

limit myself to the most obvious suggestions; many more will occur to all.

In this regard we may learn much from the recent similar survey made of our colleagues of the medical profession. The Report of the Committee on the Costs of Medical Care is a mine of most important information, a great deal of which is directly worth while for our own study in relation to our own problems.⁸ The violent adverse reaction of the medical profession to the Report is, I fear, but an indication of what we too may expect from the rank and file of the bar; although anyone interested in improving conditions in the administration of justice must be hardened to expect such outbursts. Nevertheless we can see certain errors which perhaps we may avoid. This Committee was financed by outside sources, the great advantage of which was perhaps offset by the conviction of many that a thesis must be and was proved and that arguments were being sought for this thesis. The Report may suggest to us profitable lines of inquiry while enabling us to avoid the suspicions with which it was viewed.

⁸. Medical Care for the American People, The Final Report of The Committee on the Costs of Medical Care, 1932, together with other publications of the Committee. Cf. also the final Report of the Commission on Medical Education (1932) which seems to have been more favorably received by the medical profession.

Such a program on our part may well stimulate activity of a more formal nature, possibly through governmental sources. The experience of the Committee on the Costs of Medical Care would perhaps indicate, however, that a careful investigation sponsored by our own group alone may carry as much if not more weight than one from any other source.

I am confident that such activity on the part of our Association is not only well worth while in the light of its traditions, and well justified in the light of the present demand, but is moreover a facing of responsibility which will be well received by our brethren of the bar and the general public as a start on a program of possibly far-reaching social implications. If adopted, are we likely when we meet a year hence to have before us a concrete result and definite program of reform for the future? Certainly I hope not. Little more may in fact have been accomplished by that time than the dramatization of the fundamentally important issues involved. Even that is a result of inestimable importance. The long range search by the method of trial and error for improvement of our profession will then have been made, as I believe it should be, the central activity of our Association.

ADVANCE SPECIFICATIONS OF DEFENSE IN CRIMINAL CASES

Balance in Favor of Prosecution in Early Seventeenth Century Has Swung Today Decidedly in Favor of Accused—Steps to Remedy Patent Inequalities Which Hamper Administration of Justice—Advance Specifications of Defense as a Means of Thwarting Perjured and Surprise Defenses—Notice of Intention to Offer Alibi Evidence in Michigan and Ohio—Insanity—Other Defenses, etc.

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A SPORTSMANLIKE spectator demands a contest in which the participants are not too unevenly matched, and to some extent the history of criminal procedure is characterized by judicial and legislative innovations designed to accomplish a balance of handicaps and advantages between the prosecuting agency and the accused.

Perhaps the most sweeping attempt to secure this balance came about in the century following the English Civil War. Prior thereto an accused was secretly confined before trial without opportunity to prepare a defense; he was given no intimation of the evidence or witnesses to be used against him; he was not permitted counsel, either prior to or at trial; there was no guarantee of confrontation of witnesses; confessions of accomplices were regarded as specially cogent evidence; and the trial was an unequal battle between a battery of prosecution counsel (each one of which would devote himself to a particular segment of the

case) on the one side, and the privilege-shorn suspect on the other.¹

A wide-spread revulsion was inevitable and we find much evidence of the balancing process which resulted, in the bills of rights of American commonwealths. If one were simply to list, without further description, the rights of the accused at the various stages of American criminal procedure today, the list would be an imposing one. While most of these guarantees whether legislatively or otherwise enunciated, would seem to be privileges which should be accorded in any civilized community, others are either less fundamental manifestations of the vagaries of the public mood or the work of defense lawyers in the law making bodies who are unduly solicitous for the rights of accused persons.

Today the balance is decidedly in favor of the accused. He is no longer the pitiful combatant of the

¹. ¹ Stephen, *History of the Criminal Law of England*, pp. 325, 350.

early 17th century who stood shackled before his persecutors. His bonds have been loosed and a weapon has been placed in his hands. It is unfortunate that in speaking of the American trial one finds himself resorting to the terminology of a contest, a temptation which does not confront one accustomed to the continental criminal procedure which, despite its many unfair incidents, bears little resemblance to a game—more to an earnest investigation into guilt or innocence.²

One of the most patent inequalities is bound up with the so-called right of the accused to know the prosecution's case, including the right to a copy of the indictment with the charge adequately set forth, a bill of particulars, the right to names of witnesses appearing before the grand jury, the right (if prosecution be commenced by preliminary hearing) to have the state's case presented in *prima facie* form (and in some jurisdictions in full), with no counter obligation upon the accused to reveal the nature of his defense³ unless it be by way of abatement; but rather, a privilege to remain silent, except for an uninformative plea of "not guilty" until the waning hours of the trial when the surprise defense may be dramatically ushered in to the delight of the spectators and the detriment of law enforcement.⁴

The breadth of the general issue in civil cases and abuses arising therefrom moved Bentham and his followers to agitate reforms which culminated in the Hilary Rules of 1834. There never has been any such wave of indignation directed at the corresponding abuses under the criminal plea of not guilty, and the various motions, demurrers and pleas which may be made upon arraignment remain virtually the same today as when Hale, Hawkins, and Blackstone expounded upon them.⁵

In a suit on a promissory note the pleadings inform the plaintiff whether the defense is a denial of execution or nonpayment. In a criminal case the pleadings tell nothing, and at the appropriate moment the defendant with a perjured defense has his choice of a corps of insanity experts, alibi witnesses who will testify that he was in another locality at the time of the offense, friends who will assert he acted in self-defense, was entrapped into committing the crime, that he labored under mistake or ignorance of law or fact, that he was an infant, coerced, intoxicated, immune from prosecution, or otherwise justified. The prosecution flounders in the dark. There is a last minute futile attempt to collect rebuttal evidence. Reasonable doubt has been raised. An acquittal follows, and the books on trial tactics have another illustration on how to "beat the case" through surprise.

Why should not a defendant be required either to state his defense in writing at the time of arraignment in clear and concise language or, what would seem more

practicable in most cases, present an oral titular designation of such defense, either as a special plea or as a specification under the plea of "not guilty."

The very naiveté of Hale's historical explanation why justification is not to be pleaded specially⁶ makes it most apparent that there is no particular sanctity in the present arrangement of criminal pleas, and within the last few years a small group of states, convinced that law enforcement would be best served by a break with tradition, have decided to experiment with informative defense pleadings. If there has been a Bentham in the movement he is Prof. Robert W. Millar.⁷

Eight jurisdictions⁸ require the defendant to give advance notice of an insanity defense; at least two jurisdictions⁹ make the same requirement with reference to alibi, while Scottish law¹⁰ extends the requirement to alibi, insanity, that defendant was asleep, and that the crime was committed by another person named.

Alibi

In 1927 the Michigan Crime Commission waged a successful campaign for the adoption of a statute requiring the defendant who proposed to offer alibi evidence, to give notice of that intention, and his whereabouts, at least four days before trial, to the prosecuting attorney.¹¹ Many defense lawyers, both before and after its passage, bitterly opposed the measure which has since survived attack and been at least inferentially sustained by the Michigan Supreme Court.¹² Says Harry S. Toy, Prosecuting Attorney of Wayne County (Detroit):¹³

"The great increase in convictions where alibis have been offered since the passage of the act is attributed by police and prosecuting officials to the statutory notice given them, which permits an inquiry into the alleged facts of the alibi prior to trial and the refutation and destruction of a false alibi."

As the Michigan law now operates, perjury has been materially checked:

"Instances have arisen where an alibi has been offered as a defense after notice given under the Alibi act and the police and prosecuting officials have been able to prove that the alibi witnesses committed perjury. Several perjury convictions have

6. "In case of an indictment of felony or treason there can be no justification made, as a man cannot plead that what he did was *se defendendo*, or in his defense against a burglar or robber, though it amount in truth to no felony."

And the reason is, because the indictment supposeth in treason, that the fact was done *proditore & contra iustitias suas debitu*, and in felony, that the fact was done *felonice*, which is the point of the indictment, and must be answered directly, but upon *not guilty* pleaded he shall have the advantage of all such defenses, as he can make to acquit himself of the felony or treason, and may give all his special defense in evidence, though the matter of fact be proved upon him, and so it is the most advantageous plea for the prisoner.

"If duress and compulsion from others will excuse him or his own necessary defense in safeguard of his life, or any other matter, the jury upon the general issue ought to take notice of it, and to find their verdict accordingly, as effectually as if it were or could be specially pleaded." Hale, *supra*, nt. 5, p. 258.

7. See: Millar, "The Function of Criminal Pleading," (1922) 12 J. Crim. L. 500; Millar, "The Modernization of Criminal Procedure," (1920) 11 J. Crim. L. 344; Millar, "Reform of Criminal Pleading in Illinois," (1917) 8 J. Crim. L. 337 at 359. Since the preparation of this article, Prof. Millar has published another article dealing with "The Statutory Notice of Alibi," (1934) 24 J. Crim. L. 840.

8. Alabama, California, Colorado, Indiana, Michigan, Ohio, Washington and Wisconsin. See *infra*, nt. 28-33, 36, 37.

9. Michigan and Ohio. See *infra*, nt. 11, 15.

10. Keedy, "Criminal Procedure in Scotland," (1913) 3 J. Crim. L. 728, at 761; Wood and Renton, *Criminal Procedure*, pp. 73, 819.

11. Mich. Comp. Laws (1929) §§ 17313, 17314:

"Whenever a defendant in a criminal case not cognizable by a justice of the peace shall propose to offer in his defense testimony to establish an alibi on behalf of the defendant or the insanity of such defendant either at the time of the alleged offense or at the time of trial, such defendant shall at the time of arraignment or within ten (10) days thereafter but not less than four (4) days before the trial of such cause file and serve upon the prosecuting attorney in such cause a notice in writing of his intention to claim such defense and in cases of a claimed alibi such notice shall include specific information as to the place at which the accused claims to have been at the time of the alleged offense.

"Same; effect of failure to file notice. In the event of the failure of a defendant to file the written notice prescribed in the preceding section, the court may in its discretion exclude evidence offered by such defendant for the purpose of establishing an alibi or the insanity of such defendant as set forth in the preceding section."

12. People v. Marcus, 253 Mich. 410, 235 N. W. 202 (1931). See also People v. Miller, 250 Mich. 72, 229 N. W. 475 (1930); People v. Wudarski, 253 Mich. 83, 234 N. W. 157 (1931).

13. (1931) 9 The Panel 52.

2. See generally, Wright, "French Criminal Procedure," (1928) 44 L. Q. Rev. 324, (1929) 45 L. Q. Rev. 92; Westenhaver, "What Happens in a French Criminal Trial," (1925) 31 West Virginia L. O. 237, 244, 247; Garner, "Criminal Procedure in France," (1910) 25 Yale L. Jour. 255; Coudert, "French Criminal Procedure," (1910) 19 Yale L. Jour. 328, 337.

3. See argument advanced in (1932) 6 Aust. L. Jour. 175, 176. See also Freeman, "Should the Defendant in a Criminal Case File a Written Pleading Outlining His Defense?" (1923) 8 Minn. L. Rev. 357.

4. See Millar, "The Function of Criminal Pleading," (1922) 12 J. Crim. L. 500, 504.

5. See 2 Hale, Pleas of the Crown, 1st Am. ed. 1847, p. 236 et seq.; and 4 Hawkins, Pleas of the Crown, 7th ed. 1795, p. 243 et seq.; Blackstone Commentaries, Cooley's 3rd rev. ed., vol. 2, pp. 482-486; Clark's Crim. Proc., 2nd ed. p. 438 et seq.

With the exception of the Declinatory pleas (including sanctuary and clergy), virtually the same pleas are available today. The method of raising the defense differs somewhat in the jurisdictions. What was once raised by special plea in abatement or by demurrer is now, in some jurisdictions, raised by motion to quash. Section 209 of the American Law Institute Model Code of Criminal Procedure indicates the trend. Section 210 lists the grounds for a motion to quash. But the issues raised by the plea of not guilty remain the same today as at common law. See note (1929) 28 Yale L. Jour. 650.

resulted on that score in Detroit. . . Prosecuting and police officials of this County are firmly convinced that the present Michigan Alibi and Insanity Defense Law is a step in the right direction and that it prevents many miscarriages of justice."¹⁴

In 1929 the Criminal Law Committee of the Ohio State Bar Association drafted an alibi defense statute containing virtually the same language as the Michigan statute, and secured its enactment.¹⁵ Previously there had been many abuses of the alibi defense.¹⁶

The extent to which some defendants will go with a perjured defense is illustrated by the case of Hymie Martin, a notorious gunman who when arrested in Pittsburgh for a murder committed in Cleveland secured a writ of habeas corpus and at the hearing produced alibi witnesses who testified that he was in Pittsburgh on the night in question. Disbelieving the witnesses the court refused to release the suspect and he was extradited to Ohio where he was indicted. He served notice required by the Ohio alibi law, in which, to the amazement of all he stated that on the night of the murder he was in Akron, Ohio.¹⁷

Under the Ohio law, the popularity of the alibi defense waned. Criminals found that an alibi defense refuted in open court was worse than no defense at all. The requirement of advance notice robbed this defense of its most valuable quality, i.e., the surprise element. All this was apparent two months after the enactment of the law, according to Miss Leona Marie Esch, Operating Director of the Cleveland Association for Criminal Justice.¹⁸

The Ohio Supreme Court, in a case not directly presenting constitutional questions,¹⁹ upheld the lower court which had refused to admit evidence of alibi in the absence of an advance specification.²⁰

In spite of the able sponsorship of State Attorney-General John J. Bennett, Jr., Judge Charles C. Knott, Jr.,²¹ and Thomas S. Rice, vigorous associate editor of *The Panel*²² the New York legislature has three times voted down a similar statute in that state.

In 1926, the Section of Criminal Law and Procedure of the California Bar Association recommended the adoption of such a statute but the efforts of this committee, the district attorneys of the state, and the California Crime Commission were unavailing when the legislature met in 1931.²³

The attorney general's office has recommended to

14. *ibid.* That perjury would be reduced under such a law was one of the strongest arguments leading to the enactment. See Millar, "The Modernization of Criminal Procedure," *supra*, nt. 7, p. 350.

15. Ohio Gen. Code (Page, 1931) §13444-30. "The notice under this statute must be given not less than THREE days before trial.

16. "No matter how carefully witnesses were subpoenaed, no matter how thoroughly their memories were tested, no matter how accurately their statements were reduced to writing, no matter how painstakingly the state prepared its case, 'alibi witnesses' would pop up in the courtroom to prove that the defendant was not on the East side but on the West side of the city, or in Chicago, or New York, or somewhere else but NEVER ON THE SCENE OF THE CRIME at the time of its commission." Esch, "Ohio's New 'Alibi Defense' Law," (1931) 9 *The Panel* 43.

17. *id.* p. 43.

18. *id.* p. 43.

19. *State v. Nooks*, 123 Ohio St. 190, 174 N. E. 743 (1930). See also *State v. Thayer*, 124 Ohio St. 1, 176 N. E. 656 (1931).

20. The defendant was indicted for larceny and "offered a witness, during the trial, for the purpose of proving an alibi. The state objected as no written notice had been given pursuant to the [alibi] statute, and the objection was sustained. The court of appeals then reversed the judgment, holding the testimony to be competent regardless of the statute, as it tended to disprove the truth of the state's witness, but the supreme court reversed the appellate court and affirmed the decision of the trial court, saying:

"To hold that there was an abuse of discretion under this record is to deprive section 13444-29 of any force and effect, as it is difficult to conceive how any alibi testimony in a criminal case would not tend to disprove the testimony offered by the state upon the point of the whereabouts of the accused at the time and place of the commission of the offense."—Chamblin "Failure to Plead Insanity as a Defense," (1932) 6 *Cinn. L. Rev.* 313, at 316.

21. (1931) 9 *The Panel* 49, 58.

22. (1933) 11 *The Panel* 27.

23. Report, Calif. Crime Comm. (1931) p. 10; *id.* (1933) p. 18.

the present federal congress the adoption of such a statute.

Under both the Michigan and Ohio statutes, alibi is not raised by a separate plea, but by specification under the general issue. Both statutes provide that in the event defendant fails to submit advance notice, the court may in its discretion exclude alibi evidence. This grant of discretion seems a wise insertion both from the standpoint of the prosecution and the accused. Without such a penalty the requirement of the special plea would be a most ineffective gesture.²⁴ While the cases will be rare in which the court should permit proof of an unannounced alibi, occasionally a defendant will be called upon, in a tardy prosecution, to recall and substantiate his presence at a given place on a night some years previous. When such a case arises the discretion may be exercised so as not to penalize a defendant who has not had time to refresh his memory.

Insanity

With such unsolved fundamental problems in the insanity field as the bases for criminal responsibility, the adequacy of insanity tests, the need for the creation of agencies for pre-trial psychiatric examinations, and the ultimate disposition of the mentally unsound, only the most superficial surface-scratching can be accomplished by tinkering with such purely mechanical innovations as the special plea of insanity. Our contribution is rendered all the more slight when it is realized that, contrary to popular opinion, the insanity defense is raised in comparatively few cases.²⁵

However, by requiring advance notice of intention to present an insanity defense, some of the surprise element will be eliminated, and feigned insanity may be discouraged. California statistics indicate that such a requirement will not necessarily result in fewer such pleas²⁶ although that has apparently been the result in Michigan.²⁷

In Alabama,²⁸ California,²⁹ Ohio,³⁰ Washington,³¹ Wisconsin,³² and Indiana,³³ the defense of insanity at the time of the offense must be raised by a special plea, and unless it is so raised, no evidence of insanity may be presented at the trial. Louisiana had a similar statute,³⁴ but in 1932 the section of the Code containing the provision for a special plea was amended and re-enacted omitting any reference to such a plea.³⁵

In Colorado³⁶ and Michigan³⁷ insanity must be raised by a specification under the general issue. Unless so raised it cannot be shown under "not guilty" in

24. New York and Nebraska provide for special pleas of insanity, but notwithstanding, permit insanity evidence to be offered under the general issue. See *infra*, nt. 38, 39.

25. "The Illinois Crime Survey, p. 213, states that the number of defendants found insane by juries in the various municipalities and counties covered by the survey vary from less than 1 per 1000 cases to 1.5; and that 'the insanity defense has great publicity in a few homicide cases and creates the impression that a large number escape in that way.' On p. 757 there are more detailed statistics of Cook County, showing in four years a total of only 11 findings of insanity in murder cases and 40 in all cases. . . . The California . . . report discloses (p. 37) that in 8,336 cases there were 98 pleas of insanity, or a little over one percent, and that of these 98 only 13 were successful, and in a majority of these the district attorney either stipulated that the defendant was insane or the experts called by the state testified that the defendant was insane." Bettman, *Criminal Justice Surveys Analysis*, vol. 4, Report of The Wickersham Commission, p. 129, 130.

26. Report of the Calif. Crime Comm. (1931) p. 25.

27. (1931) 9 *The Panel* 52.

28. Ala. Code (Michie, 1928) §4573.

29. Cal. Pen. Code (Deering, 1931) §1016.

30. Ohio Gen. Code 1930, §13440-2.

31. Wash. Comp. Stat. (Remington, 1922) §2174.

32. Wis. Stat. (1931) §57.11.

33. Ind. Ann. Stat. (Burns, 1926) §2231. Insanity however is admissible in mitigation, though not pleaded. *Hopkins v. State*, 180 Ind. 293, 102 N.E. 851 (1913).

34. La. Code Crim. Proc. art. 267; *State v. Harville*, 170 La. 601, 129 So. 612 (1930).

35. Act 136 La. Reg. Sess. 1932, p. 449.

36. Colo. Laws 1927, c. 90, §1.

the former state, and may be excluded by the judge in the latter.

In New York³⁸ and Nebraska³⁹ the defendant may make a special plea of insanity, but evidence of insanity is nevertheless admissible under the general issue,⁴⁰ a rather impotent provision, it would seem.

While three other states, Maine,⁴¹ Maryland,⁴² and New Hampshire,⁴³ make no requirement with reference to special pleas in insanity cases, their statutes appear to contemplate such pleas, and such pleas would not be rejected as they have been in other states.⁴⁴

The Code of Criminal Procedure of the American Law Institute contains a provision, similar to that in Michigan and Colorado requiring a specification in advance of trial.⁴⁵ And the Missouri Crime Survey⁴⁶ and the Wickersham Commission⁴⁷ contain recommendations approving such a statute.

Other Defenses

It is submitted that the specification of defense should be extended to all defenses, leaving as the scope of the plea of "not guilty" the questions whether or not the acts charged took place and whether the accused committed them. Hidden away in the voluminous report of the Wickersham Commission is this significant recommendation.⁴⁸

The accused, who has participated in the commission of crime, is in a position to know the circumstances under which his acts were committed. The prosecution is not. If the defendant was not at the scene of the crime, he knows that fact, and he also knows something the prosecution may never know, namely, where he was at the time of its commission. If he is innocent because his conduct falls within some legal excuse or justification, he would not be prejudiced by a statutory compulsion to specify such excuse or justification. If he is guilty no constitutional guarantee for the protection of the innocent should shield him.

From the standpoint of saving time and expense in the prosecution of criminal cases, the requirement of advance notice of defense would be fully justified. If a defendant wishes to raise the defense of entrapment, for instance, a defense which by its very nature admits the commission of the act charged, why should there be placed upon the prosecution the burden of collecting evidence, often a costly and time consuming task, which would simply tend to place the defendant at the scene of the crime. Entrapment is frequently urged as a defense in prosecutions for illegal sales of liquor and narcotics.⁴⁹ If in truth the only real issue is whether or not there has been a sufficient degree of persuasion or participation by the enforcement officers, why should the state be required to flounder in the dark, possibly even abandon the case because evidence is wanting which would place the defendant at the scene of the act, where he, if he could be required to, would admit that he was.⁵⁰

Where the defense is based upon a promise of

immunity⁵¹ made by enforcement officers in consideration that the defendant either give information concerning accomplices or the whereabouts of loot, or in consideration that he turn state's evidence, no unfairness would result in requiring advance notice of such defense. The defense is essentially one in abatement.

The same is true of other defenses, but particularly true of condonation. While this defense is decidedly limited it makes its appearance in jurisdictions where statutes have been enacted which call for a dismissal of the case where in rape⁵² and seduction⁵³ the parties later marry, and in adultery where the prosecution is not instituted upon the complaint of the aggrieved spouse.⁵⁴ Since the perfect example of condonation is the grant of executive clemency through pardon, and since pardon had to be raised by a special plea at common law,⁵⁵ it should not be regarded as a novel suggestion that condonation in its less perfect form be the subject of advance specification.

Most defenses,⁵⁶ unlike alibi which is exceedingly hard to refute at the last moment, and unlike immunity which may properly be classed as one in abatement, are defenses which are not usually difficult to refute, and which go to the merits. But even assuming that the cases where the surprise element hinders effective prosecution are the exception rather than the rule it would seem that whatever slight inconvenience may result to the accused from advance specifications is outweighed by the slight advantage accorded the prosecution by virtue of which defenses may be tested in advance of trial.

Obviously any attempt to confine defendants to one defense only would be unreasonable and unfair and would immediately be labelled unconstitutional, at least where consistent defenses are proffered.⁵⁷ But to require that defenses be announced in advance of trial does not deprive a defendant of such defenses. He may select any defenses applicable to his situation. No defense is made unavailable to him unless by his own choice he discards it through failure to specify.

But if the failure to specify such defenses in advance of trial is to work a forfeiture of the right to introduce evidence tending to establish such defenses, will not counsel make a practice of enumerating all defenses in their specifications?⁵⁸ This hardly seems a likely prospect, but if it becomes such, there are methods of correcting such an abuse. Statutes might be enacted prohibiting the enumeration of inconsistent defenses in the specification. But the most effective counter-irritant might be supplied by giving to the prosecutor if he needs a grant of power in this respect⁵⁹ the right to comment upon the fact that defenses specified were not established by evidence at the trial, or that the defenses offered were inconsistent. To pre-

51. See *Scribner v. State*, 90 Okla. Cr. 456, 132 Pac. 933 (1913); *State v. Sinc*, 91 W. Va. 608, 114 S.E. 150 (1922).

52. N. C. Code (Michie, 1931) §4209; 1 N. C. L. Rev. 286.

53. *Metc. v. State*, 40 Tex. Cr. Rep. 10, 57 S.W. 289 (1900); Cal. Pen. Code (Deering, 1931) §269; N. C. Code (Michie, 1931) §4330.

54. *People v. Dalrymple*, 55 Mich. 519, 22 N. W. 20 (1885).

55. Clark's Cr. Proc. (2nd ed.) §139.

56. By "defenses" is meant anything which if established would acquit the defendant.

57. Statute depriving defendant of defense of insanity was held unconstitutional in *State v. Strasburg*, 60 Wash. 106, 110 Pac. 1020 (1910). See *Rood*, "Statutory Abolition of the Defense of Insanity in Criminal Cases," (1911) 16 Va. L. Reg. 721.

58. See note (1929) 2 S. C. L. Rev. 650, 656.

59. See 9 The Panel 42, 43; 52.

37. Mich. Com. Laws (1929) §§17313, 17314.

38. N. Y. Code Crim. Proc. §336; Gilbert's Pen. Code and Crim. Law Ann. 1933.

39. Neb. Comp. Stat. (1929) §29-2204.

40. *ibid.*; *Ostrander v. People*, 28 Hun. 38 (1882); *People v. Joyce*, 293 N. Y. 61, 134 N.E. 336 (1923).

41. Me. Rev. Stat. (1930) c. 149, §1.

42. Md. Ann. Code (Bagby 1924) art. 59, §6, as amended Laws 1931, c. 436, p. 1103.

43. N. H. Pub. Laws 1926, c. 369, §2.

44. *State v. Branton*, 33 Ore. 533, 550, 56 Pac. 267 (1899).

45. A. L. I. Model Code Crim. Proc. §265.

46. Mo. Crime Survey, pp. 371-373.

47. Report, Wickersham Commission, vol. 8, p. 34.

48. *ibid.*

49. Note (1929) 2 S. C. L. Rev. 288 and authorities cited in note to *Sorrells v. United States*, 287 U. S. 435, 444, 53 Sup. Ct. 210, 213 (1932).

50. It is not suggested here that legislation be enacted making the

specification of entrapment alone an admission of presence at the scene of the offense and participation therein. The objections to such a procedure are discussed in the conclusion to this article. The real advantage of advance specification would lie in the notice given to the prosecutor that entrapment is the vital issue—the real defense. Knowing this the prosecution could be content with a lesser quantum of proof tending to identify defendant and place him at the scene, and could throw its detective resources into destroying the entrapment defense.

sent to the jury a long list of the defenses specified and to then proceed to ridicule the list would be far more damaging than any restriction on pleading inconsistent defenses. A jury is rightfully suspicious of a man who claims an alibi and who offers evidence of self-defense.

Any change in the procedural law which disturbs the existing alignment of handicaps and advantages, however unbalanced it may now be, between accused and prosecutor, is certain to be met with cries of unconstitutionality, and it would therefore seem appropriate to anticipate such objections.

In 1927 California created a new plea of "not guilty by reason of insanity."⁶⁰ By statute it was provided that if such plea were used alone, the defendant thereby admitted the commission of the offense charge;⁶¹ and if the plea of "not guilty" were used alone, the defendant was conclusively presumed to have been sane at the time of the offense charged.⁶² If the defendant joined with the insanity plea another plea, he was first to be tried as if he had entered the other plea only, and for purposes of such trial was presumed sane, following which a separate trial was provided on the insanity issue.⁶³

In the first case involving the constitutionality of the statute, *People v. Hickman*,⁶⁴ the defendant entered only the insanity plea and upon a finding of sanity, was sentenced. He urged upon appeal that having been confined to the insanity issue he had been denied due process and equal protection of the laws under the 14th amendment. The court held that he had had ample opportunity to choose appropriate pleas and that he was not therefore deprived of anything which he could not have availed himself of.

In *People v. Davis*,⁶⁵ the defendant entered both a plea of "not guilty" and one of "not guilty by reason of insanity," and although he had ample opportunity to present insanity evidence at the second hearing his appeal was based upon the court's refusal to permit the introduction of insanity evidence at the first hearing. Following the reasoning in the *Hickman Case*,⁶⁶ the court held that the procedure was valid if at some time he was permitted to have his insanity determined by the jury.⁶⁷

In *People v. Leong Fook*⁶⁸ and *People v. Troche*⁶⁹ the defendants entered pleas of "not guilty" and offered evidence of insanity under such pleas which was rejected by the court. In opinions which stress the procedural nature of the statutory change, and which rely heavily and unnecessarily upon the affirmative nature of the insanity defense,⁷⁰ the court held that the legislature could constitutionally exclude evidence of insanity on a "not guilty" plea, where opportunity was given to choose a plea by which insanity could be raised.

In none of the cases was the court troubled particularly with the validity of that portion of the statute which simply required a defendant to choose the appropriate plea or forfeit the right to raise it at trial. Its real problem was whether insanity was such a vital inseparable factor in the determination of guilt as

could not be detached from the guilt issue for determination in a separate hearing.⁷¹

The first problem would seem to be a relatively simple one and yet a dictum of the Ohio court in a recent case⁷² leaves uncertain the disposition which will be made of the Ohio insanity law when a proper case is presented:

"We do not deem it necessary under this record to consider the refusal of the court under Section 13440-2, Ohio General Code (113 Ohio Laws 175) to permit testimony to be offered as to the insanity of the accused at the time of the commission of the offense, nor to go into the question of the grave doubt as to the constitutionality of the provision establishing a conclusive presumption of sanity from the failure of the attorney to file a written plea of not guilty by reason of insanity. Two of the members of this court, including the writer of this opinion, are convinced that an enactment which would deprive an insane person of a defense going to the very vitals of his case, because of non-action upon the part of his attorney, would necessarily be unconstitutional, upon the ground that it would deprive such insane person of due process of law."⁷³

It is submitted that on the basis of the above reasoning, the Ohio statute is no more a deprivation of due process than a denial by a trial judge of a defendant's request to change a plea, entered by his attorney, from guilty to not guilty.

With the dictum in the above case may be compared the language of the Alabama Supreme Court in a case⁷⁴ upholding the constitutionality of the statute of that state which provides for a separate insanity plea:

"The rule is well settled in this state that the action of the trial court in refusing to allow additional pleas to be filed after the time prescribed by law is not revisable on appeal [citing cases]. We see no reason for making an exception in favor of the plea of 'not guilty by reason of insanity.' Section 7176 of the Code requires that this plea must be interposed at the time of arraignment, and failure to do so forfeits the right, and leaves the acceptance of the plea thereafter to the unreviewable discretion of the trial court. . . . There is no merit in the suggestion that the enforcement of this rule of practice is a violation of the defendant's constitutional right 'to be heard by himself and counsel, or either.'"⁷⁵

The proposal for a more extended use of special pleas in criminal cases is not, however, complicated by any of the constitutional problems such as arose out of the California statute which provided for separate trials on separate pleas. The proposal involves no attempt to separately try the issue of self defense, for instance, and the other issues that may be raised today under the not guilty plea. Such a procedure would be a farce, for the elements constituting self defense are so interlinked with the other proof which would be adduced that a separate trial of the self defense issue would simply result in duplicate hearings. The proposal involves one trial only, but advance notice of the defenses which are to be raised therein.

Is due process violated when one is given the choice of any defenses suitable to his situation, but is permitted to assert them at trial only if preceded by a notice of such intention? In the *Troche Case*⁷⁶ the court said:

"Due process of law is not limited to the due process of the settled usages of the past, but may include new methods of procedure unknown to the common law, provided they are in

60. Cal. Pen. Code (Deering, 1931) §1016.

61. *ibid.*

62. Cal. Pen. Code (Deering, 1931) §1026.

63. *ibid.*

64. 204 Cal. 470, 268 Pac. 909, 270 Pac. 1117 (1928).

65. 94 Cal. App. 192, 270 Pac. 715 (1928).

66. *Supra*, nt. 64.

67. 217 Pac. 715, 716 (1928).

68. 208 Cal. 64, 273 Pac. 779 (1928).

69. 208 Cal. 35, 273 Pac. 767 (1928). Appeal dismissed 280 U. S.

524 (1929).

70. See Shepherd, "The Plea of Insanity under the 1927 Amendments to the California Penal Code," (1929) 3 So. Cal. L. Rev. 1, at p. 6 et seq.

71. On reargument before the California Supreme Court in *People v. Troche*, *supra*, nt. 69, the court submitted this question to which it invited counsel to devote their arguments: "Whether any evidence bearing on the mental condition of the defendant at the time the offense is alleged to have been committed is admissible for the purpose of showing intent or premeditation, or for the purpose of enabling the jury to determine the degree of the offense charged, and the extent of the punishment." Argument of Attorney General Webb, p. 38.

72. *Evans v. State*, 133 Ohio St. 182, 174 N.E. 348 (1930).

73. *id.* p. 138.

74. *Rohn v. State*, 186 Ala. 5, 65 So. 42 (1914).

75. *id.* 65 So. at 43.

76. *Supra*, nt. 69.

harmony with the accepted underlying principles of such procedure according to the traditions of the common law. They must be orderly and provide for reasonable notice and opportunity to be heard."⁷⁷

The California cases⁷⁸ construing the insanity statute of that state would seem to present ample argument for sustaining legislation extending the use of special pleas or specifications to other defenses.

The constitutional objection which might conceivably prevail against alibi statutes such as those in Michigan and Ohio, is that the procedure in effect requires the defendant to be a witness against himself. The provision against self-incrimination exists in forty-six of the states⁷⁹ including Michigan⁸⁰ and Ohio.⁸¹ The wording of the guarantee is the same in both these states: "No person shall be compelled in a criminal case to be a witness against himself." The alibi statutes differ from the insanity statutes in that in the former the defendant must not only specify his defense or forfeit the right to raise it at the trial, but he must also state where he was at the time the offense was committed. The statute thus compels the defendant who proposes to offer such a defense to furnish particulars concerning the evidence which will establish it. It may be argued that this is the equivalent, at least, of testimonial compulsion, the very thing which the constitutional provisions were designed to prevent.⁸² It is true that the privilege against self-incrimination has not been applied to criminal pleas or pleadings,⁸³ but it is also true that no statutes have heretofore required of a defendant what the alibi statutes now require.

It is submitted, however, that the alibi statutes do not infringe on the privilege against self-incrimination. Rather, they set up a wholly reasonable rule of pleading which in no manner compels a defendant to give any evidence other than that which he will voluntarily and without compulsion give at trial. Such statutes do not violate the right of a defendant to be forever silent. Rather they say to the accused: If you don't intend to remain silent, if you expect to offer an alibi defense, then advance notice and whereabouts must be forthcoming; but if you personally and your potential witnesses elect to remain silent throughout the trial, we have no desire to break that silence by any requirement of this statute.

Certainly the change in the type of crimes committed and the means used by criminals committing them, when considered together with the safeguards thrown about accused persons under present procedure, justify a far different construction of the constitutional privilege than one which might have been invoked centuries ago. The privilege arose out of a period in English history when there was judicial sanction of the use of the thumbscrew and the rack for the extraction of pleas as well as confessions.⁸⁴ The forcing of admissions of guilt from the lips of the accused by the employment of legal process was the conduct sought to be prevented.⁸⁵ In the present temper of the courts

there is slight likelihood that the privilege will be strained to invalidate such legislation as the alibi statutes.

In conclusion it may not be out of place to indicate some of the other proposals which have been urged in recent years to bring about a more equitable distribution of advantages between the state and the accused in criminal pleading. Three of these particularly bear mentioning. The first is a proposal to require a defendant to furnish in advance of trial the names of the witnesses he expects to call at the trial or upon failure to do so, forfeit the right to call them.⁸⁶ The second is a proposal to require the defendant to submit a schedule of witnesses and a brief summary of what each will testify to.⁸⁷ The third involves setting up in criminal cases approximately the same system of pleading as now prevails in civil cases under reformed procedure in which the scope of the general issue is limited, and the tender of a certain plea without more will constitute an admission of matters not denied in the plea, thus saving the state the necessity of proving admitted facts.⁸⁸

Each of the above proposals would undoubtedly result in an increasingly aggravated disturbance of the defendant's now favorable balance, and each would therefore be increasingly difficult to sustain under the due process clause. To speculate as to the reception which the judiciary will accord such legislation is beyond the scope of this article. The first proposal would seem to involve a harsh requirement. To make a defendant specify each witness he will use to establish his innocence would seem to call for needless particularization. The second proposal while subject to the same objection, would also be a clumsy implement at best, for no law can satisfactorily regulate the brevity of a summary of testimony, and such summaries would invariably disclose little of significance to the prosecutor. The third proposal, I fear, would lead immediately to a wild scramble to set up a system of pleading akin to that on the civil side which has been centuries in the making. In order to ascertain what is to be regarded as admitted, and what denied by each of the multitude of written defense pleadings that would be presented to the courts, would call for thousands of appellate court adjudications and furnish unnecessary opportunities for delay in the administration of criminal justice. It would be a costly reform.

None of these objections apply to the proposal herein advanced that notice be given before trial of the defense to be presented. The most brief specification will be sufficiently informative. No counter pleadings are called for. The issues raised by the defense would be heard at one trial as under present procedure. But the perjured defense and the surprise defense, neither one of which has any justification in a serious search into the blameworthiness of conduct, will be substantially thwarted.

86. Millar, "The Function of Criminal Pleading," (1922) 12 J. Crim. L. 500, 503.

87. id. 504.

88. Heller, "Adam, Is My Fig Leaf on Straight?" pp. 44-45.

77. 206 Cal. 35, 42; 273 Pac. 767, 770.

78. For discussions of the California Insanity Law and the cases construing it consult: Shepherd, supra, nt. 70; Chamblin, "Failure to Plead Insanity as a Defense," (1932) 6 Cinn. L. Rev. 313, 317 et seq. and additional cases of People v. Marshall, 209 Cal. 540, 289 Pac. 629 (1930) and People v. Lamey, 103 Cal. App. 66, 233 Pac. 848 (1930).

79. Wigmore, Evidence (2nd. ed.) §2262.

80. Mich. Const. art. 2, §16.

81. Ohio Const. art. 1, §10.

82. Wigmore, Evidence (2nd. ed.) §2263.

83. For detailed discussion of the privilege, see Wigmore, supra, §§2250-2284; also Grant, "Self-Incrimination in the Modern American Law (1931) 5 Temple L. Q. 868; Corwin, "The Supreme Court's Construction of the Self-Incrimination Clause," (1930) 29 Mich. L. Rev. 1; note (1932) 41 Yale L. Jour. 618.

84. Stephen, Hist. of the Crim. Law of Eng. vol. 1, p. 297; 350; Wigmore, supra, note 83. See also comment on the privilege in The Philippine Penal Code, Acts, and Procedure (Revilla ed. 1930, vol. 2, p. 1152).

85. Wigmore, supra, nt. 82.

The following recent cases, among others, now reported in United States Law Week, have not been referred to: *United States v. Calistan Packers, Inc.* U. S. Dist. Ct. Cal., decided October 2, 1933; *The State of Texas v. Standard Oil Co.*, Texas Dist. Ct., decided October 12, 1933; *Southport Petroleum Co. v. Ickes*, Sup. Ct. D. C., August 15, 1933; *Wisconsin State Federation of Labor v. Simpler Shoe Manufacturing Co. v. Watach*, Dist. Ct. of Oregon, decided January 24, 1934; *United States v. Bob Licto*, Dist. Ct. of Texas, decided February 16, 1934; *United States v. Suburban Motor Service Corporation*, Northern District Illinois, decided February 12, 1934; *Amazon Petroleum Corp. v. Railroad Commission of Texas, et al.*, Dist. Ct. of Texas, decided February 12, 1934; *Chicago Flexible Shaft Co. v. Katz Drug Co.*, United States Dist. Ct., Delaware, decided February 23, 1934; *Drake Bakeries, Inc. v. Bowles*, Ohio Com. Pleas, decided February 14, 1934.