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THE ROLE OF THE PROSECUTOR IN A FAIR TRIAL

FREDERICK J. LUDWIG*

About forty years ago, a Georgia jury reached its verdict in one of the most celebrated cases of the century. Concededly, 13 year old Mary Phagan had eaten her meal of bread and cabbage, and then taken an Atlanta trolley to the National Lead Pencil Company factory just before noon on April 26, 1913. Concededly, she had gone for her pay envelope and its meagre contents, 10 cents an hour for each 12 hour day of that week's drudgery. Concededly, Mary had been strangled to death there, her undergarment torn and bloodied, and her body thrown in a pile of rubbish. The disputed issue of fact was whether the defendant on trial, factory superintendent Leo Frank, had been Mary's killer.

A fair reading of the transcript of the month-long trial discloses credible evidence sufficient to support the conviction of Leo Frank. It also discloses credible evidence supporting a reasonable doubt of his guilt. Two judges respectively on the Supreme Courts of Georgia and of the United States had such doubts. The trial judge, in a letter written on his deathbed to the governor urging clemency, expressed doubt. One of three prison commissioners voted for clemency because of his doubt. The courageous state chief executive commuted Frank's sentence to life imprisonment. "I can endure misconstruction, abuse and condemnation," he wrote, "but I cannot stand the constant companionship of an accusing conscience which would remind me that I, as governor of Georgia, failed to do what I thought to be right."

Whatever the doubt on the issue of Frank's guilt, there is no question about the atmosphere of hostility and prejudice that pervaded the trial of that issue and the ultimate disposition of the case. Not for a moment was the jury permitted to escape this atmosphere. An Atlanta newspaper reported an informal poll on Frank's guilt—four for conviction to one for acquittal. Despite defense motions to clear the courtroom, spectators frequently applauded statements of the prosecutor and rulings of the trial judge adverse to Frank. Larger crowds, unable to enter, loudly cheered the prosecutor within earshot of the jury as he passed in and out of

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1. Frank v. State, 141 Ga. 243, 284, 80 S.E. 1016, 1034 (1914).
the courtroom. The courtroom was finally cleared on the last day, but the roar of the crowd outside was so great upon report of the verdict of guilt that the polling of jurors ten feet away was inaudible to the trial judge. Indeed, the trial judge found the position of the prisoner so perilous that he prevailed upon defense counsel to absent themselves and their client during return of the verdict and polling of the jurors, all without the defendant's consent.

Within a month after his removal to the penitentiary, Frank was attacked by a fellow convict with a butcher knife while he slept. A seven inch gash was cut in Frank's throat and his jugular vein was severed. Four weeks later while Frank hovered between life and death, an unmasked yet never identified mob entered the prison, dragged Frank from his bed, handcuffed him, tied his ankles, and drove him in the rear of an automobile 150 miles to Marietta, Georgia, the birth and burial place of Mary Phagan. There, early on the morning of August 16, 1915, what remained of Frank's body was hanged from a pine branch within sight of Mary Phagan's grave.4

THE ILLUSION OF PROGRESS

What progress toward fair trial in criminal cases has been made in the years since that morning in Marietta? Reformers and meliorists may list many apparent advances. Leo Frank was only one of 69 Americans lynched in 1915, in 1955, there was but a single such mob action in the United States. The Supreme Court of the United States with two dissents turned down Frank's petition as unworthy of hearing because, even if its allegations were true, they would not amount to denial of due process, within a decade the same Court, with the same number of dissents, was to embrace the doctrine that due process demands a trial free from mob domination.5 Since 1915, and especially during the past 25 years, a new set of uniform minimum standards for state criminal trials has emerged by dint of a dynamic doctrine of due process. Indeed prior to 1923,6 the Supreme Court refused to disturb any state criminal convictions on constitutional grounds, except ones involving denial of equal protection of the laws for discrimination along racial lines in selection of jurors.7 Since that time, the due process clause of

the fourteenth amendment has been construed to require states to provide criminal trials before juries free from intimidation and judges without pecuniary interest in the outcome; in public; with the assistance of defense counsel; and with evidence that is neither obtained by coerced confessions nor suppressed by the prosecution. Fair post-conviction remedies must be made available, and the criminal conduct for which the accused is tried must be based on standards ascertainable in advance of the act, and upon standards that do not infringe liberty of opinion or religion.

Less optimistic observers question the extent of these advances. In the first eight amendments to the Federal Constitution there are listed 25 specific protections that comprise the bill of rights. Seventeen of these guarantees relate to fair criminal procedure. Yet practically none of the 17 has been found sufficiently "fundamental" to apply to state proceedings by force of the due process clause of the fourteenth amendment. Without offending the Federal Con-

stitution, a state may ignore the procedure of indictment by a grand jury, even in a capital case; subject a defendant to be put in jeopardy twice for the same offense; require his self-incrimination under compulsion; try him without a jury; receive real evidence against him at a "view" of the scene of the crime despite his absence; and even subject him to unusual, if not cruel, punishment. True, the Supreme Court has held that the right against unreasonable search and seizure applies to the states. But in this triumph of form over substance, the Court has also assured the states that it will not disturb convictions based upon unlawfully seized evidence. Indeed, even in federal prosecutions, the Supreme Court has held that many of these guarantees in the bill of rights are not absolute, but subject to waiver by a defendant under various conditions.

Any illusion of progress created by Supreme Court opinions may be dispelled with dispatch by consideration of the paucity of changes in the past forty years in the almost exclusively state-made ground rules that govern criminal trials in the United States. For example, in 1914 the rule excluding evidence obtained by unlawful search and seizure was adopted in the federal courts. In the forty intervening years, only 11 states have changed their rule to an exclusionary one by judicial construction, and only three by limited legislation along these lines. This is so even though every state has a constitutional provision virtually identical with that of the Federal Constitution prohibiting unreasonable searches and seizures.

30. See, e.g., Minn. Const. art. I, § 10; N.Y. Const. art I, § 12.
The problem of fair trial involves two important interests—the balance of acquitting the innocent and protecting the civil liberties of the accused, on one hand, and the counterbalance of convicting the guilty and preventing crime, on the other. Solution is simple if only one interest is carefully considered and the other obliviously ignored. Fair trial also signifies fairness to the prosecution, to the actual victims of crime, and to the community at large who are its potential victims. Prevention of crime has become an interest of no inconsiderable magnitude. For the fifth straight year in the United States the two million mark has been exceeded for the most serious crimes (homicides, robberies, aggravated assaults, burglaries, rapes and larcenies). Since 1940, the increase in such crimes (49.1 percent) has been virtually double the increase in our population (25.4 percent). For the first six months of 1956, there was one such serious crime committed every 12.1 seconds. It would be sad social engineering indeed to consider compromise of the conflicting interests involved without realistically appraising the serious extent of crime.

POWER OF THE PROSECUTOR

The characterization of the prosecutor (as a participant in a courtroom conflict) merely as one of a pair of antagonists that form the base of an imaginary triangle at whose apex sits the judge or jury is a popular misconception. Barely one in ten accused of a major crime in the United States ever reaches court for trial. A chief prosecutor in one of our largest metropolitan areas may seldom participate in a courtroom trial yet earn an enviable reputation for the administration of his office.

A striking characteristic of criminal procedure, virtually unparalleled in other fields of law, is the vast discretion vested in the administrator. It is almost entirely beyond control and comment of appellate courts. At common law the complainant had the option of coming forward with an accusation or not. The exercise of this option is now largely within police discretion. The examining magistrate may discharge or hold the accused after preliminary hearing. The grand jury may ignore both law and evidence and refuse to find an indictment. Of course, the trial jury may acquit in absolute disregard of evidence and instruction, and in doing so put an end to criminal proceedings, which they could not do in

31. See 27 Uniform Crime Reports, No. 2 (1957).
32. Compare 11 Uniform Crime Reports, No. 2 (1941), with 26 Uniform Crime Reports, No. 2 (1956).
33. 27 Uniform Crime Reports, No. 1 (1956).
civil cases. Upon conviction, the trial judge has discretion in prescribing treatment subject only to maximum legislative limitations, with mandatory or minimum punishment rare indeed in modern penal codes. Whether a convicted offender is to have his sentence suspended, or be placed on probation, or go to jail for a short or long period, is almost exclusively a matter within the discretion of a single administrator. If the offender is imprisoned, parole boards have discretion within wide limits to release him before completion of his sentence. Finally, there is the executive power to pardon or commute, which rests beyond legislative control in the exclusive discretion of a governor or president.34

The principal role in this dispensation of discretion is played by the prosecutor.

(1) Power to initiate prosecutions. Whether or not a defendant is to be accused is primarily in the unreviewable power of the prosecutor. Only in cases in which prosecution may not be initiated by information or affidavit filed by a district attorney and indictment is not waived by a defendant does the power to accuse rest with the grand jury. But the prosecutor is that body's only counsel on the law as well as its sole supplier of facts. Only the witnesses produced by the prosecutor are heard and these without cross-examination or rebuttal. Though the evidence given is required to be such as would be competent and admissible at trial, no effective remedy is available to a defendant to assure that result. Indeed, his conviction will not be later reversed even though the indictment was unsupported by competent evidence.35 It is small wonder that numerous surveys of the influence of the prosecutor on the grand jury have reported that august body as the rubber stamp of the prosecuting attorney.36 Of course, no prosecutor can investigate and proceed with all of the cases in which he receives complaints. He must select those in which the offense is the most flagrant and the proof most certain. "Therein", observed the late Mr. Justice Jackson, then Attorney General of the United States, "is the most dangerous power of the prosecutor that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted."37

34. See Ludwig, Book Review, 6 J. Legal Ed. 129, 130 (1953).
36. Bettman, Criminal Justice in Cleveland 212 (1923), Illinois Crime Survey 299 (1929); Moley, Politics and Criminal Prosecution 127, 143 (1929); Miller, Informations or Indictments in Felony Cases, 8 Minn. L. Rev. 379, 397-98 (1924); Chaplin, Reform in Criminal Procedure, 7 Harv. L. Rev. 189, 191 (1923).
(2) Power to terminate prosecutions. The prosecutor also has power to terminate a criminal proceeding, whether or not initiated by indictment. He may nol-pros in some jurisdictions, in others move to dismiss an indictment or information. There are varying conditions of judicial approval necessary before the exercise of so vast a discretion since the termination of a prosecution is not dissimilar in effect to a verdict of acquittal after trial by jury. But the role of the judge usually amounts to little more than pro-forma acquiescence. Of course, witnesses may die or disappear, or exculpatory evidence be adduced, between the time of accusation and the opening of trial, but the danger remains of dishonest exercise of such discretion in response to political pressure.88

(3) Power to compromise prosecutions. The similar power to accept bargain pleas from an accused is subject to the same use and abuse. Only a dozen years ago, a county prosecutor in an area embracing 483 square miles with a population of 350,000 was found to have had only four assistants and no investigators on his staff.99 Obviously, no prosecutor in any sizeable metropolis is equipped with personnel sufficient to conduct the trial of every accused person. There are other factors that must be delicately balanced in accepting a plea of guilty to a less severely punishable crime than the one with which the prisoner is charged: congestion of trial court calendars, burden of jury service on the community, strength and weakness in the proof of the original charge, mitigating circumstances, such as undue harshness of punishment for the original charge or the relatively good record of the accused, and, finally but not least important, the prosecutor's preference for a record of numerous convictions and few acquittals.

Perhaps the power of the prosecutor may be best portrayed in contrast with the disadvantageous position of defense counsel. For fact finding, whatever his own personnel, the prosecutor may expect cooperation from the police within his jurisdiction as well as from about 170,000 others in local police organizations throughout the United States. In some states, the police may lawfully tap telephone wires,40 to say nothing of unlawful opportunities in other jurisdictions to obtain information along these lines. Witnesses within the state may be subpoenaed, and those found in several

38. Pound, Criminal Justice in the American City 20 et. seq. (1922)
states may be returned under reciprocal witness statutes. Funds are usually available to locate key witnesses no matter where they may be, and to maintain in protective custody material witnesses, beyond threat of tampering, pending trial. If the awesome prestige of the district attorney, or pressure applied at his suggestion by numerous local licensing agencies cannot subdue a recalcitrant witness, cooperation is reasonably certain under the impending threat of punishment for contumacious refusal to answer the prosecutor's questions before a grand jury.

On the other hand, defense counsel may expect little information beyond that supplied by the accused in preparing for trial. Under simplified indictments, available in many states, it is sufficient notice to a defendant accused of even a capital crime to state in a single sentence:

"The grand jury of [X county], by this indictment, accuse A.B. of the following crime [murder in the first degree]."

"[Richard Roe,] District attorney of the county of [X]"

Of course, under such simplified system, a defendant is entitled to a bill of particulars upon demand. But such bill usually need set forth neither evidentiary matter nor all of the elements of the crime charged. If the accused finds that the particulars furnished provide no reasonable information about the nature of the crime charged, there is no recourse to appellate review until after trial and conviction. Moreover, in advance of trial, the accused may not detain prospective witnesses in protective custody, may not threaten with punishment for refusal to answer his counsel’s questions, or even subpoena for interview. Indeed, identity of the prosecution's witnesses can seldom be discovered by the defendant until they are actually called to the stand at trial by the prosecutor. This is so even though the prosecution in many jurisdictions may compel disclosure before trial of the identity of prospective defense witnesses in those cases in which alibi testimony may be given.

42. E.g., N.Y. Code Crim Proc. § 618-b.
43. Id. § 295-d.
44. Id. § 295-g.
Suppose a key witness is outside the jurisdiction. To trace and find him may cost a thousand dollars. If the defendant is indigent, no legal aid society, court appointed attorney or public defender will defray this expense. At best such assistance can provide an impoverished prisoner only with capable counsel for the courtroom. To prepare for trial, such counsel has few of the telephonic tools of investigation available to many prosecutors, and no access to 141,667,385 fingerprint cards on file in the FBI Indentification Division. The pre-trial discovery, inspection and examination of the plaintiff's case, open to a civil defendant, is closed to the criminal one. With such contrast in pre-trial preparation, it is not surprising that many accused persons come to the courtroom with no more preparation than a presumption of innocence, and leave it with little proof presented in their behalf, or that many prosecutors may point with pride to their preponderant percentages of convictions.

EXTRA-FORENSIC MISCONDUCT: PROSECUTION BY PRESS

In a recent, brutal and widely publicized sex murder of a little girl, the defendant upon arrest was spirited away to the state prosecutor's office. "The district attorney, even before defendant completed his statement, released to the press details of the statement (including defendant's admissions of sex play with his victim and other children on occasions prior to the killing) and also announced his belief that defendant was guilty and sane."\(^4\) Contemporaneously, in a celebrated espionage case, the appellate court assumed that a federal prosecutor during the course of trial released to the press a certain sealed indictment to the prejudice of defendants, and that "publication of the indictment was deliberately "\(^5\) In the historic murder of Bobby Franks, experienced counsel for Leopold and Loeb found futile any jury trial of issues of fact in the face of their pre-trial in the press with a unanimous verdict of guilt. The defendants pleaded guilty to the capital crime and were heard only by a judge on the question of mitigating punishment because apparently nothing less than death could have been expected from a jury even on a reasonably well-documented defense of insanity.\(^6\)


\(^6\) Busch, Prisoners at the Bar 178-79 (1953).
The overwhelming majority of criminal cases are disposed of by pleas of guilty without trial. Most of the criminal cases that require trial are ordinary ones and are duly disposed of by lawyers, judges and jurors in the courtroom according to rules of law. It is the cause célèbre—the extraordinary crime of bloodshed or lust, or even an ordinary one involving newsworthy defendants or witnesses—which invokes jurisdiction of a second court for trial by column and wavelength according to canons of journalism. Such trial by press usually begins as soon as the crime is reported with publication of details of its commission. It continues unabated through arrest, preliminary hearing and indictment of some defendant with disclosure of his confessions, witnesses’ statements and comments of police and prosecutor. Usually the unsealed verdict of journalism is reached before the courtroom trial opens.

Occasionally there have been deliberate attempts to influence jurors, judge and witnesses. In the trial of Leo Frank, one Atlanta newspaper conducted an informal poll of public opinion on the defendant’s guilt.51 Similar press, publicity occurred during the celebrated Lindbergh kidnapping case involving Bruno Hauptmann.52 Some newspapers have published names, addresses and photographs of jurors, coupled with declarations of public sentiment about the guilt of the defendant on trial. In a few cases there have been editorial threats to judges, ranging from demands for their impeachment to warnings of defeat at the next election.

Slanted, one-sided, sensational reports of trials have also occurred. The killing and carnal abuse of a six-year-old girl earned defendant captions and headlines such as “werewolf,” “fiend” and “sex-mad killer.”53 There seems to be an unwritten law among some newspapers to portray the defendant as sane and guilty before and during his trial. Paradoxically, some of the same newspapers often cry that the same defendant, once convicted and sentenced, is really innocent after all.

In reporting evidence not admitted at trial, the greater the truth, the greater is the danger to fair trial. By repeated association in print and picture of the defendant with the crime charged, the logical and legal presumption of innocence may disintegrate into a psychological and emotional one of guilt. Disclosing the defendant’s prior activities and criminal record nullifies any presumption of good character. Publication of information, however truthful, in-
admissible at trial because it happens to be hearsay, incompetent, privileged or irrelevant, irreparably deprives the defendant of the protection of the exclusionary rules of evidence. Even if such information would have been admissible, but had not been offered at trial by the prosecution, the defendant still irrevocably loses his rights to sworn testimony and confrontation of the witnesses against him, not to mention his privileges of cross-examination and rebuttal.

The more respectable press may discreetly abstain from such practices, but it is undeniable that they overshadow almost every celebrated criminal case. The average newspaper front page devotes ten to twenty percent of its space, and an even higher ratio of its headlines, to crime and scandal. Although only ten percent of radio time is devoted to news, crime is highlighted more in newscasts than in newspapers, to say nothing of the role of crime and fantasy in dramatic radio and television programs.

In 1949, a little girl was murdered in the District of Columbia, and within ten days another was stabbed to death in Baltimore. A suspect was taken into custody. A radio commentator in Baltimore interrupted a program with the warning, “Stand by for a sensation!” Thereupon the arrest of the suspect was announced. It was claimed in the broadcast that the suspect had confessed, had re-enacted the crime, had dug up the knife used in the murder, and had a long criminal record. The Criminal Court of Baltimore fined the broadcaster for contempt for “not merely a clear and present danger to the administration of justice, but an actual obstruction” of it. The highest court of Maryland reversed, relying on a series of decisions by the Supreme Court of the United States to the effect that such curbing of the press by punishment for contempt infringes the constitutional guarantee of freedom of speech. The Supreme Court of the United States refused to review this decision.

Yet the year before, a so-called “Bluebeard” was arrested for murder in England. The London Daily Mirror described him as a “vampire,” published a photograph of one of his alleged victims with gruesome details of the killing and stated that he had committed other murders. The editors received a three months’ jail sentence and the publishers were fined £10,000.

55. Lazarsfeld, Radio and the Printed Page 200 et seq. (1940)
The British—democratically devoted to liberty of opinion—have not found this freedom diminished by punishing the press for contemptuous publications interfering with fair trial in criminal cases. Serious constitutional objections forestall any American remedies along these lines. Proposed solution, discussed later, should be directed at improving procedures of bench and bar, rather than punishing the press. Specifically, pious canons of bar associations on public statements about pending cases ought to be implemented by sanctions sufficient to curb overzealous prosecutors.

Forensic Misconduct Improper Comment by Prosecutor

The adversary system in the administration of Anglo-American justice has posed many problems of the proper limits of zeal for the advocate. The distinction between hard blows and foul ones dealt by courtroom counsel was thus defined by one of Britain’s Lord Chief Justices: "the arms which he wields are to be the arms of the warrior and not of the assassin. It is his duty to strive to accomplish the interest of his clients per fas, but not per nefas; it is his duty, to the utmost of his power, to seek to reconcile the interests he is bound to maintain, and the duty it is incumbent upon him to discharge, with the eternal and immutable interests of truth and justice."

But fixing the bounds of forensic zeal is doubly complicated in the case of the prosecutor. On one hand, he has a dual duty as advocate to the state as party plaintiff to a controversy; but also minister of justice with special responsibilities to the adversary party defendant. On the other hand, the prosecutor may enjoy enormous prestige in the courtroom compared with defense counsel. The prosecutor with the privilege of opening is the first lawyer to instruct the jury on the intricacies of the trial to come. The advantage of a first impression is in most instances enhanced by the glamour of the district attorney as champion of the people in its combat with crime. Against the background of this halo effect, must be measured

60. See ABA Canons of Professional Ethics, Canon 20 (1955)
Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally, they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An ex parte reference to the facts should not go beyond quotation from the records and papers on file in the Court; but even in extreme cases it is better to avoid any ex parte statement.

the impact of the prosecutor's sarcastic question, derogatory remarks, inflammatory comments and derisive humor directed at defendant and his witnesses. If first impressions may sometimes fade, last ones are likely to linger. The prosecutor is assured that tactical advantage with the closing argument.

Forensic misconduct of the prosecutor assumes many forms. The threat to fair trial inherent in all such misconduct is thus the triers of fact may be induced to convict by weighing considerations irrelevant to guilt or innocence, on one hand, or they may be persuaded to disregard factors directly material to the determination of such issue, on the other hand. A simple illustration is direct appeal to group prejudice, such as reference to a racial, economic, or other class to which the defendant belongs, and which presumably possesses characteristics diminishing the credibility of its members or making their conviction probable on less evidence than would be required without such reference. Closely related, and more commonly resorted to, is the prosecutorial appeal to that perennial personal preference to avoid the stigma of community condemnation by acquitting the accused, or conversely, to earn its approbation by convicting him. Wartime appeals to patriotism for offenses hindering the war effort and the typical argument in the case of atrocious crimes involve this technique.

Less direct but often equally efficacious in distracting the jury from its function of finding a verdict based upon admissible evidence supporting guilt or reasonable doubt is the use of inadmissible evidence. In a tame and pedestrian prosecution for income tax evasion based upon a series of specific transactions with a single business corporation, the prosecutor in his opening statement promptly pictured defendant as a big-time gambler in a notorious local underworld, placing bets in excess of a million and a half dollars during a single year. After four professional gamblers called by the prosecution gave page after page of testimony identifying numerous gambling records and explaining mysterious gam-

64. Fontanello v. United States, 19 F.2d 921 (9th Cir. 1927) (rev'd for improper remarks), People v. Singh, 11 Cal. App. 2d 244, 53 P.2d 403 (1936) (remarks held to be prejudicial error).
bling codes, the prosecutor finally confessed that his gambling witnesses’ testimony "will have no probative value insofar as this case is concerned." The trial judge made the usual impossible prescription for the jury, "to treat such testimony as if it had never been heard."67

More frequently the evidence consists of the personal opinions of the prosecutor—neither given under oath nor subject to cross examination and rebuttal—by referring to the accused as guilty of the crime charged68 or sometimes by epithets indicating guilt of crimes not charged.69 It is not uncommon for the prosecutor to comment upon various omissions by the accused to produce testimony that he is privileged not to present, e.g., the accused's refusal to testify, to call some privileged witness, or to produce evidence of his good character.70 Upon summation, the jury may be urged to convict and err upon the side of severity because of the availability to the defendant of appeal, parole or pardon as corrective devices.71

Whether such misconduct will result in reversal of conviction in an appellate court depends upon a mosaic of factors: provocation of defense counsel by use of equally objectionable language; timely objection by defense counsel, corrective instruction by the trial judge; the impact of the questioned comment upon the jury; and the existence of independent errors as grounds for reversal. But the chances are slim that a combination of these factors will culminate in reversal. A study of 62 Pennsylvania appeals in which error was assigned for remarks of the prosecutor revealed but 8 reversals, or less than 13 chances (12.9) in 100. Moreover, in 5 of these 8, independent grounds sufficient to constitute reversible error existed.72

**Proposed Remedies**

Several solutions to the conflict between fair trial and misconduct of the prosecutor have been suggested.

(a) Legislation defining each category of misconduct and speci-

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70. See Note, 54 Colum. L. Rev. 946, 951-54 (1954).
71. See Note, 39 Va. L. Rev. 85, 87-95 (1953).
fying reversal of conviction as the consequence of engaging in it has been proposed.\textsuperscript{73} Of course, no statutory chart could predict with precision all possible misconduct. But it is doubtful whether even legislative definition of even some misconduct would have the desired effect of reducing its incidence. Consider a fairly well limited area of misconduct, comment by the prosecutor upon the accused's failure to testify. All but two American jurisdictions have constitutional provisions protecting the privilege against self-incrimination.\textsuperscript{74} Three of the 48 states with such provisions explicitly authorize by statute comment on failure to testify and these statutes have been held not inconsistent with their constitutions.\textsuperscript{76} The remaining jurisdictions either generally prohibit any unfavorable presumption\textsuperscript{78} or specifically forbid such comment.\textsuperscript{77} Yet among these jurisdictions, it is by no means agreed that comment by the prosecutor on the defendant's failure to testify will result in reversal. Some hold it "incurable" or "reversible per se", and consequently no prejudice need be shown for reversal.\textsuperscript{78} Others agree that it is "incurable", i.e., not subject to correction by instruction of the trial judge, yet will affirm the conviction.\textsuperscript{79} Still others find such comment "curable" by correction of the trial court.\textsuperscript{80}

Apart from the difficulty of achieving reversal of conviction in cases of prosecutorial misconduct, the wisdom of such reversal is open to serious question. On appeal, the convicted defendant is hardly concerned with the assurance of fair trial to criminal defendants as a class through prevention of such misconduct. He is concerned with setting aside his own conviction of crime. It might be readily shown that a rule which allows reversal results in the escape of the guilty more than it deters invasion of rights by prosecutors.\textsuperscript{81} To the prosecutor, the prompt verdict of guilt by

\textsuperscript{73} See Note, 54 Colum. L. Rev. 946, 978-79 (1954).
\textsuperscript{74} E.g., Minn. Const. art. I, § 7, N.Y. Const. art. I, § 6. The two states that do not have such provisions are Iowa and New Jersey.
\textsuperscript{78} Friemel v. State, 148 Tex. Crim. 454, 188 S.W.2d 175 (1945), People v. Wessel, 256 Mich. 72, 239 N.W. 259 (1931), Simmons v. State, 139 Fla. 645, 190 So. 756 (1939), per curiam.
\textsuperscript{79} People v. Shader, 326 Ill. 145, 157 N.E. 255 (1927), State v. Zemple, 196 Minn. 159, 264 N.W. 587 (1936)
\textsuperscript{80} Gable v. State, 245 Ala. 53, 15 So.2d 600 (1943), per curiam
\textsuperscript{78} Greathouse v. State, 166 Ark. 206, 265 S.W. 950 (1924). See Lanier v. United States, 276 Fed. 699 (5th Cir. 1921)
the trial jury presents the press and public with irrefutable proof that they have a faithful public servant; reversal by an appellate court, removed by time and distance from the trial and upon grounds often unintelligible to the local electorate, may be mild deterrent indeed to future misconduct by the same prosecutor.

(b) Punishing the prosecutor by removal or suspension from office, disbarment or suspension from practice, or fine or imprisonment in contempt has also been proposed. Thus far prosecutorial misconduct has been sanctioned most frequently by a "ritualistic verbal spanking" in appellate court opinions supplemented only occasionally by reversal of conviction. The relatively few reported proceedings for removal have been grounded upon lack and not excess of zeal by the prosecutor. Disbarment for forensic misconduct, an extreme penalty, has been sustained against defense counsel in but a single reported instance. The remedy of removal or suspension from office is unavailable for the misconduct of defense counsel. Certainly, it would be grossly unfair to restrict the prosecutor "to a listless, vigorless, summation of fact in Chesterfieldian politeness," under threat of such remedies, and permit defense counsel with virtual immunity from them, "his lachrymal appeal for a verdict of acquittal notwithstanding the evidence of guilt." Among the negative remedies, contempt is free from the unfairness of such unilateral application. Existing statutes are sufficiently broad to cover forensic misconduct on both sides and provide a wide and varied range of sanctions from censure through suspension and fine to imprisonment. On the side of the prosecution, this remedy should embrace not only forensic but extra-forensic misconduct involving participation in trial by press, and it should include not only prosecutors but other government officers who engage in prohibited publication practices imparring fair trial. One caution that must be observed lest legitimate argument by

82. See Note, 54 Colum. L. Rev. 946, 980-81 (1954).
84. E.g., In re Reid, 182 Cal. 88, 187 Pac. 7 (1920), Attorney Gen. v. Tufts, 239 Mass. 458, 131 N.E. 573 (1921), Chenault v. McLean, 48 Ohio App. 284, 193 N.E. 352 (1933). In some jurisdictions removal of the prosecutor is an executive and not a judicial proceeding. E.g., 28 U.S.C. § 504(b) (1952), N.Y. Const. art. 9 § 5.
86. Ballard v. United States, 152 F.2d 941, 943-44 (9th Cir. 1945), rev'd on other grounds, 320 U.S. 187 (1946).
87. See Note, 54 Colum. L. Rev. 946, 981-83 (1954).
a prosecutor be dangerously limited is the avoidance of summary proceedings that may turn upon personal hostility of a particular judge toward him. Notice specifying the misconduct, assistance of counsel and a public hearing should be provided for the advocate cited for contempt, whether prosecutor or defense counsel. There is another caution, however, with special application to the bearer of the burden of proof, and that is the necessity of recognition of appeal to emotion. More than cognitive processes are involved in determining the closely balanced probabilities of an issue of fact. Ten volumes of Wigmore set the rational limits of proof. A galaxy of statutes and judicial decisions fix the logical limits of pleading. But at the stage of summation, rhetorical and emotional argument must be indulged because men are not moved by logic and reason alone. The prosecutor at this stage with the burden of persuasion must be permitted a berth wide enough for his broad responsibilities.

Yet solution to the problem of prosecutorial misconduct is not susceptible to precipitate panaceas. A practical program should be aimed at alleviation of abuses, not their annihilation. Two affirmative points are proposed

(1) Improved preparation of prosecutors. A few years back this writer surveyed the offerings of American law schools in criminal law and procedure. Prescribed courses of from two to six hours out of a total curriculum of 72 to 76 hours were reported with a median course of three hours. Few schools provided any electives. Of the sixteen collections of printed materials used at that time in these courses, only one contained even a representative sampling of cases from the Supreme Court of the United States reflecting the impact of civil rights on criminal prosecutions in the past quarter of a century. Only one other gave respectful recognition to the tremendous statutory ingredient of criminal law and procedure as compared with courses on the civil side of the curriculum. With few exceptions, the vast role of administrative discretion, the greater precision of concept, the involved relationship with other social sciences and the moral significance of criminal law went unnoticed. Most collected materials were content to present selections of appellate court opinions that often failed to come to grips realistically with the many problems of criminal law administration that are not reviewable. This two-dimentional aspect of criminal law was hardly enhanced by the background of instructors selected to give these courses. In a catalogue of American law school teachers, few listed any practical experience with criminal law or criminals.

"Raising up of a body of lawyers," Dean Pound has observed, "who are to be advocates, prosecutors, and judges, with no thorough training in criminal law, is nothing short of a threat to the administration of justice. Both the criminal law and the administration of justice in criminal cases in the United States suffer from a growing neglect of teaching and study of criminal law in our law schools."\(^9\) In no other field of law are the stakes so vast as the indelible infamy and the loss, not merely of property, but of liberty and life itself. Enlightened performance of the prosecutor ought to begin with more thorough preparation in the law schools.

(2) **Making the criminal trial a search for truth rather than a combat of counsel.** Centuries ago, if the accused could walk blindfolded and barefoot over nine red-hot ploughshares laid lengthwise at equal distances without being scorched, he was entitled to acquittal. Otherwise, as usually was the case, he was condemned as guilty. One by one with the passing centuries, the ancient ordeals by fire, by water and by battle, and trial by compurgation provided by professional oath helpers have been abandoned. In the course of centuries, they have ceased to command the confidence of the community as sound methods of resolving disputed issues of fact. In man's relentless search for a satisfactory substitute for self-help and vengeance, does the criminal trial of today command that confidence?

We are advised \(^9\) that a lawsuit is not, and cannot be made, a scientific investigation for the discovery of truth. No scientist would think of basing a conclusion upon such data so presented. The court is not a scientific body."\(^9\) We insist that it cannot be anything less. In a criminal trial upon which life depends, or all that makes life worthwhile, liberty and freedom from stigma of conviction, pragmatic apologies for narrowing the search for truth ought not to be acceptable. It should not suffice to say, "sometimes a wrong decision quickly made is better than a right decision after undue procrastination."\(^9\) Nor should a criminal trial be so much a matter of stagecraft and so little a seeking of truth as to condone such coaching of counsel as, "it is advisable not to ask the witness a question, the answer to which the attorney does not know."\(^9\)

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\(^9\) Morgan, Forward to ALI Model Code of Evidence 3 (1942).
\(^9\) Ibid.
\(^9\) Mendelson, Criminal Cases 41 (Trial Practice Series, Practicing Law Institute, 1946).
The business of convicting the guilty and acquitting the innocent is carried on by the present system with small margin of error. Less than 1/100 of 1 per cent of 27,388 felony convictions involved innocent persons during an eleven year period in a busy metropolitan area. While not all such errors come to light with judicial rectification, other studies indicate the probability that they are few. It is doubtful, however, what the criminal trial, as it is sometimes conducted, contributes to this effectiveness. The probability of guilt of the accused has been screened long before trial with police investigation prior to arrest, preliminary hearing before a magistrate and a sifting of the evidence by a grand jury. The fact that the preponderant number of those accused of crime are convicted without trial on pleas of guilty probably adds nothing to the minute margin of error in convicting the innocent.

The criminal trial must continue to convict the guilty and acquit the innocent, but it must do so within a framework of fairness to the accused. A criminal who remains at large in the community arouses alarm proportionate to the outrageousness of his crime. An unfair criminal trial certainly arouses no less alarm. Such a proceeding threatens the liberty of every potential defendant in a criminal case, a class that embraces the entire community. In making a criminal trial a search for truth rather than a contest of counsel, a delicate balance must be achieved between preventing crime and protecting the civil liberties of the accused. The trial judge, jurors, witnesses and defense counsel have their respective responsibilities in achieving this balance. The major role remains that of the prosecutor.

95. See Borchard, Convicting the Innocent (1932).
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