that a great majority of the rulings on the pleadings have been in favor of the prosecution.

[2] See, for example, Nev. Comp. Laws (1929), §§ 10840-10871; Tex. Code Crim. Proc., Tex. Comp. Stat. (1928), tit. 7, c. 3, arts. 395-412; Mass. Ann. Laws (1932), c. 277, §§ 17-46; Mich. Comp. Laws (1929), §§ 17257-17290. See also the AMERICAN LAW INSTITUTE, CODE OF CRIMINAL PROCEDURE (Tentative Draft No. 1, 1928), pp. 449-450.

may, of its own motion, and shall, at the request of the defendant, order the prosecuting attorney to furnish a bill of particulars containing such information as may be necessary for these purposes; or the prosecuting attorney may of his own motion furnish such bill of particuars."[3]

It is the purpose of this comment to discuss the validity under the Federal Constitution of an indictment, drawn in accordance with the proposed code, which would merely accuse the defendant of having committed some kind of "offense," and would leave the particulars of the offense to a bill of particulars.

The Federal Constitution provides, in the Fifth Amendment, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ."[4] The same amendment further provides, "No person shall . . . be deprived of life, liberty, or property, without due process of law." The Sixth Amendment says, "In all criminal prosecutions the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . ." If this short indictment, plus the bill of particulars, fails in any one of these three requirements of the Constitution, obviously it is not valid.

The decisions of the United States Supreme Court indicate that for the purpose of determining whether an indictment is necessary for "due process of law," this phrase has the same meaning in the Fifth and the Fourteenth Amendments, which is that a person cannot be deprived of his liberty without reasonable notice of pending proceedings and an opportunity to be heard therein.[5] In the case of

[3] AMERICAN LAW INSTITUTE, CODE OF CRIMINAL PROCEDURE (Official Draft, 1930), §§ 152, 154, 155, pp. 67, 68, 69 (1930). See Perkins, "The Short Indictment Act," 14 IOWA L. REV. 385 (1929), and Perkins, "Short Indictments and Informations," 15 A. B. A. J. 292 (1929), for explanations of this proposed short indictment.

It should be noted that the American Law Institute uses the term "offense" as meaning the legal conclusion drawn from the particular acts, such as "murder," "assault with intent to kill," etc., and uses the phrase "particulars of the offense" as meaning the acts or omissions alleged which constitute the "offense." This terminology is followed in this comment.

[4] It is outside the scope of this comment to discuss the meaning of "infamous crimes" as used in the Fifth Amendment. Suffice it to say that the United States Supreme Court has defined it as any crime which may be punished by imprisonment in a penitentiary for a year or more. This inclusive definition is responsible for the fact that the great majority of the federal criminal prosecutions have been by indictment. See PAYNE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA 553-554 (1923).

[5] Ong Chang Wing v. United States, 218 U. S. 272, 31 S. Ct. 15 (1910). See PAYNE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA 632 (1923).

Hurtado v. California,[6] the Supreme Court of the United States decided that an indictment is not required by the due process clause of the Fourteenth Amendment for a trial in a state court, even in a type of case which, if tried in the federal courts, would require an indictment under the Fifth Amendment. The opinion gives an exhaustive analysis of the meaning of due process at the time the Fifth Amendment was passed and definitely says that the meaning of this phrase as embodied in the Fifth and the Fourteenth Amendments was the same, as far as the requirement of an indictment is concerned.[7] If no indictment is necessary to due process, the short accusation under consideration, with the compulsory bill of particulars, should satisfy the due process requirement of the Fifth Amendment, for clearly the accused is informed of the acts of which he is accused through the bill of particulars, and the regular trial procedure gives him an opportunity to be heard.

However, as pointed out above, an indictment is required independently of the due process clause, by the first clause of the Fifth Amendment. What must the accusation of the grand jury contain to be a valid indictment? Do the courts require that an "indictment" be exactly as it was known at common law in 1789 both in form and substance? If not, what modifications are permissible? An argument may be made that the framers of our Federal Constitution were acquainted only with the lengthy common-law indictment and knew no other and could have intended no other.[8] But this has not been the approach of the United States Supreme Court. In 1901, Congress provided that the proceedings on an indictment found by a grand jury in any federal court shall not be affected, "by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."[9] Although this statute departs from the common-law requirements for a good indictment, it has been expressly approved by the Supreme Court.[10]

There is an imposing array of decisions and much definite language by the Supreme Court as to the amount of information which must be in an indictment. In the case of *United States v. Cruickshank*,[11]

[6] 110 U. S. 516, 4 S. Ct. 111 (1884).

[7] Hurtado v. California, 110 U. S. 516 at 534-535, 4 S. Ct. 111 (1884).

[8] Such is the argument in Ex parte Slater, 72 Mo. 102 (1880), and in English v. State of Florida, 31 Fla. 340, 12 So. 689 (1893).

[9] 18 U. S. C., § 556.

[10] Rosen v. United States, 161 U. S. 29 at 32, 16 S. Ct. 434 (1896); Frisbie v. United States, 157 U. S. 160, 15 S. Ct. 586 (1895). See the annotations to this statute in 18 U. S. C. A., § 556, p. 34.

[11] 92 U. S. 542, 23 L. Ed. 588 (1875).

an indictment was held vague and insufficient, and no judgment of conviction could be pronounced upon it. The Court said:

> "In criminal cases, prosecuted under the laws of the United States, the accused has the Constitutional right 'to be informed of the nature and cause of the accusation.' Amend. VI. In United States v. Mills, 7 Pet. 142, this was construed to mean, that the indictment must set forth the offence 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;' and in United States v. Cook, 17 Wall. 174, that 'every ingredient of which the offence is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species,—it must descend to particulars. . . .' The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances.
>
> "It is a crime to steal goods and chattels; but an indictment would be bad that did not specify with some degree of certainty the articles stolen."[12]

This case has been cited, approved, and followed in a great number of decisions of the United States Supreme Court.[13]

According to these cases, the test of the sufficiency of the information in the indictment is that it must identify the charge against the defendant so that his conviction or acquittal may prevent a subsequent

[12] United States v. Cruickshank, 92 U. S. 542 at 557-558, 2 L. Ed. 588 (1875).

[13] United States v. Hess, 124 U. S. 483, 8 S. Ct. 571 (1888); Pettibone v. United States, 148 U. S. 197, 13 S. Ct. 542 (1893); Dunbar v. United States, 156 U. S. 185, 15 S. Ct. 325 (1895); Rosen v. United States, 161 U. S. 29, 16 S. Ct. 434 (1896); Burton v. United States, 202 U. S. 344, 26 S. Ct. 688 (1906); Bartell v. United States, 227 U. S. 427, 33 S. Ct. 383 (1913); United States v. Standard Brewery, 251 U. S. 210, 40 S. Ct. 139 (1920); Evans v. United States, 153 U. S. 584, 14 S. Ct. 934 (1894); United States v. Behrman, 258 U. S. 280, 42 S. Ct. 303 (1922); Wong Tai v. United States, 273 U. S. 77, 47 S. Ct. 300 (1927). See JOYCE, INDICTMENTS, §§ 45-48, pp. 51-55 (1908).

charge for the same offense, and it must notify him of the nature and cause of the accusation. The proposed short indictment clearly is not sufficient under such a test. However, it must be noted that the Sixth Amendment does not expressly say that the accused shall be informed *through the indictment* of the nature and cause of the accusation, although the courts have assumed that the indictment shall perform this function. Unless the performance of this function is one of the fundamental elements of an "indictment" as such, the presence of the new factor of a compulsory bill of particulars provided by the proposed code may very well do away with this feature, and may leave as the sole criterion of a valid indictment, the determination of whether it fulfills the underlying nature and purpose of the indictment. The compulsory bill of particulars of the offense will inform the accused of the nature and cause of the accusation and will enable him to make his defense; the proposed code provides that the bill of particulars shall be a part of the record, and so the record will identify the charge and will assure the accused that a plea of double jeopardy can be properly determined from the record of the previous cases.

If the courts can be persuaded to admit that the requirements of the Sixth Amendment as to informing the accused of the nature and cause of the accusation can be met by the proposed code through the compulsory bill of particulars, they will then have to consider only whether this short accusation retains the essential features of an "indictment" and fulfills the intention of the Fifth Amendment. What is the true nature and purpose of an "indictment"? Traditionally, the indictment was a formal accusation by a group of men under oath that there is just cause and sufficient admissible evidence to warrant subjecting a person to the trouble, expense, and unpleasantness of a criminal trial. The indictment did not merely accuse one of the commission of an offense or "type" of crime, such as "murder" or "larceny," but also charged the particulars of the crime.[14] The grand jury

[14] 1 BISHOP, NEW CRIMINAL PROCEDURE, 2d ed., § 131, p. 97 (1913), defines an indictment as a "written accusation, against a specified person or persons, of some crime the elements whereof it states, made on oath, by not less than twelve of a grand jury, to be carried into court and there become of record."

In 4 BLACKSTONE, COMMENTARIES, 302, Blackstone said: "An indictment is a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented upon oath by, a grand jury."

CHITTY, CRIMINAL LAW, 3d ed., p. 168 (1836), says: "An indictment is defined to be a written accusation of one or more persons of a crime, presented upon oath by a jury of twelve or more men, termed a grand jury. In the language of Lord Hale, it is a plain, brief, and certain narrative of an offence committed by any person, and of those necessary circumstances that concur to ascertain the fact and its nature."

Justice Field, in his charge to the Grand Jury, in 2 Sawy. 667, Fed. Cas.

determined what offense was to be charged and what the particulars of the offense were, and it is this accusation which gave the trial court jurisdiction to try the accused, and this jurisdiction was limited to the trial of those acts or particulars of the offense which the grand jury intended should be tried.[15] However, there has been a definite tendency in recent years towards a somewhat different basis for determining the validity of an indictment. Traditionally the premise has been that the indictment must identify the crime even to the minute particulars, whereas the more recent decisions have apparently been rendered on the premise that the indictment need only allege sufficient facts which, if proved, would constitute a crime, and presumably the prosecution is limited only by the facts alleged. This of course means that the amount of detail of the particulars of the offense required in the indictment has been greatly reduced. This shift can be seen in the decisions which have held that an indictment may be

No. 18,255 (1872), said: "In this country, from the popular character of our institutions, there has seldom been any contest between the government and the citizen, which required the existence of the grand jury as a protection against oppressive action of the government. Yet the institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government or be prompted by partisan passion or private enmity. No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes, unless this body . . . shall declare, upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial."

In Jones v. Robbins, 8 Gray (74 Mass.) 329 at 344 (1857), Justice Shaw said: "The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial, before a probable cause is established by the presentment and indictment of a grand jury, in cases of high offenses, is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty." In the case of People v. Bogdanoff, 254 N. Y. 16, 171 N. E. 890, 69 A. L. R. 1378 at 1392 (1930), the New York Court of Appeals said that an indictment includes nothing more than a written accusation of crime presented by a grand jury on oath.

"The recognized function of the grand jury and the justification for its existence, aside from inquisitory powers, is the protection it affords suspected persons against the hardship of actual trial upon accusations, not warranted by the usable evidence." 30 MICH. L. REV. 928 at 929 (1932).

[15] "The charge must contain a certain description of the crime of which the defendant is accused, and a statement of the facts by which it is constituted, so as to identify the accusation, lest the grand jury should find a bill for one offense, and the defendant be put upon his trial in chief for another, without any authority." CHITTY, CRIMINAL LAW, 3d ed., 169 (1836). See also, Ex parte Bain, 121 U. S. 1, 7 S. Ct. 781 (1887); JOYCE, INDICTMENTS, §§ 31, 49 (1908); Ex parte McClusky, (D. C. Ark. 1889) 40 F. 71.

valid even though it is necessary for proper preparation of the defense that a bill of particulars be given.[16] In such cases, it is obvious that the prosecution has not been required to prove that the grand jury had in mind every minute particular of the offense brought out at the trial.

Tested by either premise, this short indictment would seem to be lacking in some of the essentials of a valid indictment, for it does not disclose any particulars of the offense which were considered by a grand jury. It is left to the prosecuting attorney to disclose what particulars of the offense the grand jury intended to charge. It is possible that the particulars of the offense specified by the prosecuting attorney in the bill of particulars will not be those that the grand jury actually intended to charge against the accused. The grand jury may indict for the offense of using the mails to defraud, having in mind certain particulars of the offense, and the bill of particulars drawn up by the prosecuting attorney could set out a different set of particulars of the offense, which, if proved, would constitute the offense of using the mails to defraud. If such were the case, the court would be proceeding to try the facts stated in the bill of particulars without jurisdiction. Under the constitutional provision for a grand jury, the accused can only be tried for the particulars of the offense with which the grand jury intended to charge him.

The New York legislature has enacted the American Law Institute proposed code into law,[17] and the New York Court of Appeals, in a four to three decision,[18] upheld the validity of an indictment drawn according to the code, which only charged, "murder in the first degree contrary to Penal Law, sec. 1044." The New York Constitution has provisions similar to those of the Fifth and Sixth Amendments to the Federal Constitution relating to indictments and criminal prosecutions.[19] In determining whether this indictment preserved the constitutional rights of the accused to a trial only upon an indictment, the court admitted, "the present indictment is certainly not sufficient if measured by any test heretofore applied by the Courts of this State,

[16] Kirby v. United States, 174 U. S. 47, 19 S. Ct. 574 (1899); Fisher v. United States, (C. C. A. 4th, 1924) 2 F. (2d) 843, certiorari denied 266 U. S. 629, 45 S. Ct. 128 (1924). See 18 U. S. C. A., § 556, note 100, pp. 74-75; and 31 C. J. 750-754 (1923).

A recent Rhode Island case, upholding an indictment which merely charged that the defendants "did fraudulently and unlawfully, conspire together to steal the property of the National and Providence Worsted Mills," is indicative of this shift in premise. State v. Smith, (R. I. 1936) 184 A. 494.

[17] N. Y. Laws (1929), c. 176, § 295.

[18] People v. Bogdanoff, 254 N. Y. 16, 171 N. E. 890 (1930).

[19] N. Y. Constitution (1917), art. 1, § 6.

or, indeed, of any other jurisdiction."[20] But the majority of the court were of the opinion that the compulsory bill of particulars assured the accused of being informed of the nature and cause of the accusation, and against double jeopardy.[21] The court pointed out that the New York Code of Criminal Procedure[22] requires that the names of witnesses be indorsed on the indictment, and was of the opinion that in most cases this would prevent the error of the court proceeding to try the defendant for particulars of which the grand jury had not accused him.[23] In addition, the court said,

> "An accused can not claim that he is held without indictment where such evidence [extraneous evidence] proves that he is the person the grand jury intended to accuse, and the record is amended accordingly. Similarly, it seems clear that an accused is not held without indictment where extraneous proof can be adduced which shows that an accusation of crime, though indefinite in form, was intended and calculated to describe the crime for which the accused is held."[24]

Clearly, the New York court believed that the grand jury must accuse the defendant of some particulars of an offense.

[20] People v. Bogdanoff, 254 N. Y. 16 at 23, 171 N. E. 890 (1930).

[21] People v. Bogdanoff, 254 N. Y. 16 at 24-25, 171 N. E. 890 (1930).

[22] N. Y. Code Crim. Proc. (1926), § 271. The American Law Institute proposed code expressly provides in section 194, that the names of the witnesses or deponents on whose evidence the indictment was based shall be indorsed on the indictment.

[23] People v. Bogdanoff, 254 N. Y. 16 at 29, 171 N. E. 890 (1930). See also, State v. Whitmore, 126 Ohio St. 381 at 387, 185 N. E. 547 (1933), in which the court said, in construing a similar Ohio statute:

> "It is insisted that it never was the legislative intent to authorize the prosecuting attorney to provide the accused with a bill of particulars specifically describing the offense charged; that such an authorization would permit the prosecutor to inject into the indictment allegations according to his whim or caprice, using the bill of particulars as a vehicle therefor.
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> "If this argument is good, then the Legislature certainly did not intend that the prosecutor should be authorized before, during or after the trial to amend the indictment, for by so doing he could likewise indulge his whim and caprices. . . . If the bill of particulars contains 'whims and caprices' of the prosecutor, the accused may test it in connection with the indictment."

[24] People v. Bogdanoff, 254 N. Y. 16 at 30-31, 171 N. E. 890 (1930). A forceful dissenting opinion was given against the validity of this indictment, the argument being that the legislatures or Congress, although having the power to prescribe the form of an indictment, are limited by the very nature of an indictment: the indictment must set forth the particulars with sufficient fullness to enable the accused to know with reasonable certainty the charge he must meet, and to enable him to show in a subsequent trial that he was previously tried for that offense. People v. Bogdanoff, 254 N. Y. 16 at 31-41, 171 N. E. 890 (1930).

The testimony of the grand jury witnesses may be adequate to determine the relatively simple question of identity of the accused,[25] but in determining the particular acts which the grand jury charged, the value of the testimony of a grand jury witness is doubtful. It is obvious that he can only testify as to what he had told the grand jury, and could not testify as to what the grand jurors had in mind in ultimately determining the charge to be returned. Often the testimony of a particular witness to a grand jury will have little effect on the final determination of the acts charged. A great number of events and a mass of detail may be reviewed by the grand jury before it settles on the particulars of the offense to be charged. The New York court said that in such cases it would be compelled to discharge the accused when tried on this short indictment. The court said: "Extraneous evidence may still leave uncertain at times whether an indictment for 'murder' or 'larceny' covers one crime or several. The evidence presented to the grand jury might cover several connected homicides or a series of defalcations with nothing to demonstrate which crime of the series was intended to be the subject of the charge." [26] The best evidence as to the particulars of the offense intended to be charged would be that of the grand jurors themselves. However, a long time often elapses between the return of the indictment and the beginning of a prosecution upon it. The grand jurors may be in widely separated regions. There is always the possibility of some of them in the meantime coming under influences which might color their testimony.[27]

The advantages hoped to be obtained through this short indictment are those which the information as a method of criminal procedure has over the regular indictment, such as the ability to amend the accusation when it appears that the proof will show a different act or series of acts than was originally contemplated by the prosecution, without having to recall the grand jury or without having the accusation quashed and the defendant discharged, necessitating the obtaining of another indictment from another grand jury if the defendant is to be prosecuted for his offense.[28] However, under the inter-

[25] See United States ex rel. Mouquin v. Hecht, (C. C. A. 2d, 1927) 22 F. (2d) 264.

[26] People v. Bogdanoff, 254 N. Y. 16 at 31, 171 N. E. 890 (1930).

[27] See People v. Meehan, 142 Misc. 605, 254 N. Y. S. 477 (1931), in which the Nassau County Court upheld a demurrer to an indictment which merely charged the defendants with "conspiracy to commit a crime, contrary to Penal Law, sec. 580, subd. 1." The court said, "Such an indictment possesses dangerous potentialities of chicane and fraud."

[28] See Keedy, "The Drafting of A Code of Criminal Procedure," 15 A. B. A. J. 7 (1929).

pretation of the indictment requirement given by the New York Court of Appeals in the *Bogdanoff* case—that it assure that the accused be tried only for the particulars of the offense intended to be charged by the grand jury—the advantages hoped for are obviously lost, and a very real disadvantage appears.[29] Although it is improbable that a district attorney would ever attempt to hold an accused for particulars of an offense other than that for which he was indicted, still it is quite likely that the defense will plead that he has done so, as a dilatory matter if for no other reason. The whole purpose of simplified indictments is to get away from technical objections and obstructions in the path of justice, and it would seem that this short indictment is opening the way for a plea by the defense which will require the trying of a formidable collateral issue.

The real purpose of this short indictment is to change the underlying function of the indictment,[30] and to realize some of the advantages of the information as a method of prosecution. But in this respect, it would seem to go squarely against the constitutional rights and requirements embodied in the grand jury system, for by it the accused is guaranteed the right to be tried only for, and the jurisdiction of the court is limited to, those particulars of the offense for which the grand jurors find evidence sufficient to warrant a prosecution.

Although the *Bogdanoff* case is authority for upholding an indictment which charges simply "murder," the disadvantages which will likely arise from the use of this short indictment under the New York court's interpretation of constitutional requirements, and the strain which such an indictment places upon the generally accepted and oft-expressed concept of "indictment," will probably weigh heavily against its validity in the federal courts. Furthermore, it should be pointed out that one factor which has led to judicial approval of most attempts to simplify indictments is that such attempts have been made to remedy an admittedly glaring weakness in the machinery of criminal justice. But perhaps it may now be said that, with the aid of the federal statute preventing the quashing of indictments for defects in form not prejudicial to the defendant and the sympathetic interpretation given it by the United States Supreme Court, there is no need to simplify indictments in the federal courts further. The best evidence of this, per-

[29] Even the majority of the New York Court of Appeals were not pleased with the short indictment scheme and expressly stated that they did not wish to be considered as approving that form in every case, and indicated that they considered it would be better if the contents of the bill of particulars were placed in the indictment proper. People v. Bogdanoff, 254 N. Y. 16 at 31-32, 171 N. E. 890 (1930). See also 30 COL. L. REV. 1051 (1930); 8 N. Y. UNIV. L. Q. REV. 328 (1930).

[30] See Perkins, "Short Indictments and Informations," 15 A. B. A. J. 292 at 293 (1929).

haps, is to be found in the American Law Institute report on "Business of the Federal Courts" referred to above,[31] in which it is pointed out that in less than one per cent of the federal criminal prosecutions by indictment is the sufficiency of the indictment questioned, and most of the decisions on a plea to the sufficiency of the indictment have been in favor of the prosecution. On the other hand, if it is felt that prosecution by information is to be desired rather than prosecution by indictment, the remedy clearly is a constitutional amendment.

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[31] See note 1, supra.