

Notes

The Function of the Preliminary Hearing in Federal Pretrial Procedure*

There has been considerable debate in recent years over the causes and effects of the significant delay in the American criminal justice system between arrest and trial.¹ Differing views as to the nature of the problem of delay have led to different proposals for reform.² One especially controversial reform proposal which has received considerable public exposure is legislative enforcement of the right to a speedy trial.³ The public discussion of this proposal has heretofore ignored a less drastic alternative which could secure at a significantly lesser cost some of the advantages which proponents of speedy trial reforms seek to achieve for the benefit of the accused, the prosecution, and

* The basic conceptual models developed in this Note, as well as the respective designations for the two models, were first suggested to the author by Dean Abraham S. Goldstein of the Yale Law School. His contribution and assistance are gratefully acknowledged.

1. See *Hearings on S. 754 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 1-10, 109-31, 140-44, 154-64 (1973) [hereinafter cited as *1973 Hearings*]; *Hearings on S. 895 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 1-15, 24-38, 73-86, 94-121 (1971) [hereinafter cited as *1971 Hearings*]; Note, *Speedy Trial: A Constitutional Right in Search of Definition*, 61 *Geo. L.J.* 657, 661-68 (1973); 118 *CONG. REC.* S14,747 (daily ed. Sept. 13, 1972); cf. *PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS* 80-96 (1967). See also Address by Chief Justice Burger on the State of the Federal Judiciary, American Bar Ass'n Annual Convention, Aug. 10, 1970, reprinted in *1971 Hearings, supra*, at 729.

2. Compare *1971 Hearings, supra* note 1, at 1-15 (proposals of Senator Ervin), with *id.* at 94-121 (proposals of then-Ass't Attorney General Rehnquist).

3. See S. 754, 93d Cong., 1st Sess. § 101 (1973); S. 895, 92d Cong., 1st Sess. § 101 (1971); *1973 Hearings, supra* note 1, at 33-45. Under these proposals, all introduced by Senator Ervin, federal prosecutors would be required in most circumstances to commence trial within 60 days of indictment or arrest. Other plans designed to implement the right to a speedy trial have involved much more flexible standards. See *FED. R. CRIM. P.* 50(b) (requires each district court to establish a plan for the prompt disposition of criminal cases); *SECOND CIRCUIT RULES REGARDING PROMPT DISPOSITION OF CRIMINAL CASES* (1971), adopted in *United States ex rel. Frizer v. McMann*, 437 F.2d 1312 (2d Cir. 1971) (en banc) (superseded by a "Plan for Achieving Prompt Disposition of Criminal Cases," approved Feb. 28, 1973; effective April 1, 1973; prosecutor must be "ready for trial" within six months of the arrest or indictment); *N.Y. CODE CRIM. PRO.* §§ 30.20-30 (McKinney 1971) (sets specific time periods but varies those periods depending upon the severity of the crime). The American Bar Association standards resemble Senator Ervin's proposals more than the flexible plans. *AMERICAN BAR ASS'N, PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SPEEDY TRIAL* § 2.1, Commentary at 14-16 (tent. draft 1967).

the criminal justice system as a whole. This alternative is reform of the federal preliminary hearing.⁴

The preliminary hearing is a judicial proceeding, held shortly after the arrest of the accused, the primary function⁵ of which is to determine whether there is sufficient indication that a crime has been committed by the accused to justify his further detention and to screen out weak and unsubstantiated cases which do not justify any further attention.⁶ The preliminary examination is an important institution, both

4. The preliminary hearing, sometimes called the preliminary examination, should be distinguished from the initial appearance, FED. R. CRIM. P. 5, in which immediately after the arrest a federal magistrate sets bail and issues a complaint based on probable cause in cases of warrantless arrests; and from arraignment, FED. R. CRIM. P. 10, in which the accused is read the indictment before the trial court and asked to enter a plea.

5. Although historically the purpose of the hearing was to permit the prosecution to discover and preserve evidence against the accused, see Anderson, *The Preliminary Hearing—Better Alternatives or More of the Same?*, 35 MO. L. REV. 281, 288-89 (1970) [hereinafter cited as *Alternatives*]; Weinberg & Weinberg, *The Congressional Invitation to Avoid the Preliminary Hearing: An Analysis of Section 303 of the Magistrates Act of 1968*, 67 MICH. L. REV. 1361, 1365-70 (1969) [hereinafter cited as *Congressional Invitation*]; Note, *The Preliminary Hearing—An Interest Analysis*, 51 IOWA L. REV. 164, 165-67 (1965) [hereinafter cited as *Interest Analysis*], the modern preliminary examination has evolved primarily into a safeguard for the defendant by protecting him from unfounded charges. See *Alternatives*, *supra* at 284-86; *Congressional Invitation*, *supra* at 1368-70; *Interest Analysis*, *supra* at 167.

Another purpose of the preliminary hearing is to reconsider the initial conditions of pretrial release imposed (often mechanically) under FED. R. CRIM. P. 5(c) at the initial appearance. See *Coleman v. Alabama*, 399 U.S. 1, 9 (1970).

The distinction is often drawn between the purposes of the preliminary examination and its functions or collateral consequences. 8 MOORE'S FEDERAL PRACTICE ¶ 5.1.02[1], at 5.1-7 (2d ed. R. Cipes 1973); *Alternatives*, *supra* at 283. Although at one time there was some doubt on the matter, see *Blue v. United States*, 342 F.2d 894, 901 (D.C. Cir. 1964), *cert. denied*, 380 U.S. 944 (1965); Note, *Preliminary Hearing in the District of Columbia—An Emerging Discovery Device*, 56 GEO. L.J. 191 (1967), it is now clear that discovery is only a collateral consequence and not a purpose of the federal preliminary examination. See *United States v. King*, 482 F.2d 768, 775 (D.C. Cir. 1973); *Coleman v. Burnett*, 477 F.2d 1187, 1199-1200 (D.C. Cir. 1973); *United States v. Amabile*, 395 F.2d 47 (7th Cir. 1968), *vacated on other grounds*, 394 U.S. 310 (1969); *Sciortino v. Zampano*, 385 F.2d 132 (2d Cir. 1967), *cert. denied*, 390 U.S. 906 (1968); *United States v. Hinkle*, 307 F. Supp. 117 (D.D.C. 1969); 18 U.S.C. §§ 3060(a), (e) (1970); FED. R. CRIM. P. 5(c) (no preliminary examination is required if a grand jury indictment is returned); S. REP. NO. 371, 90th Cong., 1st Sess. 34-35 (1967) [hereinafter cited as S. REP. NO. 371].

On the actual workings of the preliminary examination, see generally the following empirical studies: D. MCINTYRE, *LAW ENFORCEMENT IN THE METROPOLIS* 117-25 (1967) (preliminary hearing in Detroit); F. MILLER, *PROSECUTION* 45-149 (1969) (empirical study including Wisconsin and Michigan); P. Weinberg, *Preliminary Hearing in the District of Columbia* (Institute of Criminal Law and Procedure, Georgetown Univ. Law School, 1969) [hereinafter cited as *Preliminary Hearing in the District of Columbia*]; Graham & Letwin, *Preliminary Hearings in Los Angeles: Some Field Findings and Legal Policy Observations*, 18 U.C.L.A. L. REV. 635, 916 (1971) [hereinafter cited as *Preliminary Hearings in Los Angeles*]; McIntyre & Lippman, *Prosecutors and Early Disposition of Felony Cases*, 56 A.B.A.J. 1154, 1155-57 (1970); McIntyre, *A Study of Judicial Dominance of the Charging Process*, 59 J. CRIM. L.C. & P.S. 463 (1968); Miller & Dawson, *Non-Use of the Preliminary Examination: A Study of Current Practices*, 1964 WIS. L. REV. 252 (1964); Oaks & Lehman, *The Criminal Process of Cook County and the Indigent Defendant*, 1966 U. ILL. L.F. 584, 607-31 (1966); Theis, *Preliminary Hearings in Homicide Cases: A Hearing Delayed is a Hearing Denied*, 62 J. CRIM. L.C. & P.S. 17 (1971); Note, *Metropolitan Criminal Courts of First Instance*, 70 HARV. L. REV. 320, 325-29 (1956).

6. See *Myers v. Commonwealth*, 298 N.E.2d 819 (Mass. 1973); MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 330.1(1) (Tent. Draft No. 5, 1972); note 61 *infra*.

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because of the protection it affords the accused and because of its strategic position in the criminal justice system and intimate interrelation with other aspects of the process—arrest, bail, prosecutorial discretion, the grand jury, and the trial.⁷ The federal system⁸ and each of the fifty states⁹ presently provide for the use of the preliminary examination in felony cases. Such unanimity of use, however, conceals important differences as to the nature of the preliminary examinations held in those jurisdictions. These differences relate to several issues inherent in the law of preliminary examinations.

One issue is the admissibility of evidence at the hearing, *i.e.*, whether the rules of evidence should apply at the hearing to exclude hearsay, illegally obtained evidence, and other incompetent evidence. Another issue is the evidentiary burden which the prosecution must sustain in order to have the accused bound over for trial. The dispute centers on whether “probable cause,” which is the standard for obtaining an

7. The preliminary examination must be viewed in connection with other aspects of the criminal process for these aspects vary among jurisdictions in ways which affect the preliminary examination. For example, the extent to which the prosecutor plays an active role prior to the institution of formal charges, eliminating weak cases through the exercise of prosecutorial discretion, varies among jurisdictions, *see* L. HALL, Y. KAMISAR, W. LEFAVE, & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 850-51 (3d ed. 1969); F. MILLER, *supra* note 5, at 9-19, 78, 83-84; *The Preliminary Hearing in the District of Columbia*, *supra* note 5, at x-xi, 12, 17; McIntyre & Lippman, *supra* note 5; *Congressional Invitation*, *supra* note 5, at 1381-82, and this variation has an effect on both the strength and numbers of cases which reach the preliminary examination stage. Another important variation is the grand jury. In some jurisdictions felony prosecutions must be commenced by means of an indictment, *see, e.g.*, U.S. CONST. amend. V; MASS. ANN. LAWS ch. 277, § 15 (1968); N.Y. CONST. art. I, § 6; N.Y. CODE CRIM. PRO. §§ 100.05, 180.10(2), 180.30 (McKinney 1971), while an information is sufficient in others, *see, e.g.*, ARIZ. R. CRIM. PRO. 78 (West 1956); CAL. CONST. art. I, § 8; CAL. PENAL CODE § 737 (West 1970); MICH. COMP. LAWS ANN. §§ 767.1-2 (West 1963); WIS. STAT. ANN. § 967.03 (1971). If the prosecutor proceeds by indictment, the preliminary examination may be merely an intermediate process which acts as a precursor to the grand jury screen; if he proceeds by information, it is the final formal screen prior to trial. A third important variant is pretrial release. Its availability determines whether the accused will be incarcerated during the period between the arrest and the preliminary examination and, if he is bound over, during the period between the hearing and the next stage of the process (either the grand jury or the trial). These considerations bear both on the promptness with which a preliminary examination should be held and the rigor or stringency of the screen which should be erected. *See generally* note 131 *infra*.

8. *See* 18 U.S.C. § 3060 (1970); FED. R. CRIM. P. 5.1. The Supreme Court has held that there does not exist a federal constitutional right to a preliminary hearing. *Lem Woon v. Oregon*, 229 U.S. 586 (1913). The vitality of this case, however, has been questioned. *See, e.g., Interest Analysis*, *supra* note 5, at 181-83. The Supreme Court has agreed to consider a recent federal court decision ordering a state court to hold a preliminary hearing. *Pugh v. Rainwater*, 336 F. Supp. 490 (S.D. Fla. 1972), 355 F. Supp. 1286 (S.D. Fla.), *aff'd*, 483 F.2d 778 (5th Cir.), *cert. granted sub nom. Gerstein v. Pugh*, 94 S. Ct. 567 (1973); *cf. Morrissey v. Brewer*, 408 U.S. 471, 485 (1972). *See also Brown v. Fauntleroy*, 442 F.2d 838 (D.C. Cir. 1971).

9. *See, e.g.*, ARIZ. R. CRIM. PRO. 19 (1956), 16 (Supp. 1972); CAL. PENAL CODE §§ 737, 860 (West 1970), § 859b (West Supp. 1973); MASS. ANN. LAWS ch. 276, § 38 (1968); MICH. COMP. LAWS ANN. § 766.1 (West 1968), § 766.4 (West Supp. 1973); N.Y. CODE CRIM. PRO. §§ 180.10(2), 180.60, 180.80 (McKinney 1971); WIS. STAT. ANN. §§ 970.02(1)(c), 970.03, 971.02 (1971).

arrest warrant, is enough or whether a higher burden should be required, such as evidence of every element of the offense charged and evidence which is sufficiently persuasive and credible to survive a motion for directed acquittal. A third issue is the extent to which the accused may conduct an active defense at the preliminary examination, *viz.*, cross-examine the prosecution's witnesses, testify in his own behalf, subpoena witnesses, introduce evidence in his favor, and establish affirmative defenses. The final major issue is the role of the magistrate who presides at the hearing in evaluating the credibility of witnesses and weighing the evidence which has been presented.

In practice, decisionmakers have answered each of these questions as isolated controversies without a full realization of the interrelatedness of the various aspects of the preliminary examination or a unifying theory underlying its use. The permutations of the individual answers thus rendered have led to great variety in the content of the preliminary examinations of different jurisdictions and reflect a failure to identify with particularity the goals and purposes of the preliminary hearing.¹⁰

This Note seeks to formulate a comprehensive theory of the role of the preliminary hearing in the American criminal justice system. The theory is based on the purposes which underlie the present concern with intolerable delay between arrest and trial. The proposals growing out of the theory presented here will not by any means overcome all of the problems in the present system related to excessive delay, but they may mitigate some of the more serious effects of that delay without incurring the great expenses likely to be associated with legislative enforcement of a right to speedy trial. Moreover, the theory can be the basis for an intelligent resolution of the issues inherent in the law of preliminary hearings suggested above.

Toward these ends the Note presents two alternative conceptual models of the preliminary hearing, neither of which is employed in its pure form by any jurisdiction: the "forward-looking" model and the "backward-looking" model.¹¹ The "forward-looking" model, it will be

10. Indeed, the Department of Justice apparently sees little or no purpose for the preliminary hearing and has implied that it would favor its elimination. Letter from Deputy Attorney General Ralph R. Erickson to Senator Ervin, Oct. 3, 1973, *reprinted in 1973 Hearings, supra* note 1, at 183-84.

11. The California and Massachusetts preliminary examinations are the closest existing approximations to the forward-looking model, while those of Arizona, Michigan, New York, and Wisconsin embody many of its aspects. *See* Part I-B *infra*. There appears to be no rational pattern to the adoption by given jurisdictions of certain aspects of the forward-looking preliminary examination but not of others.

In this Note, the phrases "forward-looking" and "backward-looking" will be used in two senses: (1) the descriptive sense, in which they will refer to preliminary examinations which have some, but not all, of the features of the ideal conceptual models; (2) the theoretical sense, in which they will refer to the pure conceptual models.

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argued, is preferable because it can achieve to a limited degree the goals underlying the right to a speedy trial. The Note will then tentatively suggest that the "forward-looking" preliminary hearing be adopted in the federal system. Since the lack of relevant empirical information will prevent an exact calculation of the net costs, if any, which the proposal would entail, the Note concludes only that the potential benefits of the "forward-looking" preliminary hearing are sufficient to justify the establishment of federal pilot projects and further study concerning the cost and ultimate feasibility of a "forward-looking" hearing.

I. Two Models of the Preliminary Examination as a Screen

A. *The Backward-Looking Preliminary Examination*

The first model of the preliminary examination will be termed the "backward-looking" procedure. Its primary concern is with the legality of the arrest and the validity of the detention of the arrested person; its perspective is thus backward in time, toward the arrest. This type of preliminary examination is designed to screen out illegal detentions,¹² which will be primarily of three types: first, where the arrest, though made in good faith, was nonetheless illegal;¹³ second, where the arrest was knowingly illegal;¹⁴ and third, where the arrest was legal when made but subsequent events indicate that the person should no longer be detained.¹⁵ The value of detecting these situations lies both

12. Although undoubtedly rare, there may be a difference in some cases between the legality of the arrest (at time X) and the validity of the present detention (at time Y, after the arrest), for example, when an informant originally gives reliable information which forms the basis for an arrest, but which information later turns out to be false. See *M.A.P. v. Ryan*, 285 A.2d 310, 315 (D.C. App. 1971); note 19 *infra*; cf. W. LAFAVE, *ARREST* 408 (1965). Thus, more precisely put, the purpose of the backward-looking preliminary examination is to assess the validity of the *present* detention or restraint, the assessment of which depends on the existence of probable cause at the time the examination is conducted. *M.A.P. v. Ryan*, *supra*.

13. An example of this type of arrest is an arrest based on unreliable information given to the police at the scene of the crime.

14. Examples of this type of arrest are: (1) harassment arrests, in which the arrest is for the purpose of annoying or humiliating a person; (2) preventive detention arrests, in which the police desire to incarcerate and incapacitate a person in order to prevent suspected future crime for which there does not exist probable cause to arrest; (3) investigative arrests, in which the police arrest a person on a hunch or mere suspicion and acquire the necessary evidence during subsequent investigation, see *United States v. Quinn*, 357 F. Supp. 1348, 1351-52 (N.D. Ga. 1973); *Hearings on the United States Commissioner System Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 270 (1966) (statement of Professor A. Kenneth Pye) [hereinafter cited as *1966 Hearings*].

15. One example of this would be an arrest based on credible information given by a previously reliable informant who later admits that the information was mistaken or fabricated.

in preventing further unjustified detention in the particular case¹⁶ and in deterring illegal police conduct in the future.¹⁷

Since the backward-looking model mandates a review of the legality of the arrest and detention, the procedures and requirements associated with it would be very similar to those at a proceeding before a magistrate to obtain an arrest warrant and very dissimilar to those employed at a trial. The backward-looking model stresses the preliminary and nonfinal nature of the hearing and places emphasis upon the fact that the proceeding is not a trial but is only an initial screening mechanism occurring very shortly after the accused has been arrested.¹⁸ The focus of the inquiry would be upon the factual, as contrasted to the legal,¹⁹ guilt or innocence of the accused, just as it is when a magistrate is considering whether there is "probable cause" to issue an arrest warrant.²⁰

Given these precepts the requirements of a backward-looking preliminary examination can easily be deduced. The standard for the persuasiveness or quality of the evidence required to hold the accused would be the same as is required to justify an arrest, *i.e.*, probable cause.²¹ The state, moreover, need not introduce evidence of every

16. See *Coleman v. Burnett*, 477 F.2d 1187, 1204 (D.C. Cir. 1973) ("the Government must justify continued detention by a showing of probable cause"); *United States v. Quinn*, 357 F. Supp. 1343, 1351 (N.D. Ga. 1973) ("the magistrate's examination stands as a safeguard to ensure that the defendant will not be held in custody without probable cause while the government waits to present its evidence to the grand jury").

17. See *United States v. Quinn*, 357 F. Supp. 1348, 1351-52 (N.D. Ga. 1973); 1966 *Hearings*, *supra* note 14, at 270 (statement of Professor A. Kenneth Pye); *Alternatives*, *supra* note 5, at 290-91.

18. See *Coleman v. Burnett*, 477 F.2d 1187, 1201 (D.C. Cir. 1973); *State v. Elling*, 19 Ariz. App. 317, 318, 506 P.2d 1102, 1103, 1104 (1973); *Interest Analysis*, *supra* note 5, at 167-68, 174, 180-81.

19. See F. MILLER, *supra* note 5, at 94, 97-99; Preliminary Hearing in the District of Columbia, *supra* note 5, at xiii, *cf.* Note, *The Rules of Evidence as a Factor in Probable Cause in Grand Jury Proceedings and Preliminary Examination*, 1963 WASH. U. L.Q. 102, 119-24 (1963).

The distinction between factual guilt and legal guilt refers to the difference between those persons who are "guilty" of committing the proscribed act but are nevertheless found "innocent" by the criminal justice system because the police, prosecutor, or judiciary have violated certain of the defendant's legal rights, and those who are both "guilty" of the proscribed act and are found "guilty" by the criminal justice system. See Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 16-17 (1964); *cf.* Note, *Exclusion of Incompetent Evidence from Federal Grand Jury Proceedings*, 72 YALE L.J. 590, 590-92 (1963).

20. See *Draper v. United States*, 358 U.S. 306, 311-13 (1959), discussing the difference between probable cause to arrest and guilt or innocence at trial.

21. See 18 U.S.C. § 3060(a) (1970); FED. R. CRIM. P. 5.1(a); *Coleman v. Burnett*, 477 F.2d 1187, 1201-02, 1204 n.96 (D.C. Cir. 1973). ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, MANUAL FOR UNITED STATES COMMISSIONERS 10 (1948), defines the requisite standard of probable cause as "a reasonable ground for the inference that the charges may be well founded. . . . The proof need only be such as to afford good reason to believe that the offense was committed and by the defendant"; *cf.* *Adams v. Williams*, 407 U.S. 143, 149 (1972).

Presently, "probable cause" is the nearly universal standard as to the persuasiveness

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element of the offense charged,²² but must only introduce such evidence as is necessary to establish probable cause. Hearsay²³ and other evidence which would be incompetent at trial, as well as illegally obtained evidence,²⁴ would be admissible at the preliminary examination.²⁵

In addition, analogous to the *ex parte* proceeding for an arrest warrant, the rights of the accused would be narrowly circumscribed. He would not be entitled to appointed counsel and probably would not be permitted to have retained counsel.²⁶ He would not be permitted to introduce evidence or present witnesses in his favor, nor would he be allowed to testify in his own behalf.²⁷ Similarly, he would probably

of the evidence required to bind the accused over for trial. Indeed this is generally true even in states which have a forward-looking preliminary examination:

Arizona: *Drury v. Burr*, 107 Ariz. 124, 125, 483 P.2d 539, 540 (1971); *Dodd v. Boies*, 88 Ariz. 401, 402, 357 P.2d 144, 145 (1960).

California: CAL. PENAL CODE § 872 (West 1970); *Taylor v. Superior Court*, 3 Cal. 3d 578, 582, 477 P.2d 131, 133, 91 Cal. Rptr. 275, 277 (1970); *Williams v. Superior Court*, 71 Cal. 2d 1144, 458 P.2d 987, 80 Cal. Rptr. 747 (1969); *Perry v. Superior Court*, 57 Cal. 2d 276, 283, 368 P.2d 529, 533, 19 Cal. Rptr. 1, 5 (1962); *People v. Nagle*, 25 Cal. 2d 216, 222, 153 P.2d 344, 347 (1944).

Michigan: *People v. Paille*, 383 Mich. 621, 178 N.W.2d 465 (1970); *People v. Dellabonda*, 265 Mich. 486, 251 N.W. 594 (1933).

New York: N.Y. CODE CRIM. PRO. §§ 70.10(2), 180.70(1) (McKinney 1971); *People v. Jackson*, 69 Misc. 2d 793, 331 N.Y.S.2d 216 (N.Y. City Crim. Ct. 1972); *People v. Scarposi*, 69 Misc. 2d 264, 329 N.Y.S.2d 850 (N.Y. City Crim. Ct. 1972).

Wisconsin: *Taylor v. State*, 55 Wis. 2d 168, 172-73, 197 N.W.2d 805, 807 (1972).

But see *Myers v. Commonwealth*, 298 N.E.2d 829 (Mass. 1973); MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 330.5 (Tent. Draft No. 5, 1972).

22. See *Williams v. Superior Court*, 71 Cal. 2d 1144, 458 P.2d 987, 80 Cal. Rptr. 747 (1969). But see *Garabedian v. Superior Court*, 59 Cal. 2d 124, 378 P.2d 590, 28 Cal. Rptr. 318 (1963); cf. *People v. Jackson*, 69 Misc. 2d 793, 331 N.Y.S.2d 216 (N.Y. City Crim. Ct. 1972).

In the District of Columbia the practice is that some evidence of every element of the offense must be presented at the preliminary examination, Preliminary Hearing in the District of Columbia, *supra* note 5, at xv, xxxii, 51-57.

23. See FED. R. CRIM. P. 5.1(a) and the accompanying Advisory Committee Note, in 56 F.R.D. 143, 152-54 (1972).

24. *Id.* But see 18 U.S.C. §§ 2515, 2518(9), (10), 3504 (1970) (prohibiting the use of evidence obtained by illegal electronic surveillance); *People ex rel. Pierce v. Thomas*, 70 Misc. 2d 629, 334 N.Y.S.2d 666 (Sup. Ct. 1972).

25. FED. R. EVID. 1101(d)(3) (Proposed 1972) states that the rules of evidence do not apply at the preliminary examination; this is a change from the preliminary draft, which would have applied the rules to the preliminary examination. 46 F.R.D. 161, 417-18, 426 (1969). This provision of the Proposed Draft would not be altered by recently proposed amendments in the House of Representatives. H.R. 5463, 93d Cong., 1st Sess., Rule 1101(d)(3), at 38 (Comm. amends. 1973); cf. *Draper v. United States*, 358 U.S. 307, 311-13 (1958); *Brinegar v. United States*, 338 U.S. 160, 172-76 (1949), holding that the rules of evidence do not apply to the determination of probable cause for the purpose of making an arrest and discussing the difference between the issues of probable cause to arrest and guilt or innocence at trial.

26. Of course, no jurisdiction could impose these aspects of the model since they would be unconstitutional under *Coleman v. Alabama*, 399 U.S. 1 (1970). Prior to *Coleman*, most jurisdictions permitted counsel to be present but did not provide for appointed counsel. See *Interest Analysis*, *supra* note 5, at 169.

27. Most jurisdictions now allow the accused to make statements in his own behalf and to introduce evidence in his favor, see *Interest Analysis*, *supra* note 5, at 170, 173-74, although some states hold that the magistrate has no authority to subpoena wit-

not be permitted to cross-examine the prosecution's witnesses.²⁸ Moreover, even if the accused had the right to testify, to introduce evidence, or to cross-examine the state's witnesses, such rights could not be used to establish affirmative defenses²⁹ (although they could be exercised to rebut the factual allegations of the state),³⁰ since the scope of the hearings would be narrowly confined to the factual issue of probable cause. Finally, since the issue at the preliminary examination is only probable cause and is not guilt or innocence as at the trial, the identity of informers need not be disclosed at the hearing³¹ and prior statements of the prosecution's witnesses would not have to be revealed to the defense.³²

Lastly, the role of the magistrate at a backward-looking preliminary examination would be quite limited; he would not pass upon the

nesses, *id.* at 170. New York allows the accused to call witnesses and present evidence only at the discretion of the magistrate. N.Y. CODE CRIM. PRO. § 180.60(7) (McKinney 1971).

These rights of the defendant are often rendered nugatory in practice, however, by the magistrate's adoption of a "prima facie case" rule, under which the magistrate terminates the hearing and binds over the defendant once the state has established a prima facie case showing probable cause. See Preliminary Hearing in the District of Columbia, *supra* note 5, at 73; Note, *supra* note 5, at 327. Clearly, if the right of the defendant to introduce evidence in his favor is to have any meaning, the determination of probable cause must be based on all the evidence adduced at the preliminary examination by either the state or the defendant. See *id.*; United States v. King, 482 F.2d 768, 773-76 (D.C. Cir. 1973); Coleman v. Burnett, 477 F.2d 1187, 1204 (D.C. Cir. 1973); Ross v. Sirica, 380 F.2d 557, 559 (D.C. Cir. 1967); Myers v. Commonwealth, 298 N.E.2d 819, 825 (Mass. 1973).

28. In most jurisdictions the accused has the right to cross-examine the state's witnesses who testify at the preliminary examination, although the scope of this cross-examination is often very constricted, see, e.g., *People ex rel. Pierce v. Thomas*, 70 Misc. 2d 629, 334 N.Y.S.2d 666 (Sup. Ct. 1972); *People v. Epps*, 67 Misc. 2d 907, 325 N.Y.S.2d 818 (Sup. Ct. 1971), and in some states the defendant cannot confront witnesses not called at the preliminary examination by the prosecution. See, e.g., *People v. Matthews*, 289 Mich. 440, 286 N.W. 675 (1939); *Emery v. State*, 92 Wis. 146, 65 N.W. 848 (1896).

29. *Coleman v. Burnett*, 477 F.2d 1187, 1200-02 (D.C. Cir. 1973) (self-defense); *State v. Altman*, 107 Ariz. 93, 482 P.2d 460 (1971) (entrapment); *Marcum v. Sheriff*, 85 Nev. 175, 451 P.2d 845 (1969) (entrapment).

Of course, the accused must be discharged if, as a matter of law, no offense has been charged against him, *United States v. Zerbst*, 111 F. Supp. 807 (E.D.S.C. 1953), as well as if no probable cause is shown, FED. R. CRIM. P. 5.1(b).

30. See, e.g., *Coleman v. Burnett*, 477 F.2d 1187, 1204 (D.C. Cir. 1973) (the "federal preliminary hearing is . . . an opportunity for the accused to rebut that showing" of probable cause); *Washington v. Clemmer*, 339 F.2d 715, 725 (D.C. Cir. 1964) (accused at the preliminary examination may prove misidentification on the part of the complaining witness).

31. Cf. *McCray v. Illinois*, 386 U.S. 300, 309-12 (1967); *Rugendorf v. United States*, 376 U.S. 28 (1964) (discussing the federal rule that an informer's identity need not be disclosed at a suppression hearing); FED. R. EVID. 510(a), (c)(3) (Proposed 1972) (judge in his discretion may order the disclosure of an informer's identity at a suppression hearing, if he deems it necessary). But cf. *Coleman v. Burnett*, 477 F.2d 1187, 1205-07 (D.C. Cir. 1973).

32. See *Gibson v. Halleck*, 254 F. Supp. 159 (D.D.C. 1966); 8 MOORE'S FEDERAL PRACTICE ¶ 5.1.02[3], at 5.1-11 (2d ed. R. Cipes 1973).

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credibility of witnesses,³³ but rather would resolve all issues of credibility in favor of the state.³⁴

B. *The Forward-Looking Preliminary Examination*

The alternative conceptual model of the preliminary examination as a screening device is the forward-looking hearing. The primary concern of this model is whether there is a sufficient probability of conviction at trial to warrant further proceedings³⁵ and those cases for which such a probability does not exist are screened out; the perspective is forward, toward trial, rather than backward, toward the arrest. The focus of this hearing is upon the probability of the legal, rather than factual, guilt or innocence of the accused³⁶ whose interests in avoiding further unnecessary proceedings are thus protected.³⁷

Since under this model the perspective is toward trial and the primary concern is with the legal guilt or innocence, trial-type standards would generally be imposed; this type of hearing would thus be more judicial than the backward-looking model. The rules of evidence would apply at the preliminary examination,³⁸ both because they are

33. See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, MANUAL FOR UNITED STATES COMMISSIONERS 10 (1948). 8 MOORE'S FEDERAL PRACTICE ¶ 5.1.02[3], at 5.1-13 (2d ed. R. Cipes 1973), suggests that the magistrate should not get deeply involved in the issue of credibility of witnesses.

The practice in the District of Columbia is for the magistrate to refrain from passing upon the credibility of witnesses unless the testimony is inherently incredible. See Preliminary Hearing in the District of Columbia, *supra* note 5, at xiv, 112.

The magistrate's inability to evaluate credibility renders the accused's right, if any, to cross-examine the state's witnesses and to present evidence in his favor even less effective; see notes 27-28 *supra* & pp. 782-83 *infra*.

34. See, e.g., Curley v. United States, 160 F.2d 229, 232-33 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947); United States v. Robinson, 71 F. Supp. 9, 10 (D.D.C. 1947); 8 MOORE'S FEDERAL PRACTICE ¶ 29.09[1], at 42 (2d ed. R. Cipes 1973).

35. See F. MILLER, *supra* note 5, at 87-88, 101-02, 348; MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §§ 330.1(2), 330.5 (Tent. Draft No. 5, 1972).

36. See note 19 *supra*.

37. See *People v. Elliot*, 54 Cal. 2d 498, 504-05, 354 P.2d 225, 229, 6 Cal. Rptr. 753, 757 (1960); *Stone v. Hope*, 488 P.2d 616, 619 (Okla. Crim. App. 1971). See also notes 59-64 *infra*.

38. The rules of evidence generally apply to preliminary examinations in the following states:

Arizona. See ARIZ. REV. STAT. ANN. § 22-211 (1956); *State v. Jacobson*, 106 Ariz. 129, 130, 471 P.2d 1021, 1022 (1970); *State v. Superior Court*, 100 Ariz. 236, 241, 413 P.2d 264, 268, *modified*, 100 Ariz. 362, 414 P.2d 738 (1966); *State v. Essman*, 98 Ariz. 228, 403 P.2d 540 (1965).

California. See CAL. EVID. CODE § 300 (West 1968); CAL. PENAL CODE § 1102 (West 1970); *Rogers v. Superior Court*, 46 Cal. 2d 3, 8, 291 P.2d 929, 932 (1955); *Pinizzotto v. Superior Court*, 257 Cal. App. 2d 582, 64 Cal. Rptr. 74 (1968).

Connecticut. See CONN. GEN. STAT. ANN. § 54-76(a) (1958).

Massachusetts. See *Myers v. Commonwealth*, 298 N.E.2d 819 (Mass. 1973).

Michigan. See *People v. Asta*, 337 Mich. 590, 610, 60 N.W.2d 472, 483 (1953).

Nevada. See *Goldsmith v. Sheriff of Lyon County*, 84 Nev. 295, 454 P.2d 86 (1969).

New York. See N.Y. CODE CRIM. PRO. §§ 60.10, 180.60(8) (McKinney 1971).

The preliminary draft of the Federal Rules of Evidence would have applied the rules to the preliminary examination, 46 F.R.D. 161, 417-18, 426 (1969), but this was abandoned in the proposed draft. See note 25 *supra*; cf. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 330.4(4) (Tent. Draft No. 5, 1972).

applied at the trial and because competent evidence is generally more reliable than incompetent evidence;³⁹ therefore, hearsay and other incompetent evidence would be inadmissible at the hearing. Likewise, illegally obtained evidence would be excluded.⁴⁰ The prosecution would be required to introduce evidence (either direct or circumstantial)⁴¹ which would be legally sufficient to avoid a directed acquittal at trial;⁴² evidence of every element of the offense charged⁴³ which is sufficiently credible and persuasive that the jury would be allowed to convict upon such evidence.⁴⁴

39. See C. McCORMICK, EVIDENCE § 197 (best evidence rule); § 210, at 428 (parol evidence rule); § 224, at 457-58 (hearsay rule) (1954).

40. Such evidence is excluded in preliminary examinations in the following states: Arizona. See *State v. Jacobson*, 106 Ariz. 129, 130, 471 P.2d 1021, 1022 (1970).

California. See *Priestly v. Superior Court*, 50 Cal. 2d 812, 815, 330 P.2d 39, 41 (1958); *Badillo v. Superior Court*, 46 Cal. 2d 269, 294 P.2d 23 (1956); *People v. Schuber*, 71 Cal. App. 2d 773, 163 P.2d 498 (1945); *Preliminary Hearings in Los Angeles*, *supra* note 5, at 942-44.

Michigan. See *People v. Walker*, 385 Mich. 565, 189 N.W.2d 234.

New York. See *People v. DeIorio*, 45 Misc. 2d 68, 256 N.Y.S.2d 248 (Nassau Co. Ct. 1965). But see *People ex rel. Pierce v. Thomas*, 70 Misc. 2d 629, 334 N.Y.S.2d 666 (Sup. Ct. 1972).

See also MODEL CODE OF PRE-ARRESTMENT PROCEDURE § 330.3 (Tent. Draft No. 5, 1972).

41. See *Coughlin v. Superior Court*, 4 Cal. 3d 461, 465, 482 P.2d 211, 213, 93 Cal. Rptr. 587, 589 (1971); *State ex rel. Brill v. Spieker*, 271 Wis. 237, 241, 72 N.W.2d 906, 908 (1955); *State ex rel. Marachowsky v. Kerl*, 258 Wis. 309, 319, 45 N.W.2d 668, 672 (1951).

42. See F. MILLER, *supra* note 5, at 88; *Myers v. Commonwealth*, 298 N.E.2d 819, 824 (Mass. 1973); MODEL CODE OF PRE-ARRESTMENT PROCEDURE § 330.5 (Tent. Draft No. 5, 1972). This is the minority rule. See note 21 *supra*.

In *State v. Smith*, 138 Ala. 111, 115, 35 So. 42, 43 (1903), the court held that a defendant could not be bound over based on the uncorroborated testimony of an accomplice when such testimony was insufficient as a matter of law to sustain a conviction at trial:

Why should the citizen be held to the grand jury, or indicted by the grand jury, on testimony upon which no petit jury could possibly convict him? What good end could be served by such a proceeding? Can there be said to be even probable cause shown in any case by testimony which the law expressly and positively declares to be insufficient to support a conviction? We think not. The whole theory of holding accused persons to the grand jury is that the evidence before the examining magistrate or the judge on habeas corpus is sufficient to sustain a finding of guilt by a petit jury when he shall be indicted and brought to the bar of the court. When there is not such evidence, it is not the contemplation of the law that the accused shall be held. To hold him would be a vain and useless thing, involving his incarceration not as a punishment for crime and not really to the end that he should be tried for a crime . . . [with respect to] which there is evidence to prove [the probability of his guilt], but at the best upon a mere speculation that evidence may be found to corroborate that of the accomplice.

43. Some states which require only a showing of probable cause nevertheless require evidence of each element of the offense charged. See *State v. Abbott*, 103 Ariz. 336, 442 P.2d 80 (1968); *Ex parte Decker*, 65 Ariz. 122, 124-27, 175 P.2d 204, 207-08 (1946); *People v. Medley*, 339 Mich. 486, 492, 64 N.W.2d 708, 712 (1954); *People v. Martinovich*, 18 Mich. App. 253, 257-58, 170 N.W.2d 899, 901-02 (1969); *People v. Kennedy*, 9 Mich. App. 346, 348, 155 N.W.2d 855, 856-57 (1968); cf. *Garabedian v. Superior Court*, 59 Cal. 2d 124, 378 P.2d 590, 28 Cal. Rptr. 318 (1963). But cf. *Williams v. Superior Court*, 71 Cal. 2d 1144, 458 P.2d 987, 80 Cal. Rptr. 747 (1969).

44. Only one jurisdiction, Massachusetts, presently imposes this strict a standard of evidentiary sufficiency at the preliminary examination. See note 21 *supra*; *Myers v. Commonwealth*, 298 N.E.2d 819 (Mass. 1973). Several cases in New York formerly mandated such a standard, *People ex rel. Adler v. Bieber*, 100 N.Y.S.2d 821 (N.Y. City Magis. Ct. 1950); *People ex rel. Schoen v. Bernstein*, 95 N.Y.S.2d 696, 699 (N.Y. City

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In addition, the rights of the defendant at the preliminary examination would be similar to those at trial. He would have the right to counsel and to appointed counsel.⁴⁵ He would also have the rights of cross-examination,⁴⁶ of testifying in his own behalf,⁴⁷ and of presenting witnesses and introducing evidence in his favor.⁴⁸ The scope of inquiry at the hearing would include matters relevant to the issue of whether an offense was charged⁴⁹ and to the factual allegations underlying the state's contention that the accused should be bound over.⁵⁰ Moreover, the defendant would be allowed to establish affirmative defenses,⁵¹ either through the direct introduction of evidence or through cross-examination. Finally, prior statements of the prosecution's witnesses

Magis. Ct. 1950); *People v. Weiss*, 147 Misc. 595, 261 N.Y.S. 646 (N.Y. City Magis. Ct. 1932), but the myriad of New York cases did not express a single consistent standard, and, as indicated in the Practice Commentary accompanying the statute, the stringent rule of *Bieber, Bernstein, and Weiss* was overruled by N.Y. CODE CRIM. PRO. § 180.70 (McKinney 1971).

45. See 18 U.S.C. §§ 3006, 3006A(c) (1970); FED. R. CRIM. P. 44; *Coleman v. Alabama*, 399 U.S. 1 (1970).

46. See FED. R. CRIM. P. 5.1; CAL. PENAL CODE § 685 (West 1970); MASS. ANN. LAWS ch. 276, § 38 (1968); MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 330.4(5) (Tent. Draft No. 5, 1972).

47. See MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 330.4(5) (Tent. Draft No. 5, 1972).

48. See FED. R. CRIM. P. 5.1; CAL. PENAL CODE § 866 (West 1970); MASS. ANN. LAWS ch. 276, § 38 (1968); MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 330.4(5) (Tent. Draft No. 5, 1972).

49. See *United States v. Zerbst*, 111 F. Supp. 807 (E.D.S.C. 1953).

50. See *Washington v. Clemmer*, 339 F.2d 715, 725 (D.C. Cir. 1964) (accused at the preliminary examination was entitled to try to prove misidentification on the part of the complaining witness); *Jones v. Superior Court*, 4 Cal. 3d 660, 483 P.2d 1241, 94 Cal. Rptr. 289 (1971) (in a rape case, defendant was released when he successfully contested the state's claims that there was no consent); *State v. Essman*, 98 Ariz. 228, 403 P.2d 540 (1965) (defendant successfully contested the state's factual assertion that the requisite *mens rea* existed and thereby reduced the grade of the offense).

51. See *Myers v. Commonwealth*, 298 N.E.2d 819 (Mass. 1973); *People v. Uhlemann*, 8 Cal. 3d 393, 503 P.2d 277, 105 Cal. Rptr. 21 (1972), *rev'd on other grounds*, 9 Cal. 3d 662, 511 P.2d 609, 108 Cal. Rptr. 657 (1973) (entrapment); *Jennings v. Superior Court*, 66 Cal. 2d 867, 428 P.2d 304, 59 Cal. Rptr. 440 (1967) (entrapment); *People v. Garcia*, 265 Cal. App. 2d 94, 71 Cal. Rptr. 102 (1968) (self-defense); *People ex rel. Schoen v. Bernstein*, 95 N.Y.S.2d 696 (N.Y. City Magis. Ct. 1950) (defense of mistake of fact rebutting a statutory presumption of intent); MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 330.4(5) (Tent. Draft No. 5, 1972).

Clearly, the assessment by the magistrate of whether the evidence is sufficient to bind over the accused must be based on all the evidence, including that adduced by the defendant (either directly or through cross-examination). See *United States v. King*, 482 F.2d 768 (D.C. Cir. 1973); *Coleman v. Burnett*, 477 F.2d 1187, 1204 (D.C. Cir. 1973); *Ross v. Sirica*, 380 F.2d 557, 559 (D.C. Cir. 1967); *Myers v. Commonwealth*, *supra* at 825; *State ex rel. Hanagan v. Armijo*, 72 N.M. 50, 53-54, 380 P.2d 196, 198-99 (1963); Note, *supra* note 5, at 327.

As a tactical matter, the defendant may not wish to introduce evidence at the preliminary examination, for to do so would be to disclose his case to the prosecution. See *California v. Green*, 399 U.S. 149, 197 (1970) (Brennan, J., dissenting); *Myers v. Commonwealth*, *supra* at 828; *Jennings v. Superior Court*, *supra*, 66 Cal. 2d at 880, 428 P.2d at 313, 59 Cal. Rptr. at 449; 8 MOORE'S FEDERAL PRACTICE ¶ 5.1.02[3], at 5.1-12 (2d ed. R. Cipes 1973).

would be disclosed to the defense⁵² and the identity of informers would be revealed.⁵³

At a forward-looking preliminary examination, the magistrate has a central and active role. The magistrate can and must appraise the credibility of witnesses at the hearing⁵⁴ and must be able to dismiss the charges if he disbelieves the prosecution's witnesses, even if their testimony, if accepted, would clearly indicate a sufficient basis for binding over the accused.⁵⁵ This point is fundamental to the forward-looking preliminary examination. Without such authority on the part of the magistrate, the accused's right to cross-examine the state's witnesses, to testify in his own behalf, to introduce evidence and present witnesses in his favor, and to assert affirmative defenses would be eviscerated.⁵⁶

52. Cf. *People v. Malinsky*, 15 N.Y.2d 86, 90-91, 209 N.E.2d 694, 697, 262 N.Y.S.2d 65, 70 (1965) (at a suppression hearing, a witness' prior statement must be disclosed to the defense if it "relates to the subject matter of the witness' testimony and contains nothing that must be kept confidential," and this disclosure must be made irrespective of whether the prior statement is consistent or inconsistent with the testimony at the hearing and irrespective of any assertion by the prosecutor that disclosure would not help the defendant nor nondisclosure harm him).

53. Cf. *Coleman v. Burnett*, 477 F.2d 1187, 1205-07 (D.C. Cir. 1973). California requires that the identity, credibility, and source of information of an informant be disclosed at the preliminary examination if there was a warrantless arrest or search and if the validity of such an arrest or search depends upon the information given by the informant. Compare *Priestly v. Superior Court*, 50 Cal. 2d 812, 330 P.2d 39 (1958); and *Mitchell v. Superior Court*, 50 Cal. 2d 827, 330 P.2d 48 (1958), with *People v. Keener*, 55 Cal. 2d 714, 341 P.2d 587, 12 Cal. Rptr. 857 (1961).

New York imposes the same requirement at a suppression hearing. Compare *People v. Verecchio*, 23 N.Y.2d 489, 245 N.E.2d 222, 297 N.Y.S.2d 573 (1969); *People v. Malinsky*, 15 N.Y.2d 86, 92-96, 209 N.E.2d 694, 697-701, 262 N.Y.S.2d 65, 70-75 (1965); and *People v. Boniface*, 37 App. Div. 2d 728, 323 N.Y.S.2d 876 (1971), with *People v. Cerrato*, 24 N.Y.2d 1, 5-7, 246 N.E.2d 501, 503-05, 298 N.Y.S.2d 688, 691-93 (1969), cert. denied, 397 U.S. 940 (1970); *People v. Smith*, 21 N.Y.2d 698, 234 N.E.2d 460, 287 N.Y.S.2d 425 (1967); *People v. Coffey*, 12 N.Y.2d 443, 191 N.E.2d 263, 240 N.Y.S.2d 721, modified, 13 N.Y.2d 726, 191 N.E.2d 910, 241 N.Y.S.2d 856 (1963), cert. denied, 376 U.S. 916 (1964).

Cf. *State v. Lynch*, 107 Ariz. 463, 489 P.2d 697 (1971) (when the complaint is on information and belief by a person with no personal knowledge of the crime, there is then a duty upon the magistrate at the preliminary hearing to make further inquiries into the source of the complainant's information and the grounds for his belief).

54. See *People v. Uhlemann*, 8 Cal. 3d 393, 503 P.2d 277, 105 Cal. Rptr. 21 (1972), rev'd on other grounds, 9 Cal. 3d 662, 511 P.2d 609, 108 Cal. Rptr. 657 (1973); *Jones v. Superior Court*, 4 Cal. 3d 660, 483 P.2d 1241, 94 Cal. Rptr. 289 (1971); *Rideout v. Superior Court*, 67 Cal. 2d 471, 473 n.2, 432 P.2d 197, 198 n.2, 62 Cal. Rptr. 581, 582 n.2 (1967); *DeMond v. Superior Court*, 57 Cal. 2d 340, 345, 368 P.2d 865, 867-68, 19 Cal. Rptr. 313, 315-16 (1962); *People v. Paille*, 383 Mich. 621, 178 N.W.2d 465 (1970); *Preliminary Hearings in Los Angeles*, supra note 5, at 703-06, 753-54, 960; MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 330.5(3) (Tent. Draft No. 5, 1972).

55. See *People v. Uhlemann*, 8 Cal. 3d 393, 503 P.2d 277, 105 Cal. Rptr. 21 (1972), rev'd on other grounds, 9 Cal. 3d 662, 511 P.2d 609, 108 Cal. Rptr. 657 (1973); *Jones v. Superior Court*, 4 Cal. 3d 660, 483 P.2d 1241, 94 Cal. Rptr. 289 (1971) (when the contested issue is consent in a rape case, it is proper for the magistrate to dismiss the charges when he believed the defendant's testimony that the prosecutrix had consented and disbelieved the prosecutrix' contrary account, even though the prosecutrix' testimony, if believed, would have been sufficient to bind over the accused).

56. See *Preliminary Hearing in the District of Columbia*, supra note 5, at 93-94, 99-101, 114.

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Exercise of these rights typically raises issues of credibility,⁵⁷ issues which would be of no avail to the defendant if the magistrate were required to assume the credibility of the state's witnesses and to accept their testimony.⁵⁸

C. *Advantages of the Forward-Looking Preliminary Examination*

The forward-looking preliminary examination offers to the defendant, the prosecution, and the criminal justice system significant advantages over the backward-looking model.⁵⁹ The primary benefit

57. No issue of credibility would be raised, of course, in the unlikely case of a witness who admits that his testimony was mistaken or perjurious or of testimony incredible as a matter of law.

58. See *Jones v. Superior Court*, 4 Cal. 3d 660, 483 P.2d 1241, 94 Cal. Rptr. 289 (1971) (see note 55 *supra*); *Jennings v. Superior Court*, 66 Cal. 2d 867, 428 P.2d 304, 59 Cal. Rptr. 440 (1967) (see note 51 *supra*) (affirmative defense of entrapment).

The suggestion that the magistrate appraise the credibility of witnesses can also be justified by analogy to one of the functions of the trial judge. In ruling on a motion for a directed acquittal, see, e.g., FED. R. CRIM. P. 29; 8 MOORE'S FEDERAL PRACTICE ¶ 29 (2d ed. R. Cipes 1973), which if granted would completely dismiss the case, see *United States v. Wilson*, 178 F. Supp. 881, 883 (D.D.C. 1959); *United States v. Robinson*, 71 F. Supp. 9, 11 (D.D.C. 1947); 8 MOORE'S FEDERAL PRACTICE, *supra* ¶ 29.08 [1], at 29, the trial judge must view the evidence, including the credibility of witnesses, in the light most favorable to the prosecution. See, e.g., *Curley v. United States*, 160 F.2d 229, 232-33 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947); *United States v. Robinson*, *supra* at 10; 8 MOORE'S FEDERAL PRACTICE, *supra* ¶ 29.09[1], at 42. On the other hand, in ruling on a motion for a new trial on the ground that the verdict is against the weight of the evidence, the trial judge may evaluate the credibility of witnesses and weigh the evidence, see FED. R. CRIM. P. 29; *United States v. Wilson*, *supra*; *United States v. Robinson*, *supra*; 8 MOORE'S FEDERAL PRACTICE, *supra* ¶ 29.09[1], at 42-43. While it is true that the dismissal of the charges by the magistrate at the preliminary hearing formally terminates the case, the same charges may later be reinstituted. The magistrate's action is only a statement that the evidence is presently insufficient, rather than a decision irreversibly precluding possible proceedings in the future. See 18 U.S.C. § 3060(d) (1970); FED. R. CRIM. P. 5.1(b); *United States ex rel. Rutz v. Levy*, 268 U.S. 390 (1925); *United States v. Cooley*, 441 F.2d 1299 (5th Cir.), *cert. denied*, 404 U.S. 867 (1971); *State v. Elling*, 19 Ariz. App. 317, 506 P.2d 1102 (1973); *People v. Uhlemann*, 9 Cal. 3d 662, 511 P.2d 609, 108 Cal. Rptr. 657 (1973), *rev'd* 8 Cal. 3d 393, 503 P.2d 277, 105 Cal. Rptr. 21 (1972); *People v. Kent*, 54 Ill. 2d 161, 295 N.E.2d 710 (1972); *Commonwealth v. Britt*, 285 N.E.2d 780, 783 (Mass. 1972); *People v. Miklovich*, 375 Mich. 536, 134 N.W.2d 720 (1965); *State ex rel. Beck v. Duffy*, 38 Wis. 2d 159, 156 N.W.2d 368 (1968); *Tell v. Wolke*, 21 Wis. 2d 613, 124 N.W.2d 655 (1963). *But cf.* *Wilson v. Garrett*, 104 Ariz. 57, 448 P.2d 857 (1969); *People v. Beagle*, 6 Cal. 3d 441, 457-58, 492 P.2d 1, 11-12, 99 Cal. Rptr. 313, 323-24 (1972); *Jones v. Superior Court*, 4 Cal. 3d 660, 483 P.2d 1241, 94 Cal. Rptr. 289 (1971); *Stone v. Hope*, 488 P.2d 616 (Okla. Crim. App. 1971); MODEL CODE OF PRE-ARRESTMENT PROCEDURE § 330.7 (Tent. Draft No. 5, 1972); *Preliminary Hearings in Los Angeles*, *supra* note 5, at 957-61.

Furthermore, the defendant's opportunity to cross-examine the state's witnesses and the power of the magistrate to evaluate credibility will have real significance only if the witness at the preliminary examination has first-hand knowledge of the events, that is, if witnesses may not give hearsay evidence. It is particularly appropriate that persons with first-hand knowledge be cross-examined by counsel for the defendant, see *Wilson v. Anderson*, 335 F.2d 687, 690 n.6 (D.C. Cir. 1964) (Bazelon, C.J., dissenting), *cert. denied*, 381 U.S. 927 (1965); FED. R. EVID. 1101 (Prelim. Draft 1969), and *Advisory Committee Note*, 46 F.R.D. 161, 426 (1969); C. McCORMICK, EVIDENCE § 245, at 583-84 (2d ed. E. Cleary 1972).

59. The forward-looking preliminary examination also serves the purpose of the backward-looking model (determining the present legality of the arrest and detention), since the lesser standards of the backward-looking hearing are subsumed by the more stringent standards of the forward-looking procedure.

would inure to the legally innocent defendant.⁶⁰ First, as a consequence of the higher standards of the forward-looking hearing, the defendant has a greater opportunity to escape the anxiety, humiliation, and stigma of an unjustified public accusation and prosecution, as well as to avoid the expense and inconvenience of the trial proceeding.⁶¹ Second, a successful defense at a forward-looking preliminary hearing can free the accused from an "undue and oppressive incarceration" prior to trial.⁶² Third, the forward-looking preliminary hearing permits the defendant to preserve the testimony of his witnesses and to freeze the testimony of the prosecution witnesses, as well as to make any relevant documentary evidence a matter of record in the preliminary hearing transcript.⁶³ These three benefits to the accused are presently recog-

60. One should at the outset dispose of the contention that the criminal justice system is properly *not* concerned with giving "advantages" to the accused as against the "peace forces," i.e., the police and prosecutor. Any contention advanced in this form misunderstands the nature of the criminal process. The issue is not giving "advantages" to either "side" in the struggle between prosecutors and defendants, but rather the degree to which the system should avoid convicting, incarcerating, or otherwise disturbing the innocent accused. The greater the desire to avoid disturbing the innocent citizen, the greater the burden imposed on the "peace forces" in commencing or continuing the process of disturbance. As Justice Harlan noted, the American criminal justice system is committed to the ideal that the cost of allowing a guilty man to go free is less, arguably much less, than the cost of convicting an innocent man. *In re Winship*, 397 U.S. 358, 370-72 (1970) (Harlan, J., concurring). A "benefit" to a legally innocent accused is thus in reality a reflection of the principle that the criminal justice system tilts in favor of protecting the potentially innocent at the cost of allowing some factually guilty persons to go free. In any event, in the specific context of the forward-looking hearing, there seems to be no disadvantage to the "peace forces" in ending the incarceration of an individual who cannot be proven guilty. *See State v. Smith*, 138 Ala. 111, 115, 35 So. 42, 43 (1903).

61. *See Jones v. Superior Court*, 4 Cal. 3d 660, 667-68, 483 P.2d 1241, 1245-46, 94 Cal. Rptr. 289, 293-94 (1971); *Jaffe v. Stone*, 18 Cal. 2d 146, 150, 114 P.2d 335, 338 (1941); *Myers v. Commonwealth*, 298 N.E.2d 819, 822-25 (Mass. 1973); *Thies v. State*, 178 Wis. 98, 103, 198 N.W. 539, 541 (1922); *Packer*, *supra* note 19, at 41; *Interest Analysis*, *supra* note 5, at 173, 177-78; cf. statement by Judge Frank in *In re Fried*, 161 F.2d 453, 458-59 (2d Cir.), *cert. denied*, 331 U.S. 858 (1947), on the indelibly harmful effects of an erroneous grand jury indictment. *See also* P. GREENWOOD, S. WILDHORN, E. POGGIO, M. STRUMWASSER & P. DELEON, PROSECUTION OF ADULT FELONY DEFENDANTS IN LOS ANGELES COUNTY: A POLICY PERSPECTIVE vii (Nat'l Institute of Law Enforcement & Criminal Justice 1973) [hereinafter cited as P. GREENWOOD].

62. *United States v. Ewell*, 383 U.S. 116, 120 (1966). The most obvious incarceration is actual imprisonment, either because of the denial of bail (in murder cases or under preventive detention schemes) or the inability to post it. *See* note 131 *infra*. However, public accusation of criminal activity has serious consequences even on a "free" defendant; indeed, the Supreme Court has recognized these consequences as an "incarceration" of sorts. *United States v. Marion*, 404 U.S. 307, 320 (1971). *See also* *Washington v. Clemmer*, 339 F.2d 725, 727-28 (D.C. Cir. 1964); *Thies v. State*, 178 Wis. 98, 103, 189 N.W. 539, 541 (1922); Note, *Preliminary Examination—Evidence and Due Process*, 15 U. KAN. L. REV. 374, 385-86 (1967); *Interest Analysis*, *supra* note 5, at 181.

63. This "benefit" of the forward-looking hearing is, of course, a product of the original purpose of the preliminary hearing—to preserve testimony. *See* sources cited note 5 *supra*.

The "former testimony" exception to the hearsay rule admits on the merits (as opposed to admission for purposes of challenging a witness' credibility) at trial prior testimony if such testimony was given at a judicial hearing by a declarant under oath, if the declarant is presently "unavailable" to testify at trial, and if a reasonable opportunity for adequate cross-examination on substantially the same issues was afforded

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nized purposes underlying the speedy trial provision of the Sixth Amendment⁶⁴ and may therefore be acknowledged as established goals of pretrial procedure.

The forward-looking preliminary examination would also offer several benefits to the prosecution.⁶⁵ First, it would allow the prosecution to test its witnesses in an adversary proceeding prior to trial, thereby enabling it to avoid the double jeopardy proscription if its case is shown to be then insufficient.⁶⁶ Moreover, it would afford the prosecution an opportunity to record and perpetuate the testimony of its witnesses while the events are recent and clearly remembered and would operate to freeze the testimony of any witnesses who testify on behalf of the accused.⁶⁷ Furthermore, it would offer a potential opportunity for discovery by the prosecution if the defendant chose to present any evidence or witnesses. Finally, the forward-looking hearing may in fact encourage more pleas of guilty at earlier stages in the proceedings, thus expediting disposition of increasingly heavy caseloads.⁶⁸

the opposing party in that hearing. See *California v. Green*, 399 U.S. 149 (1970); C. McCORMICK, EVIDENCE § 255, at 616, § 257, at 621, § 258, at 622 (2d ed. E. Cleary 1972); cf. *id.* § 260, at 625. See also CAL. EVID. CODE §§ 1290-91 (West 1966); FED. R. EVID. 801(d)(1)(B), (C); 804(b)(1) (Proposed 1972). This rule has been applied to testimony given at a preliminary hearing in a state with a substantially forward-looking proceeding. *People v. Gibbs*, 255 Cal. App. 2d 739, 63 Cal. Rptr. 471 (1967). Even if the witness were available at trial, statements in the preliminary hearing transcript could be introduced on the merits at trial in some jurisdictions as prior inconsistent statements. See FED. R. EVID. 801(d)(1) (Proposed 1972); C. McCORMICK, *supra*, § 251, at 601-04. Finally, testimony at the preliminary hearing could be used by the defense and prosecution to refresh the memories of their respective witnesses and to impeach the testimony of opposing witnesses. See C. McCORMICK, *supra*, § 9, § 34, at 67, § 254, at 615, § 620, at 624-25.

Documentary evidence made a part of the preliminary hearing record would presumably be admitted in a later proceeding by means of a certified copy of the preliminary hearing record; it would be unnecessary to introduce the original or to authenticate again a copy. See generally J. WIGMORE, EVIDENCE § 1681, at 325-37 (3d ed. Supp. 1972).

64. See *Barker v. Wingo*, 407 U.S. 514, 532 (1972); *United States v. Marion*, 404 U.S. 307, 320 (1971); *Dickey v. Florida*, 398 U.S. 30, 41-43 (1970) (Brennan, J., concurring); *Smith v. Hooy*, 393 U.S. 374, 377-78 (1969); *United States v. Ewell*, 383 U.S. 116, 120 (1966).

65. See *Alternatives*, *supra* note 5, at 288-89; *Interest Analysis*, *supra* note 5, at 171-73; Note, *Preliminary Hearings—The Case for Revival*, 39 U. COLO. L. REV. 580, 585-86 (1967); Note, *The Preliminary Examination in the Federal System: A Proposal for a Rule Change*, 116 U. PA. L. REV. 1416, 1419 (1968).

66. See note 58 *supra*.

67. See note 63 *supra*. There is reason to believe that this factor will be particularly advantageous to prosecutors. A recent study in the District of Columbia indicated that 42 percent of prosecution dismissals result from failure of witnesses to cooperate; better than 40 percent of these witnesses stated the reason for refusal to cooperate was delay between the event and trial. Law Enforcement Assistance Administration, U.S. Dep't of Justice, Press Release, Jan. 26, 1974, at 2, reprinted in 14 CRIM. L. REP. 2366-67 (1974). See also *United States v. Carillo-Frausto*, 14 CRIM. L. REP. 2376 (9th Cir. Jan. 21, 1974) (conviction overturned because of government failure to attempt to detain material witnesses). Preservation of such witnesses' testimony at the preliminary hearing might prevent such dismissals.

68. This controversial proposition will be discussed in more detail below. See pp. 786, 791 & 793-94 *infra*.

The forward-looking hearing may also benefit the criminal justice system itself. By eliminating unnecessary trial proceedings and by centralizing the myriad pretrial hearings into one complete preliminary hearing, resources in the process as a whole might be conserved and the congestion and delay in the judicial system might be reduced.⁶⁹ A forward-looking preliminary hearing could also serve as a means of evaluating an area of pretrial procedure which has consistently eluded rational control: the plea bargain.⁷⁰

69. This potential benefit of a forward-looking hearing will be discussed in detail at pp. 791-95 *infra*. The societal interest in prompt disposition of criminal cases has been increasingly recognized as a prime justification for the right to a speedy trial. See *Barker v. Wingo*, 407 U.S. 514, 519-20 (1972) (prompt disposition of criminal cases is necessary to prevent commission of additional crimes while the accused is out on bail, to prevent manipulation of the plea bargaining system, to prevent bail jumping, to eliminate the detrimental effects on rehabilitation caused by delay between commission of the crime and the punishment, to mitigate overcrowded conditions in local jails, and to reduce the costs of detaining the accused in a public facility); *Dickey v. Florida*, 398 U.S. 30, 42 (1970) (Brennan, J., concurring). See also 1973 *Hearings*, *supra* note 1, at 1-10 (Statements of Senator Ervin).

70. See White, *Proposal for Reform of Plea-Bargaining*, 119 U. PA. L. REV. 439 (1971), and Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 286 (1972), for two intelligent discussions of the procedural inadequacies of the present plea bargaining system arising from a failure of decisionmakers to ascertain exactly what role the plea bargain should play in the criminal justice system. One essential role the plea bargain presently performs is adjudication of guilt. See Note, *supra*, at 289; *cf.* *Brady v. United States*, 397 U.S. 742, 748 (1970) ("But the plea of guilty is more than an admission of past conduct; it is the defendant's consent that a judgment of conviction may be entered . . ."); FED. R. CRIM. P. 11 ("The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."). The major problem in connection with plea bargains is the lack of information necessary to render an intelligent "adjudication." See PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 11-13 (1967); MODEL CODE OF PRE-ARRESTMENT PROCEDURE § 350, Comment, at 62 (Tent. Draft No. 5, 1972). A forward-looking hearing could develop sufficient information as to the defendant's alleged crime and, therefore, as to the real strength of the case against him. This might permit the judge to evaluate rationally the fairness of the bargain struck between the defendant and the prosecutor as an adjudication of guilt. To the extent guilty pleas are entered after a preliminary hearing or at the close of a preliminary hearing, the judge will thus be in a position to evaluate the bargain and to invalidate those parts he considers contrary to the public interest; *cf.* *United States v. McCarthy*, 394 U.S. 459 (1969); *United States v. Ammidown*, 42 U.S.L.W. 2296 (D.C. Cir. Nov. 16, 1973). Of course, the forward-looking preliminary hearing itself cannot serve as a means of evaluating guilty pleas entered pursuant to a bargain made before the preliminary hearing. See p. 791 *infra*. However, if the defendant were required to plead when he comes on for the preliminary hearing (he is not under present law; see FED. R. CRIM. P. 10), the magistrate could question the parties at that time about the nature of the bargain, the nature of the underlying crime, and the agreed-upon sentence, if any, much as is required of trial judges by *United States v. McCarthy*, *supra*. Though a full-scale preliminary hearing would not be held and the prosecution would not be required to sustain his burden of proof, the magistrate could order further investigation or require presentation of further information as to the crime in order to ensure that the bargain is fair as an adjudication of guilt. Furthermore, by regulation of the plea bargain through full-scale preliminary hearings or limited *McCarthy* hearings, the magistrate will also be in a position to review withdrawal of charges by the prosecution, a power presently reserved to the trial judge by FED. R. CRIM. P. 48(a); see *United States v. Ammidown*, *supra*. This practice will permit some review of prosecutorial discretion, the abuse of which has been the subject of considerable discussion in recent years. See, e.g., *Hutcherson v. United States*, 345 F.2d 964, 973-76 (D.C. Cir. 1965) (Bazelon, C.J., dissenting); *Abrams, Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 U.C.L.A. L. REV. 1 (1971). Use of the preliminary hearing to control abuse of prosecutorial discretion would

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Since the forward-looking preliminary examination would provide such substantial benefits, the issue becomes whether there are countervailing costs and objections which outweigh these advantages. This question can best be answered in the context of a particular system of criminal justice. Therefore attention will now be directed to the federal system and the focus will be upon the changes which would be necessary to implement the forward-looking model and upon the possible objections to its implementation.

II. Reform of the Federal Preliminary Hearing

A. *The Nature of the Reforms*

The present federal preliminary hearing, based on statute⁷¹ and rule,⁷² approximates the backward-looking model; indeed, the only major element of the forward-looking hearing in the federal system is the right to counsel.⁷³ Furthermore, the Constitution requires the use of the grand jury as a regular part of the federal charging process⁷⁴ and, under present law, the existence of a grand jury indictment obviates the requirement that a preliminary hearing be held at all.⁷⁵ Prosecutors often take advantage of this fact and obtain a grand jury indictment prior to the scheduled date for the preliminary hearing or before the hearing has been completed.⁷⁶

be similar to the proposals for a "pre-charge" or "screening" conference. See MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 320, Comment, at 14 (Tent. Draft No. 5, 1972); PRESIDENT'S COMM'N, *supra* at 4-9.

71. 18 U.S.C. § 3060 (1970).

72. FED. R. CRIM. P. 5(c), 5.1.

73. This is mandated by *Coleman v. Alabama*, 399 U.S. 1 (1970). Otherwise, the federal preliminary hearing requires only a showing of probable cause, 18 U.S.C. § 3060(a) (1970); FED. R. CRIM. P. 5.1(a), which showing can be based solely on hearsay, FED. R. CRIM. P. 5.1(a), or upon illegally obtained evidence, *id.* But see 18 U.S.C. §§ 2515, 2518(9), (10) (1970), which prohibit the use of evidence obtained by illegal electronic surveillance. The identity of informers need not be disclosed at the preliminary hearing, *cf. McCray v. Illinois*, 386 U.S. 300, 309-12 (1967); but *cf. Coleman v. Burnett*, 477 F.2d 1187, 1205-07 (D.C. Cir. 1973), and prior statements of the prosecution's witnesses need not be revealed to the defense, *Gibson v. Halleck*, 254 F. Supp. 159 (D.D.C. 1966). The accused may cross-examine prosecution witnesses to rebut the prosecution's factual allegations, *see, e.g., Coleman v. Burnett, supra*, at 1204; *Washington v. Clemmer*, 339 F.2d 715, 725 (D.C. Cir. 1964), but not to establish affirmative defenses, *see Coleman v. Burnett, supra*. Finally, the federal magistrate, the presiding official at the preliminary hearing, does not pass on the credibility of witnesses, but rather resolves all issues of credibility in favor of the state, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, MANUAL FOR UNITED STATES COMMISSIONERS 10 (1948); *cf. 8 MOORE'S FEDERAL PRACTICE* ¶ 5.1.02[3], at 5.1-13 (2d ed. R. Cipes 1973).

74. U.S. CONST. amend. V. See also FED. R. CRIM. P. 6, 7.

75. 18 U.S.C. § 3060(e) (1970); FED. R. CRIM. P. 5(c). See *United States v. Quinn*, 357 F. Supp. 1348 (N.D. Ga. 1973).

76. See *United States v. Cowan*, 396 F.2d 83, 88 (2d Cir. 1968); *United States v. Quinn*, 357 F. Supp. 1348 (N.D. Ga. 1973); *United States ex rel. Wheeler v. Flood*, 269 F. Supp. 194 (E.D.N.Y. 1967); 1966 *Hearings, supra* note 14, at 220 (statement of Professor Irving Younger); *id.* at 254-55 (statement of Judge Talbot Smith).

In practice, relatively few federal preliminary examinations are actually conducted.

The reforms necessary to recast the federal preliminary hearing into a forward-looking preliminary hearing are essentially as follows. First, the prosecution would have to introduce evidence of every element of the offense charged, evidence which would be sufficiently persuasive and credible to avoid a directed acquittal if such evidence were introduced at trial.⁷⁷ The rules of evidence would apply at the hearing. Hearsay and other incompetent evidence would be inadmissible and illegally seized evidence would be excluded.⁷⁸ The accused would be

During fiscal year 1972, only 9,554 such hearings were held, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS FOR THE FISCAL YEAR ENDED JUNE 30, 1972, VI-9, Table M3, at A-84 (1972), while in the district courts, 31,601 cases were commenced by indictment, 4,402 cases were started by information where indictment was waived, and 10,268 cases were otherwise begun by information, *id.*, Table 29, at II-52; Table D2, at A-42; there was thus a total of 46,281 cases in which a preliminary hearing should have been held unless waived by the defendant, *see* 18 U.S.C. § 3060(b) (1970); FED. R. CRIM. P. 5(c), or obviated by the return of a grand jury indictment. *See also* 1966 *Hearings* 220 (statement of Professor Irving Younger); *id.* at 254-55 (statement of Judge Talbot Smith).

77. It is possible that this strict a standard would impose upon the prosecution a burden which would be impossible to meet in the short time before the preliminary examination, *Interest Analysis*, *supra* note 5, at 168 n.24. Perhaps for this reason only one jurisdiction requires the quality of the evidence to be more persuasive than to establish probable cause. *See* notes 21, 42, & 44 *supra*. This important part of the model may thus prove impractical. The question, however, is unsettled, and experimentation and empirical research are necessary for a resolution of the issue.

If this standard should prove unworkable, a standard greater than "probable cause" but less than "avoidance of a directed acquittal" could be applied. *See* A. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 *YALE L.J.* 1149, 1166 (1960). This intermediate standard is the "preponderance of the evidence" test: There must be a stronger probability of guilt than of innocence. Some courts have applied this standard at the preliminary examination, *see* *Drury v. Burr*, 107 *Ariz.* 124, 125, 483 P.2d 539, 540 (1971); *Hafenstein v. Burr*, 92 *Ariz.* 321, 376 P.2d 782 (1962); *Dodd v. Boies*, 88 *Ariz.* 401, 403-04, 357 P.2d 144, 145-46 (1960).

78. In jurisdictions which presently exclude illegally obtained evidence from the preliminary hearing, there is a dispute over whether the defendant must still make a motion to suppress the evidence at trial and, correspondingly, over whether the trial judge is bound by the magistrate's ruling. *Compare* CAL. PENAL CODE § 1538.5 (West Supp. 1973); *People v. Superior Court*, 275 *Cal. App. 2d* 49, 79 *Cal. Rptr.* 704 (1969); *Stone v. Hope*, 488 P.2d 616, 619 (Okla. Crim. App. 1971), *with* *State v. Jacobson*, 106 *Ariz.* 129, 471 P.2d 1021 (1970). *See also* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 330.3 (Tent. Draft No. 5, 1972). The better view would seem to be that of endorsing the magistrate's decision as final and binding but allowing an interlocutory appeal of that ruling to the trial judge for review of the legal conclusions but not findings of fact of the magistrate. *But see* CAL. PENAL CODE § 1538.5(i) (West Supp. 1973) (trial judge hears the issue *de novo*); MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 330.6 (Tent. Draft No. 5, 1972); *Congressional Invitation*, *supra* note 5, at 1398-99. Under this view the federal magistrate must be seen as an article III judge. *See* Comment, *An Adjudicative Role for Federal Magistrates in Civil Cases*, 40 *U. CHI. L. REV.* 584 (1973).

The rules of evidence should be applied at a forward-looking preliminary examination for two reasons: (1) the rules of evidence are applied at trial and the forward-looking preliminary examination is concerned with the issue of legal guilt or innocence and the possibility of conviction at trial, and (2) competent evidence is generally more reliable than incompetent evidence. *See* notes 38-39 *supra*. However, it is possible that some incompetent evidence is also reliable, at least under the circumstances of a particular case. Therefore, if hearsay evidence is not disputed, *see* Preliminary Hearing in the District of Columbia, *supra* note 5, at 74-75; *Congressional Invitation*, *supra* note 5, at 1398, or if the judge finds it to be reliable, and if the prosecutor makes a suitable offer of proof that competent evidence will be produced at trial, then such incompetent evidence could be admitted as a substitute without contradicting

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allowed to elicit testimony through cross-examination and to introduce evidence directly, either to rebut the prosecution's case or to establish an affirmative defense. The identity of informers would be revealed and prior statements of prosecution witnesses would be disclosed to the defense. The magistrate would have the authority to evaluate the credibility of those who testify and to dismiss the charges if he disbelieves the testimony of the prosecution's witnesses.

In addition to the above changes in the requirements and format of the preliminary examination, two modifications should be made in the existing federal system. First, the application of trial-type standards in the forward-looking hearing will require that the federal magistrate have legal training and be qualified to handle those legal issues which will arise; the existing requirements for federal magistrates will have to be changed.⁷⁹ Second, a change should also be made in the existing federal law which allows the prosecutor to avoid the preliminary examination if a grand jury indictment is obtained prior to the completion of the hearing.⁸⁰

B. *Objections to a Forward-Looking Federal Preliminary Examination*

1. *Expense and Limited Resources*

One of the foremost objections to a forward-looking preliminary hearing in the federal system is that such a hearing may well be more expensive than the existing type of hearing and is an improvident expenditure of the relatively limited resources of the criminal justice

the premises of the forward-looking model; cf. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 330.4(4) (Tent. Draft No. 5, 1972). Examples of the appropriate application of such an exception to the rules of evidence include admitting certain scientific reports despite the hearsay rule, see N.Y. CODE CRIM. PRO. §§ 180.60(8), 190.30(2) (McKinney 1971), and allowing the hearsay testimony by affidavit of a witness who is either unable to attend the hearing or who would be greatly inconvenienced by being required to attend (a particularly important exception for the federal criminal justice system, which has an expansive geographical jurisdiction; see the Dyer Act, 18 U.S.C. § 2311-13 (1970), hypothetical in the *Advisory Committee's Note to FED. R. EVID.* 1101 (Proposed 1972), in 56 F.R.D. 183, 352 (1972)). Convenience and efficiency, however, must not be allowed to override the substantial rights of the defendant; if the hearsay evidence is contested and the judge is not clearly persuaded of its reliability, then the person with personal knowledge must appear as a witness at the preliminary examination.

79. See note 73 *supra*. Under the forward-looking model the magistrate must have legal training and be considered an article III judge. See Comment, *supra* note 78; *Wedding v. Wingo*, 483 F.2d 1131 (6th Cir. 1973), *cert. granted*, 42 U.S.L.W. 3146 (U.S. Jan. 21, 1974); *Noorlander v. Ciccone*, 14 CRIM. L. REP. 2329 (8th Cir. Dec. 27, 1973).

80. As will be discussed at pp. 802-04 *infra*, the preliminary hearing and the grand jury are radically different institutions. The grand jury cannot alone serve the purposes of the preliminary hearing. Both proceedings (if neither is waived) should be required; cf. *United States v. Strickland*, 14 CRIM. L. REP. 2324 (D.C. Super. Dec. 20, 1973) (grand jury indictment obviates need for preliminary hearing but defendant is entitled to grand jury testimony of major complaining witnesses).

system. A number of factors will contribute to the increase in expense: hiring more and legally qualified magistrates to hold the hearings;⁸¹ meeting increased prosecution and defense (to the extent the public pays for the defense) manpower requirements in order to prepare for and participate in the hearings; and paying the general expense of more judicial proceedings.⁸² Basic data on the expense of a preliminary hearing in the backward-looking federal system or in the forward-looking state systems do not appear to be available. However, the main variables in determining any increase in expense occasioned by the proposed reform will be the absolute increase in the number of hearings actually held and the scope of those hearings.⁸³

a. *Guilty Pleas and Pre-Trial Strategy*

If every felony defendant in the federal system were given a forward-looking hearing in which he actually exercised all the rights available

81. See *Shadwick v. City of Tampa*, 407 U.S. 345, 347-49, 352-53 n.10, 353 n.12 (1972); S. REP. NO. 371, *supra* note 5, at 14; *Alternatives*, *supra* note 5, at 289 n.41, 290; *Interest Analysis*, *supra* note 5, at 178. At present federal magistrates need not be lawyers and may serve only part-time. 28 U.S.C. §§ 631(b)(1), 633(a)(3) (1970). The particular legal responsibilities placed upon a magistrate in the forward-looking hearing, e.g., ruling on the admissibility of evidence and the burden of proof, will require that all magistrates be qualified lawyers. See also *Wedding v. Wingo*, 483 F.2d 1131 (6th Cir. 1973), *cert. granted*, 42 U.S.L.W. 3146 (U.S. Jan. 21, 1974) (suggests only an article III judge can conduct evidentiary proceedings).

It is important to note that the additional expense resulting from changes in the number of qualifications of federal magistrates should be minimal. While the overwhelming number of United States magistrates serve only part-time, see ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS FOR FISCAL YEAR ENDED JUNE 30, 1972, at VI-1 (1972), 68.1 percent of all federal preliminary examinations in fiscal year 1972 were conducted by full-time magistrates, *id.* at VI-12. More significantly, prior to the passage of the Federal Magistrates Act of 1968, 28 U.S.C. §§ 631-39 (1970), only 30 percent of the 700 United States commissioners were not lawyers, S. REP. NO. 371, *supra* note 5, at 10; H. REP. NO. 1629, 90th Cong., 2d Sess. 13 (1968); 1966 *Hearings*, *supra* note 14, at 2; PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 36 (1967), and, given the congressional preference for lawyers as magistrates (S. REP. NO. 371, *supra* at 13-14), the percentage of legally untrained federal magistrates is probably lower than the prior 30 percent figure.

82. These general expenses include stenographer costs, transcript costs, court employee costs, and perhaps increased courthouse space.

The expense objection to the forward-looking hearing duplicates the expense objection to the right to a speedy trial. See, e.g., 1973 *Hearings*, *supra* note 1, at 119-22 (testimony of Deputy Att'y General Joseph Sneed). One must assume that if the forward-looking hearing is adopted in the federal system, it will be accompanied by an appropriation sufficient to meet whatever added expenses it engenders. If there is no such appropriation, enactment of the forward-looking preliminary hearing could cause a significant impediment in the prosecution of less important criminal cases (prosecutors might hesitate to prosecute less important cases if they have insufficient manpower and resources to fully explore those cases), and perhaps increase delay in the system as a whole; cf. 1973 *Hearings* 127 (testimony of United States Att'y James Thompson).

83. As the number of hearings increases the number of magistrates, prosecutors, and defense attorneys, as well as supporting personnel, increases. As the scope of the hearing increases the number of hours spent per hearing by the aforementioned persons would necessarily increase.

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in such a hearing, the expense might well be intolerable.⁸⁴ It is unlikely, however, that such would occur. First, the number of guilty pleas entered *before* the preliminary hearing is actually conducted, and thus obviating the need for it, would probably approximate the number of guilty pleas entered today before trial.⁸⁵ While it is possible that forcing the prosecution to its proof might reduce the prosecutor's bargaining position and enable the defendant to defeat a charge,⁸⁶ there would seem to be substantial considerations weighing in favor of pleading out before the preliminary hearing. Most notably, once the prosecution has gone to the trouble of producing sufficient evidence to avoid a directed acquittal and has generally memorialized its case, there is very little that it can gain from withdrawing the charges already substantially proved, except avoidance of the relatively limited incremental expense of re-presenting the evidence at trial. Furthermore, if the defendant is factually guilty, he may wish to obtain sentencing concessions by pleading early in the process.⁸⁷ If, contrary to current practice, defendants were required to plead at the preliminary hearing, earlier guilty pleas might be elicited.⁸⁸ Second, even if the defendant does not plead out before the hearing, he may not genuinely contest the prosecution's case, since to do so would involve disclosing

84. Preliminary hearings are presently held in less than one-fifth of the criminal cases commenced in federal courts. *See* note 76 *supra*.

85. Presently, the federal system, like those of the states, relies very heavily on pre-trial disposition of cases by guilty pleas. *See* Letter from Deputy Attorney General Ralph Erickson to Senator Ervin, Oct. 3, 1973, *reprinted in 1973 Hearings, supra* note 1, at 183, 188 (stating that 75 percent of the cases in the federal system are disposed by means of guilty pleas). *See also* ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS FOR THE FISCAL YEAR ENDED JUNE 30, 1972, Table D4, at A-54; Table D7, at A-62 (1972) [hereinafter cited as 1972 ANNUAL REPORT]; Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 897 (1964).

86. It is unlikely, however, that a defendant would plead guilty to a charge he could defeat at a forward-looking preliminary hearing even under the present system. The forward-looking preliminary hearing should not, therefore, because of its increased standard of proof alone, lead to a reduction in the number of guilty pleas unless prosecutors frightened by the prospect of increased massive workloads, unnecessarily adopt a particularly lenient bargaining position. *See* note 122 *infra*; *cf.* Note, *The Impact of Speedy Trial Provisions*, 8 COLUM. J.L. & SOC. PROB. 356, 382-83 (1972).

87. *See* *United States v. Wiley*, 184 F. Supp. 679, 681 (N.D. Ill. 1960); Note, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204, 206-07 (1956). *See also* P. GREENWOOD, *supra* note 61, at 21-23, 41-46.

88. *Cf.* CAL. PENAL CODE § 859 (West Supp. 1973). Presently the defendant is required to plead only at arraignment before the trial court. FED. R. CRIM. P. 10. Requiring an earlier plea might encourage more pre-arraignment negotiation since the parties' attention will be focused on the preliminary hearing as the normal date for culmination of plea negotiations; *cf.* R. NIMMER, *THE OMNIBUS HEARING* 93-94 (1971). Since there is no reason to assume that the forward-looking hearing will cause any absolute decrease in the number of guilty pleas (the real issue being when the plea is made and thus whether a full-scale preliminary hearing need be held, *see* note 70 *supra*), if earlier pleas are encouraged most cases which would in any event be disposed of by guilty pleas could be concluded before the preliminary hearing.

his case to the prosecution⁸⁹ and might be fruitless in those situations where the outcome of the case turns, for example, on jury reaction to identification testimony.⁹⁰

The real picture of a system with a forward-looking hearing then is one in which the vast majority of criminal defendants either plead out before the preliminary hearing or do not contest the prosecution's case at that hearing.⁹¹ The limited use, however, of the right to a full forward-looking preliminary hearing in no way defeats its purpose—to afford legally and factually innocent defendants a protection from unwarranted charges. The limited use simply reflects the fact that legally and factually innocent defendants are generally not subjected to unwarranted charges.⁹²

b. *Costs Saved By the Forward-Looking Preliminary Hearing*

Despite the fact that the total increase in the number and scope of preliminary hearings under the proposed reform should not be substantial, certain increases in expense will occur and must be considered as inherent in the proposal. These will stem largely from some limited increases in the number and quality of magistrates and in the number of prosecuting and defense attorneys required in pretrial procedure. These expenses, however, may be offset by certain cost-savings which the forward-looking hearing might effect.

One such cost-saving is that caused by the combination and unification of the various pretrial motion hearings. Presently, a defendant is entitled to a preliminary hearing,⁹³ a hearing on a motion to suppress illegally gathered evidence under either the Fourth or Fifth Amend-

89. See *California v. Green*, 399 U.S. 149, 197 (1970) (Brennan, J., dissenting); *People v. Gibbs*, 255 Cal. App. 2d 739, 744, 63 Cal. Rptr. 471, 475 (1967); *Myers v. Commonwealth*, 298 N.E.2d 819, 828 (Mass. 1973); 8 MOORE'S FEDERAL PRACTICE ¶ 5.1.02[3], at 5.1-12 (2d ed. R. Cipes 1973).

90. However, not all cases which involve credibility should be processed forward to trial since the magistrate has the authority and responsibility to evaluate the credibility of witnesses. See p. 782 *supra*.

91. This conclusion is supported by the experience of California with its forward-looking hearing. In 1965-66, California municipal courts disposed of 48,601 felony filings, of which 16,200 involved no hearing at all because of guilty pleas or dismissed charges and 31,896 involved limited hearings in which the defendant did not contest the prosecution's evidence. *People v. Gibbs*, 255 Cal. App. 2d 739, 743-44 n.2, 63 Cal. Rptr. 471, 475 n.2 (1967). See also ADMINISTRATIVE OFFICE OF THE CALIFORNIA COURTS, ANNUAL REPORT FOR THE FISCAL YEAR 1970-71, at 118, 121, 155 (1972); P. GREENWOOD, *supra* note 61, at 18-20.

92. The ratio of convictions to prosecutions in the federal and some state systems is approximately 90-95 percent; most of these convictions (85-95 percent) are obtained by pleas of guilty. See Weinberg & Vasios, A Statistical Outline, in A. Goldstein & L. Orland, Cases & Materials on Criminal Procedure, at III-A-3 to -6 (unpublished course materials 1972). See also P. GREENWOOD 72-73.

93. FED. R. CRIM. P. 5.1.

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ments,⁹⁴ a *Wade-Stovall*⁹⁵ hearing⁹⁶ and, increasingly, a hearing on discovery motions.⁹⁷ In a forward-looking system, all these hearings could be consolidated and held at the time of the preliminary hearing; since a forward-looking preliminary hearing is concerned with the legality of evidence, such issues would come before the magistrate in the normal course of the hearing. This combination pretrial hearing held before one magistrate would thus promote efficient allocation of judicial resources and speed the flow of cases through the system.⁹⁸ Furthermore, the unification of pretrial motion practice before a magistrate would relieve the trial judge of the burden of conducting most pretrial proceedings.⁹⁹

Second, the unification of pretrial practice in the preliminary hearing and the nature of the forward-looking hearing itself may be expected to force earlier plea negotiations and ultimately an earlier plea bargain, if one is forthcoming.¹⁰⁰ Since the great mass of cases in the

94. See *Miranda v. Arizona*, 384 U.S. 486 (1966); *Mapp v. Ohio*, 367 U.S. 643 (1961); Symposium, *Bail, Preventative Detention and Speedy Trial*, 8 COLUM. J.L. & Soc. PROB. 1, 19, 20 (1971).

95. See *Stovall v. Denno*, 388 U.S. 293 (1967); *United States v. Wade*, 388 U.S. 218 (1967).

96. This hearing is held to determine the constitutional sufficiency of line-up or other identification procedures. See *United States v. King*, 461 F.2d 152 (D.C. Cir. 1972).

97. See 18 U.S.C. § 3500 (1970); *United States v. Bryant*, 439 F.2d 642 (D.C. Cir. 1971); R. NIMMER, *supra* note 88, at 21-24, 66-71.

98. Efficient allocation of court time and speedy disposition of cases were the main goals of the "omnibus hearing" proposed by the American Bar Association. AMERICAN BAR ASS'N, PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL 135-37 (1969). See R. NIMMER, *supra* note 88, at 1-3, 53-71. The omnibus hearing was designed, much like the civil pretrial conference, see *Louisell, Discovery and Pre-Trial Under the Minnesota Rules*, 36 MINN. L. REV. 633, 660-68 (1952), to eliminate issues, promote scheduling efficiency, and resolve discovery controversies. See R. NIMMER, *supra* at 1-3, 53-71. See also Miller, *The Omnibus Hearing—An Experiment in Federal Criminal Discovery*, 5 SAN DIEGO L. REV. 293 (1968). At least two states have instituted a proceeding similar to the omnibus hearing to oversee plea negotiations. See Cahalan, *Efficiency and Justice*, 5 PROSECUTOR 330 (1969). The expanded preliminary hearing proposed in this Note would presumably exercise the functions of the omnibus hearing as well as certain others. See notes 94-96 *supra*. Mr. Nimmer has indicated that the San Diego omnibus hearing did not speed disposition of criminal cases. R. NIMMER, *supra* at 87. However, this can be traced largely to the fact that the hearing occurs before the trial judge after arraignment and does not involve issues upon which court time has already been spent, e.g., motions to suppress. Mr. Nimmer notes that discovery after arraignment delayed completion of plea negotiations and thus lengthened the time for disposition of cases. *Id.* at 92. This would rarely occur under the preliminary hearing reforms suggested herein since they advance the point of plea negotiation. Conceivably, however, defendants could demand further discovery, e.g., of grand jury minutes, or a suppression hearing for after-acquired evidence.

99. See *Commonwealth v. Scott*, 355 Mass. 471, 479, 245 N.E.2d 315, 320 (1969) (length of time spent on pretrial hearings is "amply demonstrative of the reason why there is heavy and increasing congestion in the jury trials of criminal causes"); Symposium, *supra* note 94, at 119-20. See also SEMI-ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 10, 38-39, 44, 57-58 (1973); Comment, *supra* note 78, at 585-86, 594-96.

100. See p. 791 *supra* for a discussion of the impact of a forward-looking hearing on prehearing pleas. Even if prehearing pleas decrease, one could reasonably expect

criminal justice system are concluded by a guilty plea,¹⁰¹ this shortening of the time lapse between arrest and ultimate disposition would reduce the expense, both social and individual, associated with delay in the criminal process.¹⁰² By ensuring that ultimate disposition occurs in most cases before the need for a grand jury indictment arises, the forward-looking hearing may significantly reduce the costs of grand jury proceedings.¹⁰³

The stiff evidentiary standards of the forward-looking hearing may also have cost-saving effects. First, defendants who are bound over after a genuinely contested forward-looking preliminary hearing might be expected to plead guilty, thus resulting in an absolute increase in the number of guilty pleas entered.¹⁰⁴ The experience in the Southern District of New York after institution of speedy trial rules¹⁰⁵ suggests that this increase will be fostered by elimination of attrition of prosecution evidence as a result of delay. After imposition of speedy trial rules in that jurisdiction there was a 20 percent increase in guilty pleas because defendants who formerly might have relied upon such attrition saw no point in delaying guilty pleas.¹⁰⁶ The advantages of forward-looking hearings in the preservation of evidence¹⁰⁷ would thus

that this decrease will be obviated by pleas entered immediately after the hearing, since there would then be little reason for delaying the bargain; *cf.* R. NIMMER, *supra* note 88, at 66. *See also* 118 CONG. REC. S14,748 (daily ed. Sept. 13, 1972) (Statement of United States Attorney Whitney North Seymour, Jr.).

101. *See* sources cited note 85 *supra*.

102. *See* R. NIMMER, *supra* note 88, at 91-94; 1973 *Hearings, supra* note 1, at 141-44 (Statement of Dean Dallin H. Oaks). On the costs of delay in the criminal justice system, *see* sources cited in notes 5 & 69 *supra*.

103. In fiscal year 1972, 31,601 federal prosecutions were begun by indictment, while indictment was waived in 4,402 cases. 1972 ANNUAL REPORT, *supra* note 85, Table 29, at II-52; Table D2, at A-42. During this fiscal year, the per diem compensation of grand jurors, the only cost with respect to grand jury proceedings available, was \$3,085,800, *id.* at II-79 to -80. Since guilty pleas in the federal system account for 75 percent of total dispositions, *see* note 85 *supra*, the reforms suggested herein should save substantial funds.

104. *Cf. Hearings on S. 3475 and S. 945 (Federal Magistrates Act) Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 141-42 (1967) (Statement of Prof. Samuel Dash); 1966 *Hearings, supra* note 14, at 271-72 (Statement of Prof. A. Kenneth Pye); *id.* at 222 (Statement of Prof. Irving Younger); *Preliminary Hearings in Los Angeles, supra* note 5, at 937, 948-53.

105. *See* 118 CONG. REC. S14,748 (daily ed. Sept. 13, 1972) (Statement of United States Attorney Whitney North Seymour, Jr.). *See also* Law Enforcement Assistance Administration, U.S. Dep't of Justice, Press Release, Jan. 26, 1974, at 2, *discussed* note 67 *supra*.

106. *See* 118 CONG. REC. S14,748 (daily ed. Sept. 13, 1972) (Statement of United States Attorney Whitney North Seymour, Jr.). Mr. Seymour reported that the rate of disposition after the institution of the speedy trial rules was up 20 percent, largely because "defendants now know that they will go to trial soon, and are therefore more inclined to enter guilty pleas than they were when they could count on a certain amount of attrition as cases languished in file cabinets. . . . From a prosecutor's point of view, the result was a bonanza—the conviction rate in cases which were disposed of on the merits climbed from 90 percent to 95 percent."

107. *See* note 63 *supra*.

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seem to buttress the inference that such hearings may result in an absolute increase in guilty pleas. At the very least, a bind-over after a genuinely contested preliminary hearing should result in more waivers of grand jury indictment.¹⁰⁸ On the other hand, stiff standards of proof may well eliminate charges upon which the government could not convict, and thereby save the expense of a trial on those charges.¹⁰⁹ In other cases where the ultimately guilty defendant still goes to trial, the preliminary hearing transcript might be introduced at trial, by stipulation of the parties¹¹⁰ or otherwise,¹¹¹ in lieu of testimony on settled issues, thus eliminating trial expenses and simplifying presentation of the remaining issues at the trial.

A final cost-savings of sorts involves the enhancement in the skill of and participation by federal magistrates as a consequence of the proposed reforms. Such a growth in skill and participation should improve their conduct of the other duties for which they are presently responsible.¹¹² The cost-savings which might be expected from this improvement include fewer habeas petitions alleging an illegal detention, fewer illegal incarcerations, and less time spent by trial judges on pre-trial procedural matters.¹¹³

108. See 1966 Hearings, *supra* note 14, at 271 (Statement of Prof. A. Kenneth Pye).

109. More than one-third of federal and state trials in the period 1946-66 resulted in acquittals. See Weinberg & Vasios, *supra* note 92, at III-A-7 to -9, 14-15. A forward-looking preliminary hearing could screen out many of these unsuccessful prosecutions. For an example of the type of trial an effective forward-looking hearing might avoid, see Harris, *Hogtown Justice*, ROLLING STONE, Feb. 14, 1974, at 46 (the Gainesville Conspiracy trial of eight members of the Vietnam Veterans Against the War cost the government \$1 million in an unsuccessful prosecution).

In fiscal year 1972, there were 7,818 criminal trials in the federal district courts, of which 2,968 were nonjury trials and 4,850 were jury trials, 1972 ANNUAL REPORT, *supra* note 5, Table 43, at II-P2 (1972). The trend is toward a greater number of criminal trials, with the number of criminal jury trials increasing more rapidly than the number of criminal nonjury trials, *id.*

110. See *People v. Cagle*, 21 Cal. App. 3d 57, 60-61, 98 Cal. Rptr. 348, 349-50 (1971).

111. See note 63 *supra*. In Los Angeles County, the entire preliminary hearing transcript is introduced into evidence in 75 percent of the trials. *Preliminary Hearings in Los Angeles*, *supra* note 5, at 931; see also *id.* at 638 n.5, 648, 658 n.76, 931-39.

Both 18 U.S.C. § 3060(f) (1970), and FED. R. CRIM. P. 5.1(c) require that a verbatim record be kept of the preliminary hearing and sound equipment has been furnished to magistrates for this purpose. See 1972 ANNUAL REPORT, *supra* note 85, at IV-4. See also MODEL CODE OF PRE-ARREST PROCEDURE § 330.4(7) (Tent. Draft No. 5, 1972). The furnishing of a tape recording instead of a written transcript of the preliminary hearing withstood an equal protection attack in *State ex rel. Moreno v. Floyd*, 516 P.2d 670 (N.M. 1973). But cf. *Wedding v. Wingo*, 483 F.2d 1131, 1137 (6th Cir. 1973), cert. granted, 42 U.S.L.W. 3146 (U.S. Jan. 21, 1974) (phonograph recording of habeas corpus proceeding violates FED. R. APP. P. 10).

112. Presently, the federal magistrates oversee the issuance of search warrants, 28 U.S.C. § 636(a) (1970), hold bail hearings, *id.*, inform the accused of his rights at the initial appearance, *id.*; FED. R. CRIM. P. 5(c), assist with pretrial discovery proceedings, 28 U.S.C. § 636(b)(2) (1970), provide preliminary review of prisoners' applications for postconviction relief, *id.* at (b)(3), serve as special masters, *id.* at (b)(1), and conduct trials involving minor offenses, 18 U.S.C. § 3401 (1970); FED. R. CRIM. P. 5(b). Congress had indicated that it prefers that magistrates be lawyers. See S. REP. NO. 371, *supra* note 5, at 13-14.

113. See note 99 *supra*.

c. *The Benefits Are Worth the Probable Cost*

The increased expense of the forward-looking hearing and the potential cost-savings it might effectuate are uncertain since there have been no detailed empirical studies of these issues. Eliminating delay in the criminal justice system and protecting defendants from unwarranted charges are values of such force, however, that they should be pursued even at significant cost.¹¹⁴ Indeed, in *Barker v. Wingo*,¹¹⁵ Justice White in concurring was careful to point out that "crowded dockets and prosecutorial caseloads"¹¹⁶ are not sufficient reason for excusing a presumptively prejudicial delay in trial. Thus, under principles embodied in the Constitution itself, the nation should be prepared to spend significant sums to make meaningful the right to a speedy trial. Surely the nation should be prepared to spend a lesser amount to realize the same goals in the forward-looking preliminary hearing.

2. *Burden on Prosecution*

Another objection to the forward-looking hearing is that such a hearing will put an intolerable burden on prosecutors. This burden may be conceptualized as follows. First, a forward-looking preliminary hearing will require a prosecutor to be substantially ready for the hearing within an unrealistically short time frame, thus interfering with the flow of work in the prosecutor's office and seriously impairing prosecution of particularly complicated cases. Second, a corollary to the first objection, the potential pressure on the prosecutor resulting from the early preliminary hearing date will give leverage to defendants in plea negotiations.¹¹⁷

These objections are not persuasive. While under the forward-looking hearing the prosecution would have to be ready for a potentially lengthy hearing within 20 days,¹¹⁸ as indicated above only a fraction of all criminal cases would probably go through a complete forward-

114. See 1973 Hearings, *supra* note 1, at 119.

115. 407 U.S. 514, 536 (1972) (White & Brennan, JJ., concurring) (five-year delay does not violate the right to a speedy trial).

116. *Id.* at 537.

117. These objections have been advanced in opposition to legislative implementation of the right to a speedy trial. See Letter from Deputy Attorney General Ralph Erickson to Senator Ervin, Oct. 3, 1973, reprinted in 1973 Hearings, *supra* note 1, at 183, 188; *id.* at 144 (Statement of Dean Dallin Oaks); *id.* at 132-38 (Statement of Carol Vance, President, National District Attorneys Association); Note, *supra* note 86, at 378-80.

118. FED. R. CRIM. P. 5(c) requires that the preliminary hearing be held within 10 days if the defendant is in custody and within 20 days if he is free on bail. Most preliminary examinations in the federal system are held toward the end of the allowable time period. See Note, *Probable Cause at the Initial Appearance in Warrantless Arrests*, 45 So. CAL. L. REV. 1128, 1132-33 (1972).

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looking hearing.¹¹⁹ Furthermore, if there is insufficient manpower in a particular prosecutor's office to move the cases on to a hearing, the solution is to hire more prosecutors. If the prosecutor has sufficient manpower to move forward with the preliminary hearings which will be held, the defendant should enjoy no greater bargaining position in plea negotiations;¹²⁰ indeed, the prospect of virtually no bargaining position after the prosecution is forced to put on a substantial part of its case may move the defendant to be more willing to plead out before the hearing.¹²¹ In sum, if the prosecution has the manpower to go to the preliminary hearing and indicates to all potential defendants a firm resolve to do so if there is no bargain, guilty pleas should increase and there should be no addition to the defendant's bargaining position.¹²²

There would remain, however, the problem of the particularly complicated case. The impact of the preliminary hearing reforms suggested herein may be significant but not necessarily adverse to the prosecution's interests. The requirement of an early hearing may discourage the prosecution from arresting any of the participants in the alleged complex crime until the case is sufficiently developed, but it is hard to understand why that causes difficulty. This procedure is very similar to that followed in "extraordinary" process, the process generally involved in complicated antitrust, tax fraud, or election law cases, in which no arrests are made until after the grand jury indictment.¹²³

119. See p. 791 *supra*.

120. This notion of insufficient prosecutorial manpower is implicit in criticisms of proposals to implement the right to a speedy trial. See sources cited note 117 *supra*. Thus, when reduced, these criticisms are mostly an expression of skepticism as to society's willingness to pay for a better criminal justice system. See, e.g., 1973 *Hearings*, *supra* note 1, at 119-21 (Testimony of Deputy Attorney General Joseph Sneed).

121. Cf. 118 CONG. REC. S14,748 (daily ed. Sept. 13, 1972) (Statement of United States Attorney Whitney North Seymour, Jr.). See also Note, *supra* note 86, at 384, 394-95 (data which indicate that the relative stringency of various state speedy trial provisions has no discernible effect on the quality of prosecution's preparation as reflected in rate of guilty pleas).

122. It should be emphasized that the greatest threat to the stability of plea negotiations in connection with institution of a forward-looking preliminary hearing is a subjective self-fulfilling prophecy occasioned by prosecutors who fear that if they do not immediately plead out large numbers of defendants on very lenient terms, they will be engulfed with requests for lengthy preliminary hearings and trials. See Note, *supra* note 86, at 383-85; cf. Rothblatt, *Bargaining Strategy*, TRIAL, May/June 1973, at 20. If, however, the prosecution stands firm and negotiates vigorously, there is no reason to believe that relative bargaining strengths will shift. All this, of course, assumes that any increased costs occasioned by a forward-looking preliminary hearing are in fact met.

123. See *Albrecht v. United States*, 273 U.S. 1, 4 (1927); *In re Presentment of Special Grand Jury*, 315 F. Supp. 662 (D. Md. 1970); FED. R. CRIM. P. 9(a); Cohen & Dession, *Inquisitorial Functions of Grand Juries*, 41 YALE L.J. 687, 711-12 (1932); A. Goldstein, *supra* note 77, at 1169; Note, *The Grand Jury as An Investigative Body*, 74 HARV. L. REV. 590 (1961). In extraordinary process a grand jury indictment precedes arrest and thereby eliminates the preliminary hearing altogether. If the prosecution went into a preliminary hearing in a complicated case and failed to carry its burden of proof, the result would be only a dismissal of the charges without prejudice. See note 58 *supra*. In effect, the prosecution must fully develop its case, with or without grand

3. *Burden on the Defense*

A further objection to the forward-looking preliminary hearing is that in many cases it will occur before the defense can develop an intelligent rebuttal of the prosecution case.¹²⁴ A corollary to this argument is that any continuances beyond the present 20 day period would delay judicial review of the arrest.¹²⁵

This objection must be premised on a belief that the defense bar will be unable to prepare for preliminary hearings in cases where the defendant's interests demand a vigorous rebuttal and will, therefore, be forced either to bargain before the hearing or to allow an uncontested bind-over. Fear of such consequences seems largely unfounded. Most criminal litigation does not involve extensive investigation.¹²⁶ To the extent it does, the prosecution's case is generally more carefully prepared, and it is thus less likely in such cases that unwarranted charges of the sort which a forward-looking preliminary hearing seeks to eliminate would be brought. Moreover, a major cause of delays presently requested by defense counsel is not counsel's concern about

jury subpoena power, before arresting under a forward-looking preliminary hearing procedure; the result is similar to extraordinary process because the arrest follows the full development and investigation of the case, rather than precedes it.

Another potential difficulty with the forward-looking preliminary hearing from the prosecution's point of view is that it might affect the operation of the statute of limitations. Normally the statute of limitations is tolled by a grand jury indictment. See *United States v. Garcia*, 412 F.2d 999 (5th Cir. 1969). If a forward-looking hearing causes dismissal of charges in a complicated case after a grand jury indictment and arrest, the question arises whether the statute of limitations begins to run again. The answer presumably is negative as long as the grand jury indictment is not "stale," cf. *Commonwealth v. Eazer*, 312 A.2d 398 (Pa. 1973), and could be used to re-arrest at any time; cf. *United States v. Wilsey*, 458 F.2d 11 (9th Cir. 1972); *United States v. Zirpolo*, 334 F. Supp. 756 (D.N.J. 1971). Dismissal of charges at a forward-looking hearing does not operate to "dismiss" an indictment since the grand jury is a qualitatively different pretrial screen, see pp. 802-04 *infra*, justifying arrest on its own grounds. See *United States v. Calandra*, 94 S. Ct. 613, 617-19 (1974).

All this discussion admittedly does not deal with the problem of the absconding defendant. That problem, however, exists regardless of the form of the preliminary hearing. The absconding accused is not irretrievably lost to the charging jurisdiction. He may be kept under surveillance while the prosecutor builds a stronger case and then extradited or "forcibly abducted," see *Frisbie v. Collins*, 342 U.S. 519 (1952), from another jurisdiction. Furthermore, if the defendant is a "fugitive from justice" or is otherwise removed from the jurisdiction, the statute of limitations is tolled. See *Taylor v. United States*, 238 F.2d 259 (D.C. Cir. 1957); *Donnell v. United States*, 229 F.2d 560 (5th Cir. 1956).

124. This argument has frequently been advanced in opposition to strict implementation of the right to a speedy trial. See, e.g., 1973 *Hearings*, *supra* note 1, at 144-52 (Statement of Gilbert Rosenthal).

125. Prompt judicial review of arrest is a function of the present backward-looking preliminary hearing. See *United States v. Quinn*, 357 F. Supp. 1348, 1351-52 (N.D. Ga. 1973); 1966 *Hearings*, *supra* note 14, at 270 (Statement of Prof. A. Kenneth Pye).

126. Most criminal litigation involves the relatively simple issue of whether X did Y; most investigation involves review of the prosecution's file and perhaps some independent investigation of that evidence; cf. E. BORCHARD, *CONVICTING THE INNOCENT* xiv-xx (1932); R. NIMMER, *supra* note 88, at 66-71, 84-85. Indeed, the better view is that the preliminary hearing is the best investigation device the defense has. See A. Goldstein, *supra* note 77, at 1182-83; note 89 *supra*.

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adequate time in which to prepare a case but rather his efforts to delay and obtain a bargaining advantage, an interest which, in terms of the system as a whole should be considered illicit and not deserving of protection.¹²⁷

It is certainly not clear that the forward-looking preliminary hearing need require more than 20 days' preparation.¹²⁸ Even if it does, the increase in delay of review of the arrest is not a significant prejudice to the rights of accused. First, few illegal detentions are actually discovered at those preliminary hearings which are held;¹²⁹ since most illegal detentions are screened out by other mechanisms, go undetected, or do not occur,¹³⁰ little would be lost by a delay of the reviewing mechanism. Second, the availability of pretrial release¹³¹ reduces the

127. See *Barker v. Wingo*, 407 U.S. 514, 521 (1972); 118 CONG. REC. S14,748 (daily ed. Sept. 13, 1972) (Statement of United States Attorney Whitney North Seymour, Jr.); Anderson & Banfield, *Continuances in the Cook County Criminal Courts*, 35 U. CHI. L. REV. 259, 300 (1968); Note, *supra* note 86, at 372-73.

128. States with forward-looking hearings require that preliminary hearings be held within comparable time frames. See CAL. PENAL CODE § 859b (West Supp. 1973) (defendant has a right to a hearing within 10 days of his initial appearance, which is termed an arraignment in California; it has not been settled whether the defendant may consent to continuances, but any continuance can only be for a period of six days, see *id.* § 861 (West 1970)); MICH. COMP. LAWS ANN. § 766.4 (Supp. 1973) (hearing must be conducted within 12 days after the initial appearance); WIS. STAT. ANN. § 970.03(2) (1971) (hearing "shall be commenced within 20 days after the initial appearance . . . if the defendant has been released from custody or within 10 days if the defendant is in custody . . ."). See also MASS. ANN. LAWS ch. 276, § 38 (1968) (preliminary hearing must be held "as soon as may be" after the initial appearance); MODEL CODE OF PRE-ARRESTMENT PROCEDURE § 310.5(3) (Tent. Draft No. 5, 1972) (hearing must be held within 10 days if the defendant is in custody and within 30 days if released).

129. Few charges are dismissed at preliminary hearings. See 8 MOORE'S FEDERAL PRACTICE ¶ 51.02[3], at 51-12 n.17 (2d ed. R. Cipes 1973); Preliminary Hearing in the District of Columbia, *supra* note 5, at 41-45. THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 43 (1967), indicates that the screening function of the existing preliminary examination is only "relevant to a small minority of cases" and is "meaningful only in a small percentage of the cases."

130. It is unclear which of the three possibilities enumerated in the text is responsible for the infrequent dismissal of charges at federal preliminary examinations. See A. Goldstein, *supra* note 77, at 1169, although it is likely that prosecutorial screening is the most important explanation. In particular, the exercise of prosecutorial discretion not to press charges, after an initial review of the case by the prosecutor, is a major screen in the federal system. See Preliminary Hearing in the District of Columbia, *supra* note 5, at x-xi, 12, 17; *Congressional Invitation*, *supra* note 5, at 1381-82. In fiscal year 1970, for example, 38,102 federal criminal cases were commenced, while prosecution was declined in 89,139 investigative matters which were presented for prosecutorial decision. See OFFICE OF MANAGEMENT AND BUDGET, SPECIAL ANALYSES, BUDGET OF THE UNITED STATES, 1972, FEDERAL PROGRAMS FOR THE REDUCTION OF CRIME, SPECIAL ANALYSIS M Table M-4, at 209 (1971). On this aspect of state criminal justice systems, see F. MILLER, *supra* note 5, at 9-19, 78, 83-84, 103, 347-50; McIntyre & Lippman, *supra* note 5.

131. See 18 U.S.C. §§ 3141, 3148 (1970); FED. R. CRIM. P. 5(c), 46; Bogomolny & Sonnenreich, *Bail Reform Act of 1966: Administrative Tail Wagging and Other Legal Problems*, 11 ARIZ. L. REV. 201 (1969); Hunter, *Bail Reform Act of 1966*, 40 U.M.K.C. L. REV. 295 (1972); Miller, *Bail Reform Act of 1966: Need for Reform in 1969*, 19 CATH. U. L. REV. 24 (1969); Note, *Bail Reform Act of 1966*, 53 IOWA L. REV. 170 (1967).

Of course, some detrimental consequences of an illegal arrest can never be rectified, no matter how prompt or thorough the preliminary examination, e.g., the stigma and

urgency of very early judicial review of the legality of the continued detention and permits attention to be focused more on dismissal of the underlying charges than on physical freedom.

4. *Comparison with the Speedy Trial Right*

Another objection which might be made to the forward-looking preliminary hearing is that its goals can be better realized by effective implementation of the right to a speedy trial.¹³² If all trials had to be held within 60 days of arrest, there would be little need for so serious a pretrial proceeding. The present judicially enforced right to a speedy trial does not, of course, approach such a 60 day limit.¹³³ Furthermore, the political opposition to Senator Ervin's proposals for a mandatory trial within 60 days of arrest suggests that legislative action is unlikely to be forthcoming.¹³⁴ In any event, both Senator Ervin's proposals and other proposals to decrease delay between arrest and trial have a number of loopholes which arguably permit many cases to be delayed far beyond 60 days.¹³⁵

humiliation of the arrest itself; the focus of any preliminary examination, however, must be on those aspects of an illegal arrest which can be cured and particularly on the termination of the illegal detention, for all other remediable consequences can be handled by the cessation of incarceration. To the extent that the accused is not in custody, therefore, it becomes less imperative that there be a prompt preliminary examination.

This discussion does not imply that some of the conditions of pretrial release under 18 U.S.C. §§ 3146, 3148 (1970), are not burdensome; it is only stating that they are less onerous than incarceration and to that extent that the need for a prompt preliminary examination is reduced. Moreover, given the language and legislative history of the federal system of pretrial release contained in 18 U.S.C. §§ 3146, 3148 (1970), it was clearly the congressional intent that these more onerous conditions of release are to be imposed only rarely. Unfortunately there is a dearth of information on this subject. In the District of Columbia in 1970, pretrial release on personal recognizance or other nonfinancial condition was ordered in 57 percent of the cases, while a per centum deposit or surety bond was required in the remaining cases. *See Report of the District of Columbia Bail Agency for the Period January 1, 1970–December 31, 1970*, in 1971 *Hearings*, *supra* note 1, at 581. However, the *Report* does not indicate at what point in the process these pretrial releases were obtained, what the nonfinancial conditions of release were, or what percentage of these people upon whom financial conditions of release were imposed were able to satisfy the conditions.

Furthermore, the remedy of habeas corpus might be employed to test the legality of the arrest. *See* U.S. CONST. art. I, § 9, cl. 2; 28 U.S.C. § 2241(c) (1970); A. Goldstein, *supra* note 77, at 1165 n.46, 1168 n.53. *But see* F. MILLER, *supra* note 5, at 60-63. *See generally* R. SOKOL, *FEDERAL HABEAS CORPUS* (2d ed. 1969).

132. On the various proposals to implement the right to a speedy trial beyond its present interpretation by the courts, see sources cited note 3 *supra*.

133. *See* Note, *supra* note 1, at 663-65. Two particularly egregious examples are *Barker v. Wingo*, 407 U.S. 514 (1972) (five-year delay does not violate the speedy trial right); *United States ex rel. Pierce v. Lane*, 302 F.2d 78 (7th Cir. 1962) (18 years between conviction and new trial held not to violate right to a speedy trial). *See also* Note, *The Lagging Right to a Speedy Trial*, 51 VA. L. REV. 1587 (1965).

134. *See* 1973 *Hearings*, *supra* note 1, at 109-26 (Statement of Deputy Attorney General Joseph Sneed expressing Department of Justice opposition to Senator Ervin's bill); *id.* at 107-09 (Statement of Senator Roman Hruska).

135. *See* S. 754, 93d Cong., 1st Sess. § 3161(c) (1973) (excludes from computation of the 60 day period delays resulting from other trials involving the defendant, delays

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Moreover, the objections to a mandatory trial within 60 days of arrest, objections which generate both political opposition and lead to loopholes within the proposals themselves, have considerable merit. The primary objection is that the sanction for failure to try within 60 days is mandatory dismissal with prejudice, arguably a sanction too severe for the transgression.¹³⁶ A secondary objection, tied to the first, is that, given the extreme sanction of dismissal with prejudice, 60 days is simply too short a time to prepare extremely complicated cases.¹³⁷ Finally, there is the issue of cost. It is not at all clear that implementation of the speedy trial will result in more trials and, therefore, in significantly increased costs, for reasons advanced earlier;¹³⁸ however, even assuming that implementation of the speedy trial right or of a forward-looking preliminary hearing would either, individually, result in more trials or hearings, the cost objection is more formidable in the speedy trial context than in the forward-looking preliminary hearing context. The combination of a backward-looking hearing and an effective speedy trial right would be more expensive than the combination of a forward-looking hearing and an ordinary, that is, delayed, trial if for no other reason than the expense of juries.¹³⁹

Finally, there are few benefits which the speedy trial right would afford that could not also be afforded to some extent by a forward-looking preliminary hearing. With respect to speedy disposition of most cases, the preliminary hearing is superior since it will probably induce earlier plea negotiations and bargains. Admittedly, the forward-looking preliminary hearing cannot finally dispose of a case and thus

resulting from pretrial motions, and any period of delay resulting from a continuance granted by the judge on the basis of a finding that "the ends of justice and the best interest of the public as well as the defendant, would be served thereby"); Note, *supra* note 1, at 677-88 (discusses excluded periods under the proposed ABA standards, the New York state speedy trial rules, and the Second Circuit Plan; all three exclude continuances for the "ends of justice" and continuances for "exceptional circumstances").

136. See *Barker v. Wingo*, 407 U.S. 514, 522 (1972); 1973 *Hearings*, *supra* note 1, at 111 (Statement of Deputy Attorney General Joseph Sneed); *id.* at 139 (Statement of Dean Dallin Oaks).

137. *Id.* at 125 (Colloquy of Senator Roman Hruska and Deputy Attorney General Joseph Sneed).

138. See pp. 790-95 *supra*.

139. Two other objections to legislative imposition of the right to a speedy trial, its effect on guilty pleas, see note 117 *supra*, and its burden on the defense, see note 124 *supra*, are also more persuasive in the speedy trial context than in the preliminary hearing context. Since both prosecution and defense are faced with an irrevocable sanction, *i.e.*, conviction or dismissal with prejudice, there is a greater burden on both at trial than at a preliminary hearing where the sanction is temporary, *i.e.*, bind-over or dismissal without prejudice. Thus, there is more reason for prosecutors to fear large-scale refusals to bargain and requests for jury trials by recalcitrant defendants and for defense attorneys to fear that they will not have sufficient time to prepare certain delicate and tricky trial strategies, *e.g.*, undermining the credibility of a prosecution identification witness. See pp. 795-99 *supra*.

permit incarceration which would prevent commission of further crimes while the accused is out on bail; it can, however, develop sufficient information as to the probability of guilt of the accused¹⁴⁰ to permit the magistrate to set bail which more accurately reflects the likelihood that the accused will abscond and, in jurisdictions where it is permitted, to justify imposition of preventive detention. A forward-looking preliminary hearing cannot in all cases, of course, clear an individual of charges which will not prevail at trial; it can, however, relieve him, at least temporarily, of charges which as a matter of law cannot withstand a motion for directed acquittal. In conclusion, while complete implementation of the right to a speedy trial might be more effective in some respects than a forward-looking preliminary hearing, its implementation is so improbable, its monetary and social costs so high, and its incremental advantages so slight that the forward-looking preliminary hearing seems preferable.

5. *Redundancy and Relation to the Grand Jury*

A further objection that may be raised is that a forward-looking preliminary examination is unnecessary and redundant in a federal system in which the grand jury is a regular part of the charging process in felony cases¹⁴¹ and acts as a screening mechanism for the protection of the accused.¹⁴² This objection is subject to serious dispute. First, the grand jury is very often a rubberstamp for the prosecutor, and therefore affords no protection to the accused in the overwhelming majority of cases.¹⁴³ Moreover, even if the grand jury process functioned properly, it would not render the forward-looking preliminary examination

140. See 18 U.S.C. § 3146(b) (1970).

141. See note 74 *supra*.

142. Although all states with forward-looking preliminary hearings permit felony prosecutions to be instituted by indictment, only Massachusetts (for felonies punishable by imprisonment for five years or more) and New York require the use of an indictment (MASS. ANN. LAWS ch. 218, § 26, ch. 263, § 4 (Supp. 1973); N.Y. CONST. art. I, § 6; N.Y. CODE CRIM. PRO. § 100.05 (McKinney Supp. 1972), §§ 180.10(2), 180.30 (McKinney 1971). Indictments are not regularly used in the other states with forward-looking preliminary examinations. During the period of 1960-70, for example, grand jury indictments were used in less than four percent of the California felony prosecutions. See *Preliminary Hearings in Los Angeles*, *supra* note 5, at 678.

143. See, e.g., Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A.J. 153, 154 (1965); Boudin, *The Federal Grand Jury*, 61 GEO. L.J. 1 (1972); Calkins, *Abolition of the Grand Jury Indictment in Illinois*, 1966 U. ILL. L.F. 423, 431-32 (1966); Campbell, *Delays in Criminal Cases*, 55 F.R.D. 229, 253 (1972); A. Goldstein, *supra* note 77, at 1171; Meshbeshier, *Right to Counsel Before Grand Jury*, 41 F.R.D. 189 (1967); Morse, *A Survey of the Grand Jury System II*, 10 ORE. L. REV. 295, 363 (1931); Shannon, *The Grand Jury: True Tribunal of the People or Administrative Agency of the Prosecutor?*, 2 N. MEX. L. REV. 141, 164-66 (1972); Note, *Evaluating the Grand Jury's Role in a Dual System of Prosecution: An Iowa Case Study*, 57 IOWA L. REV. 1354, 1369 (1972); Note, *Should the Grand Jury Indictment Procedure be Abolished in Illinois?*, 2 JOHN MARSHALL J. PRACTICE & PROCEDURE 348, 354-58 (1969).

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redundant or superfluous, for the two screens are qualitatively different, serving different purposes and having different rationales.¹⁴⁴ The grand jury and the preliminary examination should be viewed as independent institutions which complement and augment, rather than duplicate, each other. Under this approach the forward-looking preliminary examination is an adversarial proceeding conducted before a judicial officer, a proceeding in which the accused is entitled to counsel, to cross-examine the witnesses against him, and to introduce evidence in his own behalf. The focus is on the probability of the legal guilt or innocence of the accused and only those cases in which there is sufficient legal basis, as determined by standards closely resembling those at trial, are permitted to proceed.¹⁴⁵ On the other hand, the grand jury proceeding is *ex parte* and nonadversarial and is conducted by the prosecutor before a body constituted of lay people. The grand jury is designed in theory to provide an input for lay or community views into the criminal process at a stage prior to trial,¹⁴⁶ an input which both provides protection against the arbitrary or oppressive utilization of power by a government official (*i.e.*, the committing magistrate or the prosecutor) and allows the grand jury to express its community judgment by exercising a power of nullification to prevent a prosecution.¹⁴⁷ Given these disparate purposes, there is no redundancy in employing a forward-looking preliminary examination in a jurisdic-

144. The usual view is that all pretrial screens are essentially similar and serve the same purposes, the primary difference being the increasingly more difficult burden placed upon the prosecution at each succeeding stage. See *Goldsmith v. United States*, 277 F.2d 335, 343, 345 (D.C. Cir.) (majority opinion by Burger, J.), *cert. denied*, 364 U.S. 863 (1960); S. REP. NO. 371, *supra* note 5, at 34 (discussed in *Congressional Invitation*, *supra* note 5, at 1379-80); A. Goldstein, *supra* note 77, at 1163-72.

An alternative view is that cases are screened out at the various stages of the process "for different reasons rather than for [a] progressively more sophisticated application of the same reason," *Preliminary Hearings in Los Angeles*, *supra* note 5, at 695, and this is the approach propounded in this Note. See also *Congressional Invitation* 1379-80, 1384-86.

145. Of course, as part of his assessment of the probability of the legal guilt of the accused, the magistrate must necessarily consider the factual claims asserted by the prosecution. To the extent that the grand jury duplicates this factual determination, such repetition may be viewed as a check against erroneous (but nonetheless good faith) determinations by the magistrate, an internal systemic check against human fallibility. See *Preliminary Hearings in Los Angeles*, *supra* note 5, at 695. Moreover, such duplication of factual determinations also exists with respect to backward-looking preliminary examinations. This objection, if it be one, is not an objection which is focused at the forward-looking hearing.

146. See *United States v. Calandra*, 94 S. Ct. 613, 617-19 (1974); Kaufman, *The Grand Jury—Its Role and Its Powers*, 17 F.R.D. 331, 332, 334-35 (1955); *Preliminary Hearings in Los Angeles*, *supra* note 5, at 681.

147. See *Preliminary Hearings in Los Angeles*, *supra* note 5, at 667. The power of grand jury nullification is analogous to the power of nullification of the petit jury at trial. See, *e.g.*, *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972). This Note does not contend that such community input or nullification is desirable, but only that it exists as one of the theoretical functions of the grand jury.

tion which uses the accusatory grand jury as a regular part of its charging process in felony cases.¹⁴⁸

Finally, even assuming *arguendo* both that the grand jury process is functioning properly and that the screening purposes of the grand jury and the preliminary examination are the same, there is still good reason for instituting a forward-looking preliminary examination in the federal system. A forward-looking preliminary examination will admit only competent evidence, whereas a federal grand jury may consider incompetent evidence and may return an indictment based solely on such evidence;¹⁴⁹ since competent evidence is generally more reliable than incompetent evidence,¹⁵⁰ the forward-looking preliminary examination would provide a more accurate fact-finding mechanism than would the grand jury. Moreover, the truly adversarial nature of the forward-looking preliminary examination, before a trier who can assess credibility and weigh the evidence, will also increase the accuracy of the fact-finding process.¹⁵¹

148. Given these disparate purposes, moreover, it is not nonsensical to apply a more stringent standard at the preliminary examination than at the later grand jury proceeding; the grand jury is a qualitatively different, as well as later, screening procedure. It is presently unnecessary in the federal system to hold a preliminary examination if an indictment has been returned against the accused. See p. 787 *supra*. This practice is based on the view that the preliminary examination and the grand jury are equivalent screening mechanisms, see note 144 *supra*; *Congressional Invitation*, *supra* note 5, at 1379-80, and that the grand jury's determination that there exists probable cause obviates the need to conduct a preliminary examination. See *United States v. Quinn*, 357 F. Supp. 1348 (N.D. Ga. 1973); *Congressional Invitation* 1376-77, 1384-85. If the forward-looking preliminary examination were adopted, this practice would be undesirable. It would allow circumvention by the prosecutor of the substantial safeguards afforded the defendant by the forward-looking hearing, see pp. 784-85 *supra*. It also would ignore the differences in the screening functions of the two institutions. Every felony defendant in the federal criminal justice system should therefore be accorded a right to a preliminary hearing irrespective of the existence of a grand jury indictment. See MODEL CODE OF PRE-ARREST PROCEDURE § 330.1(1) (Tent. Draft No. 5, 1972); Preliminary Hearing in the District of Columbia, *supra* note 5, at xxiii, xxvi-xxvii. A similar argument, based on the differences in the screens provided by the preliminary examination and the grand jury, was recently accepted in *People v. Duncan*, 388 Mich. 489, 201 N.W.2d 629 (1972), in which the court held as a matter of state law that the right of a defendant to a preliminary examination in a felony case is not mooted by an intervening grand jury indictment between the arrest and the originally scheduled preliminary hearing. See also *Stone v. Hope*, 488 P.2d 616, 618-19 (Okla. Crim. App. 1971). The same proposal, but based on the recognition of the difference in the discovery rights accorded the defendant by a preliminary examination as compared to a grand jury proceeding, is presented in *Alternatives*, *supra* note 5, at 295-96, and Note, *The Preliminary Examination in the Federal System: A Proposal for a Rule Change*, *supra* note 65, at 1427-33.

149. See *Costello v. United States*, 350 U.S. 359 (1956); *United States v. Payton*, 363 F.2d 996, 998-99 (2d Cir.), *cert. denied*, 385 U.S. 993 (1966).

150. Increased reliability is one of the major purposes for many of the rules of evidence. See C. McCORMICK, EVIDENCE § 197 (best evidence rule), § 210, at 428 (parol evidence rule), § 224, at 457-58 (hearsay rule) (1954).

151. It might be argued that the appropriate response is to change the procedure used by the federal grand jury, rather than to establish a forward-looking preliminary examination. Such a change would be inconsistent with the history and tradition of the grand jury, see, e.g., *Costello v. United States*, 350 U.S. 359, 362, 363-64 (1956);

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Conclusion

In modern criminal law pretrial procedure is for most defendants the only criminal procedure. For this reason, if no other, the criminal justice system must pay close attention to the functioning of pretrial procedure to insure that it is providing the protections to which all accused persons are entitled. Furthermore, expeditious and effective pretrial procedure protects other important social interests. The core of pretrial procedure, in theoretical terms at the very least, is the preliminary hearing, at which police and prosecutorial discretion and the defendant's guilt are first subjected to judicial scrutiny. This Note argues that the central role occupied by the preliminary hearing should be openly acknowledged and further developed in the federal system. The benefits of such development are, hopefully, a more expeditious pretrial procedure and a just system of criminal law.

However, the costs and benefits of this development, particularly in monetary terms, are still uncertain. An appropriate course of action at this point, therefore, is the congressional implementation of forward-looking preliminary hearings in a limited and geographically dispersed number of federal district courts to provide information on the actual impact of such reform. On the basis of that information, which this Note forecasts will be favorable, Congress can make a thorough and intelligent evaluation of the proper structure of pretrial procedure.

Note, *Exclusion of Incompetent Evidence from Federal Grand Jury Proceedings*, 72 YALE L.J. 590, 592-93 (1963), and seems unlikely, see *United States v. Calandra*, 94 S. Ct. 613, 617-19 (1974).