BIFURCATION: THE TWO PHASE SYSTEM OF CRIMINAL PROCEDURE IN THE UNITED STATES*

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I

ANTECEDENT SEGMENTALIZATION

A. *Introduction*

The term bifurcation, as used in this article, stands for the separation of the issue of criminal liability from that of the appropriate sentence in an American criminal trial. The essence of bifurcation is the restriction of character and background evidence to that portion of the proceeding in which the sentence is determined. It is, therefore, a procedure that refrains from judging the defendant's character and personality until he is proven guilty of the crime charged.

In part historic accident, in part a conscious response to a number of psychological recognitions, some of which will be described in this article, bifurcation has roots deep in Anglo-American legal history. Although historic tradition and inertia may partially explain the continued bifurcation of American trials in the Twentieth Century, this sort of inertial reasoning does not explain the continued advocacy and use of bifurcated procedures. Indeed, bifurcation is a matter of considerable interest in the United States.

During the last decade, several American states, including California, Pennsylvania, and New York, instituted a new

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bifurcated system for the imposition of the death penalty.[1] In the first stage, the jury determines guilt under the rules of an ordinary criminal trial. However, if the jury returns a verdict of guilty, it then hears evidence as to the circumstances of the crime and the defendant's background and retires to consider the appropriate penalty.[2]

The President's Commission on Law Enforcement and the Administration of Justice, in its principal report, recommended the bifurcation of juvenile court trials, which are not now generally bifurcated.[3]

Any purported description of the legal system of the United States of America must be viewed with considerable caution. It is virtually impossible to describe in one sweep a system composed of fifty-three (or more) different criminal jurisdictions (fifty states, the District of Columbia, Puerto Rico, and the federal courts) with individual differences which are sometimes as great as the differences in the thirty-five (or thereabouts) European nations. In our description of the American bifurcated procedure we shall restrict ourselves to those aspects of procedure which are common to all fifty-three jurisdictions.

B. *American Segmentalization vs. Continental Concentration*

Critics and admirers of American criminal procedure alike have been impressed with what might be characterized as the overwhelming respect for the dignity of the accused which permeates the entire system. To the extent that this respect results in obliteration of the truth—as it frequently does—the American system is distinctly set apart from the systems of procedure of most other nations. Nothing characterizes the American criminal procedure as much as the effort to compel the accusing government to respect the

1. Mueller, *Procedure en Deux Phases en Matiere de Peine Capitale aux Etats-Unis d'Amerique*, 19 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PENAL COMPARE (n.s.) 206 (1964).

2. G. MUELLER, FROM DEATH TO LIFE § 4 (Centenario da Abolicao de Morte em Portugal 1967).

3. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLANGE OF CRIME IN A FREE SOCIETY 87 (1967).

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human rights of the individual, even during its efforts to promote law and order. This compulsion most frequently takes the form of suppressing all evidence which the government obtained while violating any of those human rights which find their expression in the Bill of Rights of the United States Constitution, as these guarantees have become largely binding on the states through the due process clause of the fourteenth amendment. It is accepted that this exclusion of evidence actually results in the suppression of truth in many cases.

Skillful counsel will naturally search diligently for any violation of his client's rights so as to achieve the suppression of evidence detrimental to his cause. The resulting struggle between prosecution and defense about issues of exclusion exaggerates the already pronounced adversary nature of the American criminal proceeding. The American judge today often is little more than an arbiter in a "game" of excluding evidence played for high stakes. Perhaps the traditional conceptualization of the American criminal trial as a game anticipated the realization of modern psychology that most human interactions are explainable in terms of game theories. Be that as it may, it is understandable that the adversary system and the sporting spirit it induces are the heart of American criminal law; and the implicit equality between government and individual which it fosters has important and beneficial effects on the development and maintenance of a free and democratic society. This is what the Supreme Court meant in *Miranda v. Arizona* in which it said that the limitations on criminal procedure contained in such parts of the Bill of Rights as the fifth amendment were meant to vouchsafe a "fair individual-state relation."[4] In order to make certain that any interference with personal liberty is both minimized and clearly justified, the American legal system provides a series of safeguards or obstacles (depending upon one's point of view) under which the law enforcement apparatus, including the courts, must operate. The obstacles engendered by application of the exclusionary rules have gravitated around two opposing focal points—the law enforcement focal point and the civil liberties focal point. Law enforcement officers are very outspoken in their claims that the scales have been weighted in favor of the criminal element,

4. Miranda v. Arizona, 384 U.S. 436, 460 (1966).

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and that law enforcement has been "handcuffed."[5] These obstacles are *not* designed to prevent or to emasculate the enforcement of laws. Due process "does not deny the social desirability of repressing crime . . . ."[6]

The imposition of these safeguards or obstacles is in large part effectuated by the piecemeal litigation of issues in a criminal trial. Bifurcation is an example of this piecemeal determination of criminal liability at the trial stage. But there are several other instances of segmentalization of criminal procedure into distinct phases which make it clear that the American model rests perhaps on a different principle than the continental one. The continental model of criminal procedure is one of unity or compactness. This is exemplified by the German procedural maxims of the unity of proceedings (Verhandlungeinheit), concentration (Konzentrationsgrundsatz), and immediacy (Unmittelbarkeitsgrundsatz).[7] By contrast, the American criminal proceeding evidences a conscious effort to avoid the massing of all issues into one complex. In an American criminal proceeding there may be as many as four distinct quasi-trials antecedent to the main trial, each of which can act as a check on the imposition of sanctions upon the individual. This segmentalization, or sequential trial of issues, is significant, because in its design it allows for the isolation of issues. Thus, for example, determination of incompetency is not colored by, and by the same token does not color, the issue of reasonable search and seizure. The voluntariness, and thus permissibility of its use at trial, of a confession is not determined by the same body (namely the trial jury) that will have to determine ultimate liability, on the chance that the confession will be found involuntary and thus nonusable. This separation of triable issues, as will be seen, gives the defendant greater room to maneuver, though admittedly it does suppress that truth which was

5. F. Inbau, *Law Enforcement, the Courts and Individual Civil Liberties*, in CRIMINAL JUSTICE IN OUR TIME 134 (A. Howard ed. 1965). We cannot have "domestic tranquility" and "promote the general welfare" as prescribed in the Preamble to the Constitution when all the concern is upon "individual civil liberties." Our civil liberties cannot exist in a vacuum. Alongside of them we must have a stable society, a safe society; otherwise there will be no medium in which to exercise such rights and liberties. To have these liberties without safety of life, limb, and property is a meaningless thing. Individual civil liberties, considered apart from their relationship to public safety and security, are like labels on empty bottles.

6. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 13 (1964).

7. K. PETERS, STRAFPROZESS EIN LEHRUCH 443-48 (1952).

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derived through governmental fault, or which has the tendency to unduly prejudice the defendant's rights and, thus, the greater truth.

Roughly sketched, the four segments of which we speak are: (1) the grand jury or preliminary hearing; (2) pleas in abatement or pretrial motions to dismiss the charges; (3) pretrial exclusionary hearings; and (4) competency hearings. It is to be noted that only one of these four quasi-trials, antecedent to the main trial, can be said to have a regular counterpart in continental criminal procedure, namely an amalgamation of numbers (1) and (2) in the form of the French proceeding before the chambre d'accusation (indictment chamber),[8] or to the German *Eroffnungsbeschluss* (order opening trial), rendered in the intermediate proceeding.[9] The other antecedent quasi-trials are deemed unnecessary in continental criminal procedure because the issues therein resolved are ordinarily being dealt with by the trial court in the course of the main proceeding.

C. *The Grand Jury*

All legal systems have created a filter to allow for the sifting out of those cases which, for evidentiary, legal, or policy reasons, should not reach the trial stage; a function which in continental systems investigating magistrates and chambres d'accusation interact. In felony cases in the United States this function is performed by the grand jury—a body of from sixteen to twenty-three laymen. The use of citizens indicates the special emphasis on potential policy reasons for not processing a case for trial.[10] Nevertheless, officially it is the function of the grand jury to review the evidence presented by the prosecution and to test it against the legally required standard of relative certainty of guilt, that is, comprises a "prima facie" case of guilt.

This antecedent trial *in absentia* is not necessarily an aspect of procedural segmentalization; but because it distinctly separates the

8. THE FRENCH CODE OF CRIMINAL PROCEDURE §§ 191-230, at 79 (7 American Series of Foreign Penal Codes 1964).

9. THE GERMAN CODE OF CRIMINAL PROCEDURE §§ 198-212b, at 109 (10 American Series of Foreign Penal Codes 1965).

10. This screening of cases is designed to prevent unjust prosecutions. Originally, when prosecution was allowed by private parties, it may also have been a protection against private malice. L. MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT? 267 (1959).

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whole of the process at an important juncture, separating the pretrial phase from the trial phase, it does constitute segmentalization of a sort.

It is to be noted that in recent years the so-called preliminary hearing has gained in importance. It is a trial in miniature, in the sense of an adversary proceeding (if the defendant wishes to interpose a contest) at which a number of ancillary problems are resolved, most notably the question of whether the defendant is sufficiently suspect to warrant further proceedings against him. These further proceedings would then be the grand jury hearing, unless—as happens ordinarily—the defendant waives the grand jury hearing and consents to proceed directly to trial.[11]

D. *Arraignment*

Historically and functionally more significant as a separate *segment* of the whole trial process is the proceeding traditionally known as the arraignment. In this phase, held before a judge of the trial court, the defendant has the opportunity of presenting those procedural obstacles to trial which require separate resolution out of the presence of the trial jury, and, indeed, before the right to call a trial jury is clearly established.

First of all, such obstacles may be in the nature of dilatory pleas. There can be objections to the jurisdiction of the court. By such a plea, the defendant, without admitting or denying the crime alleged, can object to the place, mode, or time of trial. It is a "dilatory" plea because it merely delays, abates, or postpones the trial until the appropriate place, mode, or time is achieved.[12] The plea in abatement remains in the criminal law of the states and the federal court. Its name has generally been modernized and changed to "motion to dismiss."[13]

Secondly, there are pleas in bar of the indictment, such as *autrefois acquit* (formerly acquitted), *autrefois attaint* (formerly attained), *autrefois convict* (formerly convicted).[14] At common law,

11. Note that local rules frequently vary from this pattern, which is based wholly on the federal model. FED. R. CRIM. P. 5-6.

12. 1 J. BISHOP, COMMENTARIES ON THE LAW OF PLEADING AND EVIDENCE AND THE PRACTICE IN CRIMINAL CASES 455 (3d ed. 1880).

13. FED. R. CRIM. P. 6(b)(2).

14. 1 J. BISHOP, *supra* note 12, at 455.

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if the defendant pleaded these historic equivalents of double jeopardy as a bar to the trial against him, a special jury had to be impaneled to determine that question.[15] It was regarded as important that this jury not be the one which ultimately would pass on the guilt or innocence of the defendant; first, so it was said, because the right to bring the defendant before a trial jury had not been established—which amounts to circular reasoning—and secondly, for fear that issues revealed on the antecedent question might have a detrimental psychological impact on the jury, which then could not consider the guilt of the defendant without prejudice.[16]

E. *Pretrial Exclusionary Hearings*

The Bill of Rights of the United States Constitution and the constitutions of most states contain guarantees of such rights as the right against self-incrimination (fifth amendment), the right to counsel (sixth amendment), and the right to be free from unreasonable search and seizure of person and property (fourth amendment). In recent years the Supreme Court has paid much attention to the problem of enforcing these rights.

In so doing, the Supreme Court has had to face the problem of policing the law enforcement establishment. All other methods of policing the police having failed, the Supreme Court saw itself forced to require all evidence discovered through illegal and unconstitutional means be excluded from the trial. Thus, the Court excluded from the trial all evidence discovered during an illegal search and seizure.[17] It also excluded any confession obtained after a suspect had requested a lawyer and not been permitted one,[18] or before a suspect was advised of his right against self-incrimination and of his right to counsel.[19] These exclusions are not directed primarily at protecting a particular innocent defendant. Instead, they are meant to check improper police methods by rendering the fruits of such methods useless. An indication of the degree to which this stage and issue are unconcerned with the defendant's guilt or

15. *Id.* at 458-59.
16. *Id.*
17. Mapp v. Ohio, 367 U.S. 643 (1961).
18. Escobedo v. Illinois, 378 U.S. 478 (1964).
19. Miranda v. Arizona, 384 U.S. 436 (1966).

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innocence is illustrated by *Walder v. United States*.[20] In that case an admission of guilt, made to prove improper search and seizure at an exclusionary hearing, was excluded from the subsequent trial.

To protect the effectiveness of such exclusions, any determination to exclude must be made outside the presence of the trial jury, or else the impact of the improper evidence might be sufficient to induce the trial jury to convict despite instructions to disregard the excluded evidence. Consequently, in the case of *Jackson v. Denno*,[21] the Supreme Court required that the voluntariness of a confession be determined by someone other than the trier of guilt, and that such determination be made outside the presence of the trier of guilt.

What has resulted is an entirely new stage in many criminal trials. In New York these hearings to determine the exclusion of evidence are held in a specialized part of the criminal court, sitting only to hold exclusionary hearings, which have become known as Huntley Hearings, after the case in which this procedure was first established.[22]

F. Hearings on Fitness to Proceed

The common law provided that whenever the issue of the defendant's fitness to proceed had been raised by the prosecutor, the defendant, or the court itself, the trial in chief had to be suspended and a special lunacy jury had to be impaneled to determine the issue.[23] Contemporary American practice provides for the determination of this issue by the judge of the court, often with the aid of expert investigation and examination of the defendant.[24] Although the issue can be raised at any time, it most frequently is resolved prior to trial, because trial of a incompetent person would violate the Constitution.[25]

Although a great number of defendants who, if tried, would be found insane, are in this way denied an exculpating trial, the object

20. Walder v. United States, 347 U.S. 62 (1954).
21. 378 U.S. 368 (1964).
22. People v. Huntley, 15 N.Y.2d 72, 255 N.Y.S.2d 838, 204 N.E.2d 179 (1965).
23. Mueller, *Procedure to Determine Responsibility and Fitness to Proceed in Criminal Cases*, 3 CRIM. L. REV. 29, 37 (1956).
24. *Id.* at 39-44.
25. Bishop v. United States, 350 U.S. 961 (1956), *rev'g* 223 F.2d 582 (D.C. Cir. 1955).

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here is to protect someone wnom the court finds unable to stand up to the state at the time of trial. The United States Supreme Court, in determining who fits in this category, has stated: "the 'test must be whether . . . [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.' "[26] "In short, emphasis is on capacity to consult with counsel and to comprehend the proceedings, and lower courts have recognized that this is by no means the same test as those [sic] which determine criminal responsibility at the time of the crime."[27]

A hearing to determine the competency of the defendant to stand trial is provided for by federal statute, the relevant section of which reads as follows:

> Whenever after arrest and prior to the imposition of sentence . . . the United States attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused . . . . Upon such motion or similar motion on behalf of the accused, or upon its own motion, the court shall cause the accused . . . to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court.[28]

Unless the report made by the psychiatrist indicates that the defendant is unable to understand the proceedings against him or unable to properly assist in his own defense, there is no obligation on the court to hold a hearing pursuant to the statute.[29] If the court orders a hearing, though, the defendant has a right to be present.[30] Nowadays he is not entitled to a jury determination of the issue.[31] It should be noted that the psychiatric examination in itself is not a hearing and can result in no binding determination of competency.[32]

26. Dusky v. United States, 362 U.S. 402 (1960).
27. Pate v. Robinson, 383 U.S. 375, 388-89 (1966).
28. 18 U.S.C. § 4244 (1964).
29. Coffman v. United States, 290 F.2d 212 (10th Cir. 1961).
30. Martin v. Settle, 192 F. Supp. 156 (W.D. Mo. 1961).
31. United States v. Davis, 365 F.2d 251 (6th Cir. 1966).
32. Stone v. United States, 358 F.2d 503 (9th Cir. 1966).

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Incidentally, lay testimony, if offered, must also be considered in evaluating the defendant's mental state.[33]

In some states, for example Wisconsin,[34] there is a further stage to determine the defendant's capacity as of the time of the crime. This appears to be a successful and reasonable method of avoiding the undue prejudice caused by the usual insanity defense when offered at trial. Separated, as it is in Wisconsin, from what may be the lurid details of the crime, this same procedure may actually have the effect of increasing the number of successful insanity defenses because the decision-maker will not feel as strong an urge to "punish" the wrongdoer. By separating the issue of sanity from that of factual criminal liability, the determination of capacity, by isolating it from other considerations and by isolating other considerations from it, like the determination of fitness to proceed, may become a fairer and more scientific process.

II

TRIAL: FIRST SEGMENT

A. The Trial Purpose

The American criminal trial itself is likewise characterized by the piecemeal litigation of issues. The trial consists of two rigidly separated phases. In the first phase, the court is concerned only with establishing the facts in proof of the elements of the crime: did the defendant commit the prohibited act of which he is accused; and did he commit the act with the requisite criminal intent which renders him liable for it? During this phase of the trial, the character and background of the defendant play no role. They remain hidden from the triers of fact, unless the defendant raises the issue either directly or by implication, *e.g.*, through a plea of insanity.[35]

Thus, the most prominent feature which differentiates the Anglo-American system from the continental one is the fact that the individual is not judged, as a human being, before it is determined that he committed the act in question. In other words, the individual's character is not called into question until after the

33. Smith v. United States, 353 F.2d 838 (D.C. Cir. 1965).

34. WIS. STAT. ANN. § 957.27 (West 1958).

35. 1 J. WIGMORE, EVIDENCE §§ 190-218 (3d ed. 1940).

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act has been proven beyond a reasonable doubt. Then the question of character may be raised for the determination of sentence.

The exploration of the rationale for this separation is the purpose of this article. However, before the reasons for it are discussed and evaluated, it will be helpful to describe how this separation is affected and enforced by the rules of evidence which act to exclude the unwanted evidence.

Such a discussion raises fundamental philosophical questions about the nature of human action. A philosophy which views every human act as an emanation, or as symptomatic, of the total human being, could not possibly judge an act constituting a crime without a complete background and personality investigation.[36] Such a system regards every nuance of human emotion and motivation as important for the full understanding, and thus of the proof, of a criminal act. The American procedural philosophy, on the other hand, is less depth-psychiatrically oriented—which is paradoxical for a country in which psychoanalysis has become so important. In America, at the trial stage, these nuances of emotion and virtually all motives are feared as potentially dangerous, for some knowledge of potential motive may lead the judges to the wrong conclusions as to whether an alleged human event took place in fact. This is not to say that American law is not interested in understanding the motivational aspects of the crime, but it postpones the consideration of these aspects for subsequent stages in the proceeding.

B. *The Trial Rules*

American trials are guided by formal rules of evidence, the basic premise of which is that all relevant evidence is admissible in the trial unless excluded by a specific rule. Thus Wigmore summarizes the rule as a two-part axiom: first, "None but facts having rational probative value are admissible," and secondly, "All facts having rational probative value are admissible unless some specific rule forbids."[37]

Evidence is relevant if a reasonable person could reasonably infer the fact in issue from the fact offered in evidence.

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36. E. SEELIG, SCHULD, LUGE, SEXUALITAT 74 (1944); Mueller, *To the Memory of Ernst Seelig*, 47 J. CRIM. L.C. & P.S. 539, 545 (1957).

37. 1 J. WIGMORE, EVIDENCE §§ 9, 10, at 289, 293 (3d ed. 1940).

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Circumstantial evidence is relevant because it tends to prove the fact in issue. Relevant evidence may nevertheless have to be excluded when a policy reason demands it. These policy reasons can be summarized under the following headings:

(1) Hearsay,
(2) Privileged communications,
(3) Opinion,
(4) The privilege against self-incrimination,
(5) Other exclusions imposed to insure related constitutional rights, and
(6) Background and character evidence.

(1) *Hearsay*. Hearsay is described by McCormick as follows:

> Hearsay evidence is testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.[38]

The general rule is that hearsay is not admissible at trial because the "out-of-court" asserter is neither under oath nor subject to cross-examination. The right to cross-examine witnesses is an essential hallmark of an adversary proceeding like the American criminal trial. About the cross-examination, Wigmore wrote:

> The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening service.[39]

Thus, the reliability of testimonial evidence is considered best insured by providing for the cross-examination of all testimony. Testimony which cannot be tested by cross-examination is excluded at trial because it is feared that the jury will give it too much probity. There are a number of exceptions to this general rule; enough so that many critics claim that the general rule should be that hearsay statements are admissible subject to some exceptions. However, an extended discussion of hearsay would not be relevant to the purposes of this article.

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38. C. McCORMICK, THE LAW OF EVIDENCE § 225, at 460 (1954).
39. V J. WIGMORE, *supra* note 37, § 1367, at 29.

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(2) *Privileged Communications.* Privileged communications are excluded from the evidence presented at the cost of excluding relevant testimony. They are not inadmissible because of any danger of undue prejudice to the defendant. Quite to the contrary, in most cases such evidence would be most accurate and relevant. They are excluded from the evidence in order to protect and maintain socially needed and useful interpersonal relationships. Varying from state to state, privileged communications can include: the attorney-client relation, the doctor-patient relation, the husband-wife relation, the priest-penitent relation, and, in a few states, the social worker-client relation. The privilege is held by the one who has communicated and, unless waived, it prevents the admission of evidence concerning a privileged conversation or communication.

> They do not in any wise aid the ascertainment of truth, but rather they shut out the light. Their sole warrant is the protection of interests and relationships which . . . are regarded as of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.[40]

(3) *Opinion.* In a trial, testimony which is in fact only the opinion of the witness is excluded on the grounds that it is for the jury to come to conclusions based upon the evidence and that it is the function of witnesses merely to provide the facts for such jury conclusions. Again, as in hearsay, there is present the fear that the jury may ascribe undue probity to the testimony of the witness. Necessity and common sense provide two exceptions to this exclusionary rule. First, if "the subject . . . [is] . . . beyond the . . . [knowledge] of the average layman,"[41] an expert on the subject can testify and give his opinion. Secondly, a layman's opinion is admissible in those cases where ordinary language is adequate to convey what was observed by the witness. Describing a person as "drunk," instead of going through a detailed description of bleary-eyedness, unsure step, incoherent speech, etc, is permitted because such additional testimony would only waste the court's time without altering the substance of the witness' testimony.

(4) *The Privilege Against Self-Incrimination.* The so-called self-incrimination clause of the fifth amendment provides that no

40. C. McCORMICK, *supra* note 38, § 72, at 152.
41. *Id.* § 13, at 28.

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person "shall be compelled in any criminal case to be a witness against himself." Under contemporary practices the defendant need not testify at the trial at all, indeed he cannot even be compelled to take the witness stand. His failure to do so creates no implication of guilt, and no comment to the jury may be made on his failure to testify.[42]

The privilege protects a person "only from being compelled to testify against himself or otherwise provide the State with evidence of a testimonial or communicative nature . . . ."[43] It has no application to "compulsion which makes a suspect or accused the source of 'real or physical evidence' . . . ."[44] Thus, taking a blood sample from a defendant is not a violation of the privilege.[45] The privilege does not affect the duty of a defendant to exhibit himself in a pretrial lineup for identification, even if it requires him to utter words allegedly spoken during the crime,[46] and the taking of a handwriting specimen is not a violation of the privilege either.[47]

Moreover, if the danger of criminal prosecution has been removed by the operation of the statute of limitations, the doctrine of double jeopardy, a pardon, or a grant of immunity from further prosecution concerning the information divulged, the defendant cannot claim the privilege.[48] If any one of these exceptions is applicable, it is clear that the individual is not a proper defendant. He is no longer the target of prosecution. The grant of immunity is given in those cases where the information sought is considered of such importance as to justify allowing the individual defendant freedom from prosecution. The privilege, of course, can be waived if the waiver is "knowing" and "voluntary."[49]

Whatever the historical roots of the privilege, it is seen today to have a threefold purpose: (a) it protects the innocent; (b) it promotes the accusatorial system of justice; and (c) it protects the right of privacy.

42. Griffin v. California, 380 U.S. 609 (1965).
43. Schmerber v. California, 384 U.S. 757, 761 (1966).
44. *Id.* at 764.
45. 384 U.S. 757 (1966).
46. United States v. Wade, 388 U.S. 218 (1967).
47. Gilbert v. California, 388 U.S. 263 (1967).
48. Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).
49. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

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Griswold argued in *The Fifth Amendment Today*,[50] that ambiguous circumstances could make an innocent man appear guilty. A suspect would be forced to admit to activities which he would be unable to explain away. Through 1966, the Supreme Court stated that a major policy argument in favor of the privilege was that it protected the innocent. For example, in *Grunewald v. United States*,[51] the Supreme Court said that the privilege protects the innocent suspect who might be ensnared by ambiguous circumstances. Similarly, Justice Douglas, dissenting in *Crooker v. California*,[52] said:

> The innocent as well as the guilty may be caught in a web of circumstantial evidence that is difficult to break. A man may be guilty of indiscretions but not of the crime. He may be implicated by ambiguous circumstances difficult to explain away.[53]

It was never clear, however, whether an innocent defendant would in fact refuse to try to explain away suspicious circumstances.[54] In *Tehan v. United States ex rel. Shott*,[55] the Supreme Court specifically rejected the notion that the privilege is meant to protect the innocent.[56] Instead, the Court declared that it is the purpose of the privilege to insure the adversary system and to protect a person's privacy. The Court referred to a passage from *United States v. Grunewald*,[57] subsequently adopted by the Court in *Miranda v. Arizona*:

> As a "noble principle often transcends its origins," the privilege has come rightfully to be recognized in part as an individual's substantive right, a "right to a private enclave where he may lead a private life."[58]

Underlying this privilege is "the respect a government—state or federal—must accord to the dignity and integrity of its citizens."[59] In our accusatory system of justice the government

50. E. GRISWOLD, THE FIFTH AMENDMENT TODAY (1955).
51. 353 U.S. 391, 421 (1957).
52. 357 U.S. 433 (1958).
53. *Id.* at 447.
54. L. MAYERS, *supra* note 10, at 69.
55. 382 U.S. 406 (1966).
56. *Id.* at 415.
57. 233 F.2d 556, 581-82 (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957).
58. 384 U.S. at 460.
59. *Id.*

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must convict by the fruits of its own labors and not depend on the "simple expedient"[60] of compelling a witness to testify against himself. In *Tehan* the Court talked in terms of "preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load.' "[61] Justice Frankfurter, in *Watts v. Indiana*,[62] defined the accusatorial system:

> Under our system society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation.[63]

(5) *Constitutionally Founded Exclusionary Rules and Their Limitations.* The privilege against self-incrimination, the protection against unreasonable search and seizure, and like constitutional guarantees are protected by the exclusion of any evidence gained from such prohibited methods. Generally, as discussed earlier, the exclusion of such evidence is determined at a pretrial exclusionary hearing, but the issue can be raised at the trial either again or initially.

It is to be noted that this type of exclusionary rule also extends to other evidence derived from the excluded evidence,[64] and that the exclusion is available only to the party whose rights have been infringed,[65] and upon his motion.[66] But in any event, only evidence obtained through *official* wrongdoing can be excluded.[67]

(6) *Background and Character evidence.* As noted, the general rule of evidence is that all relevent evidence is admissible unless specifically excluded. Evidence of background, character, and prior crimes may well be relevant to the charge before the court. Nevertheless, such evidence is generally to be excluded.

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60. *Id.*

61. 382 U.S. at 415.

62. 338 U.S. 49 (1949).

63. *Id.* at 54.

64. Nardone v. United States, 308 U.S. 338 (1939); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

65. Massiah v. United States, 377 U.S. 201 (1964). *But see* People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955).

66. Wong Sun v. United States, 371 U.S. 471 (1963).

67. Hoffa v. United States, 385 U.S. 295 (1966).

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> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt.[68]

The reason commonly given for this exclusion is that such evidence creates "uncontrollable and undue prejudice, and possible unjust condemnation . . . ."[69] But, built within this reason is its own exception. Because *probative value is weighed against undue prejudice*, there are naturally cases where probative value in fact does outweigh the prejudice created. Under certain circumstances, exceptions to the rule that character evidence is inadmissible are recognized, namely: (a) to establish motive; (b) to establish intent; (c) to negate the actual or probable defense of mistake or accident; and (d) to establish a common scheme or plan.[70]

> [T]he law of evidence, which has been chiefly developed by the States, has evolved a set of rules designed to reconcile the possibility

68. Michelson v. United States, 335 U.S. 469, 475 (1948).

69. 1 J. WIGMORE, EVIDENCE § 57, at 454 (3d ed. 1940).

70. Spencer v. Texas, 385 U.S. 554, 560-61 (1967). The rules concerning evidence of prior offenses are complex, and vary from jurisdiction to jurisdiction but they can be summarized broadly. Because such evidence is generally recognized to have potentiality for prejudice, it is usually excluded except when it is particularly probative in showing such things as *intent*. Nye & Nissen v. United States, 336 U.S. 613 (1949). For other cases allowing evidence of prior offenses see Michelson v. United States, 335 U.S. 469 (1948) (when the defendant has raised the issue of his character); Moss v. State ___ Tex. Crim. ___, 364 S.W.2d 389 (1963) (motive); Moses v. State, 168 Tex. Crim. 409, 328 S.W.2d 885 (1959) (motive); Chavira v. State, 167 Tex. Crim. 197, 319 S.W.2d 115 (1958) (malice); Ellisor v. State, 162 Tex. Crim. 117, 282 S.W.2d 393 (1955) (an element of the crime); Perkins v. State, 152 Tex. Crim. 321, 213 S.W.2d 681 (1948) (defendant raised issue of character); Giacona v. State, 124 Tex. Crim. 141, 62 S.W.2d 986 (1933) (when defendant has testified and the state seeks to impeach his credibility by prior convictions); Haley v. State, 87 Tex. Crim. 519, 223 S.W. 202 (1920) (a system of criminal activity); Doyle v. State, 59 Tex. Crim. 39, 126 S.W. 1131 (1910) (identity).

The *Spencer* Court included the following footnote. 385 U.S. at 561 n.7:

> These Texas cases reflect the rules prevailing in nearly all common-law jurisdictions. See generally McCormick, Evidence §§ 157-158 (1954); 1 Wharton's Criminal Evidence §§ 221-243 (Anderson ed. 1955); 1 Wigmore, Evidence §§ 215-218 (3d. ed. 1940 and 1964 Supp.); Note, Other Crimes Evidence at Trial, 70 Yale L.J. 763 (1961). For the English rules, substantially similar, see Cross, Evidence 292-333 (2d ed. 1963). Recent commentators have criticized the rule of general exclusion, and have suggested a broader range of admissibility. Model Code of Evidence, Rule 311; Carter, The Admissibility of Evidence of Similar Facts, 69 L.Q. Rev. 80 (1953), 70 L.Q. Rev. 214 (1954); Note, Procedural Protections of the Criminal Defendant, 78 Harv. L. Rev. 426, 435-451 (1964). For the use of this type of evidence in continental jurisdictions, see Glanville Williams, The Proof of Guilt 181 (2d ed. 1958); 1 Wigmore, *supra* § 193.

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that this type of information will have some prejudicial effect with the admitted usefulness it has as a factor to be considered by the jury for any one of a large number of valid purposes.[71]

Thus, for example, evidence of prior convictions or arrests would be very useful to a jury charged with determining whether a defendant found with an unconscious woman is a murderer, a rapist, or merely a mugger. Likewise, such information would be very helpful to a jury to determine whether the defendant found with stolen goods in his possession did, as he claims, merely find them. In such cases, knowledge of prior crimes, if any, is invaluable to the determination of the factual question and for that reason it is admitted, albeit reluctantly, for surely, evidence of prior larcenies makes an acquittal difficult for a defendant, who, *this time*, really did not steal.

A defendant's character, then, subject to these exceptions, is inadmissible in any action against him unless he, himself, puts it in issue. He may do so by presenting evidence as to his good character, or by taking the witness stand in his own behalf. If he does either, the prosecution is free to introduce character evidence, either in rebuttal or on the grounds that by testifying the defendant has raised the issue of his credibility which the prosecution can now challenge.[72]

Finally, there is a grey area in which the jury is called upon to judge the personality of the defendant. Under the habitual offender statutes of such states as California[73] and Texas,[74] a defendant is liable for an increased sanction if he is judged to be a habitual offender. To be judged a habitual offender, the defendant must have been found to have been convicted of crimes in the past. The "essence of those procedures [is] that, through allegations in the indictment and the introduction of proof respecting a defendant's past convictions, the jury trying the pending criminal charge was fully informed of such previous derelictions . . . ."[75] Although a majority on the Supreme Court affirmed its faith in "the ability of juries . . . to sort out discrete issues given to them under proper

71. Spencer v. Texas, 385 U.S. 554, 562 (1967).
72. 1 J. WIGMORE, EVIDENCE §§ 190-97 (3d ed. 1940).
73. CAL. PENAL CODE § 644 (West 1955).
74. *See* Spencer v. Texas, 385 U.S. 554 (1967).
75. *Id.* at 556.

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instructions . . ."[76] and, therefore, held that this evidence of past convictions was not so prejudicial to the defendant as to deny him due process of law as defined and protected by the United States Constitution, such procedures are clearly an abberation from the norm of the bifurcated trial. As such, "it needlessly prejudices the accused without advancing any legitimate interest of the State."[77] For that reason, such procedures should be avoided. Moreover, with recent additions to the Court, should such procedures again be constitutionally challenged, it is no longer clear that the unavoidable added prejudicial effect will be tolerated.

III

TRIAL: SECOND SEGMENT

A. *Sentencing Purpose*

It will be recalled that in our view of the American system, it is the purpose of criminal procedure to determine legal liability, *i.e.*, to determine that the defendant in fact committed the act charged with the requisite frame of mind. Only after that has been established does law justify the interference with personal liberty and freedom to the extent of prying into the defendant's character and background. Thus, the entire criminal procedure, from the pretrial stages to the most important stage, the trial, can be seen as a complex triggering mechanism. It is only after the defendant is found criminally liable, *i.e.*, found to be a person to whom the criminal law's sanctions are meant to apply, that the penological aims of criminal law become relevant.

The second segment, or phase, seeks to properly fulfill these penological aims. Statistically, there may well be more second phases than first phases since under American law and practice a defendant can waive the first phase by pleading guilty.[78] In such a case, the court could proceed directly to the second, or sentencing, stage. In all candor, it must be said that in minor cases the second stage may become a mere formality. That, of course, is true in petty cases even regarding the first phase, where the issues are simple and evidence of guilt overwhelming.

76. *Id.* at 565.
77. *Id.* at 570.
78. FED. R. CRIM. P. 11.

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It may be surmised that the historical antecedent of the sentencing phase of an Anglo-American criminal trial is the *allocution*, a stage in the common law trial of the middle ages at which a convicted offender could prevent his execution (on the gallows) by interposing a reason as to why the sentence should not be imposed and executed; thus, he could plead the benefit of clergy. This amounted to an assertion that he was in holy orders and that therefore only the bishop, but not the king, could dispose over his life and soul. The proof of clergy was made by handing the convict a Bible from which he had to read the fifty-first Psalm (the "Poor Sinners Psalm" or "neck verse"). If he could manage to read it (sometimes with the Bible upside-down, and turned to the wrong page), he had proved his clergy, for, obviously, only clergymen could read and write.[79]

This summary presentencing procedure had its counterpart in American law, where a defendant could always plead for mercy after conviction, or interpose legal objections as to why sentence should not be imposed.[80] American law has come a long way since these primitive beginnings of the modern sentencing phase, when clergy and mercy were the only considerations.

In comparing the data with which a trial court deals during the two segments of the trial, we come to the uneasy conclusion that its task is light in the first segment, where little more is at stake than a finding of those limited facts which match the form and model of the elementary statutory requirements of the penal code section allegedly violated. By contrast, in the second segment the court must deal with four complicated, extensive, and variegated complexes:

(1) the correctional-penological aims,
(2) background and personality information,
(3) social science impact data, and
(4) available sanctioning methods and institutions.

The commonly recognized penological aims of the American

79. J. MARKE, VIGNETTES OF LEGAL HISTORY 268-80 (1965); E. PUTTKAMER, ADMINISTRATION OF CRIMINAL LAW 215 (1953); 1 J. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 457-78 (1883).

80. A. ABBOTT, A BRIEF FOR THE TRIAL OF CRIMINAL CASES 1091 (3d ed. J. Barbour 1925); J. ARCHBOLD, PLEADING, EVIDENCE & PRACTICE IN CRIMINAL CASES 185 (36th ed. T. Butler & M. Garsia 1966).

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correctional scheme fall into two basic categories: those alleged to be nonutilitarian, and those claimed to be utilitarian. Among the alleged nonutilitarian aims we find the idea of vindication, which stands for little more than the ideal restoration of the broken rule of law. Secondly, there is the aim of retribution, which, by tradition, is deemed to serve the function of ameliorating society's and the victim's outrage, and of restoring the balance of the scales of justice. Thirdly, there is the idea of penitence, *i.e.*, the opportunity for the wrongdoer to find the inner peace which was broken through his wrongdoing.

Contrasted with these ideal and often mystical aims, are three aims more oriented toward the utilitarian goal of social control. They are: (1) neutralization or incapacitation of a dangerous offender; (2) deterrence (or prevention)—acting both through example on the community, as well as on a convicted offender—as a demonstration that suffering and hardship will follow conviction for wrongdoing; and (3) perhaps the most significant in our age, there is the aim of rehabilitation or resocialization which attempts to remove from the defendant those inner and outer personal and social conditions which led him to commit the crime, and which seeks to replace such factors with others which have a positive impact on the person in question. Such positive factors may include the internalization of a healthy communal value structure as exemplified by the retributive function of the criminal law. Thus, it can be seen that retribution, as a theory and as a practice, is not nearly as nonutilitarian as often claimed but, rather, that its existence constitutes an often positive social determinant.[81]

These more or less officially recognized correctional and penological aims have become the guiding principles for the second segment of the trial. Aiming at their fulfillment, the trial judge will now have to find and give weight to those facts which have a bearing on the correctional-penological aims and objectives. These facts fall into two groups: (1) those having a bearing on the defendant's personality, background, psyche, mental health, and character, including facts surrounding the deed which may have a bearing on such personality factors; and (2) those facts which have a bearing on the fulfillment of the correctional aims. The latter

81. Mueller, *Punishment, Correction and the Law*, 45 NEB. L. REV. 58 (1966).

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facts pertain to social science data on the sucess or impact rate of given sanctions on given types of offenders. Naturally, this assumes a knowledge of all legally and factually available penal and correctional methods, practices, and institutions.

Among these four complexes, with which the sentencing judge must deal, only one is certain—the legally and factually available sanctioning methods and institutions, *i.e.*, the correctional alternatives—provided of course that the judge has gone to the trouble of informing himself of what the sanctions provided by statute really mean in practice.

When we turn to the penological aims, we leave the area of relative certainty and enter the dominion of philosophic and criminological conflict. The uncertainty increases with the third complex; namely, the personality characteristics and background data on the offender. While not difficult, through personality investigation, tests, witness testimony, etc., to test the personality traits and characteristics of an offender, it usually is very difficult to assess values to those traits, particularly in a society undergoing rapid social change. It is even more difficult to deal with the remaining complex; namely, that of impact of sanctions on given personalities. Social science test data is becoming available only gradually. Prediction studies for offender treatment are as yet in their infancy, and the differences of applying them to offenders with different background characteristics are fantastic indeed. Nevertheless, there is near unanimity in the United States that, however imperfect, the system must continue to operate with the four complexes until greater certainty is established in the area of prediction—particularly through behavioral science research.

B. Procedural and Evidentiary Rules at the Sentencing Stage

According to American theory—certainly in the past—a defendant enjoyed all human rights before conviction and virtually none thereafter. But even traditionally this has not been fully true. Persons reasonably suspected of crime, though not yet convicted, forfeited several of their rights. *Mutatis mutandis*, persons convicted of crime, did not nearly lose all their human rights. The nation is now in the middle of a development aiming at the retention of all human and constitutional rights on the part of a convict, save those which must be forfeited when absolutely essential to the

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fulfillment of correctional-penological aims. Foremost among these is the liberty of the convict.

The loss of rights issue for convicts finds its very first reflection in the procedural rules which govern the sentencing segment of the trial phase. The constitutionally dictated trial rules and safeguards and, thus, the formalities, are reduced to a minimum. The sentencing phase is conducted by a tribunal consisting of a judge only, no jury being present.

Nearly all of the evidence bearing on the defendant's personality is adduced by officers of the court's probation department, as supplemented by other evidence which the prosecution or the defendant himself may adduce. Especially in more serious cases, weeks may pass between conviction and the sentencing hearing before all that evidence is amassed by notoriously understaffed American probation departments. There has been some movement in this area, which is perhaps the most fluid area of American law. Yet, as recently as 1967, the Supreme Court held that there is no constitutional right to a hearing before determination of sentence.[82]

This discussion of sentencing rules is properly prefaced by a warning that sentencing procedures vary widely from state to state. Some states have only the most rudimentary sentencing procedures while others have complex and sometimes unmanageable systems. Moreover, the President's Commission on Law Enforcement and the Administration of Justice has found this area of court responsibility is in worse condition and more understaffed and ill-equipped than any other court function.[83]

The procedural safeguards and the rules of evidence which apply at the first stage of the trial do not apply during this second stage. This is perhaps a necessary procedure, but it demonstrates the inherent dangers of the second stage. At this point the defendant's character and personality needs are the prime concern. The judge must have full information on *this human being before him*, in order for him to make an intelligent decision as to sentence. The reputation of the defendant is an important factor in sentencing, as are his honesty or his dishonesty, his humaneness,

82. Specht v. Patterson, 386 U.S. 605 (1967).

83. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLANGE OF CRIME IN A FREE SOCIETY 144 (1967).

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any prior criminal record, personal characteristics, circumstances affecting behavior, etc. But how can one establish these factors except by interviewing friends, neighbors, and fellow employees? The interview results, *i.e.*, heresay statements, find their way into a presentence report that is submitted to the judge in many jurisdictions.[84]

On the evidence before the sentencing court, often gathered and presented perfunctorily, depend years of the defendant's life. Yet, the defendant or his lawyer has no right to see the presentence report,[85] and no right to introduce evidence to refute any part of it.[86] (The judge may, however, in his discretion, allow the defendant to explain or refute the evidence.)[87] Moreover, there is also no right to confront and cross-examine witnesses.[88] As was seen, the right to cross-examination was guaranteed at the trial stage to provide a test of the accuracy and credibility of the witness. This right is a cornerstone of the adversary system. There is as great a need for accuracy at the sentencing stage as at the trial stage. An argument often advanced for denying a right to test the accuracy and credibility of witnesses is one of administrative convenience and undue burden on the courts if a second adversary proceeding is allowed.[89] But to protect the appropriateness of the sentence there must be reliable information. A sentence can be reversed if based on erroneous information.[90] Thus, these are especially harsh rules.

The exclusionary rules of evidence do not apply at the sentencing stage. Of course, evidence must still be relevant to an issue before the court, but almost anything about the defendant

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84. *E.g.*, Michelson v. United States, 335 U.S. 469 (1948). In this case the court held that the use of hearsay evidence as to character instead of particular acts is "justified by 'overwhelming considerations of practical convenience' in avoiding innumberable collateral issues which, if it were attempted to prove character by direct testimony, would complicate and confuse the trial, distract the minds of jurymen and befog the chief issues in the litigation." *Id.* at 478.

85. United States v. Durham, 181 F. Supp. 503 (D.C. Cir.), *cert. denied*, 364 U.S. 854 (1960).

86. United States v. Fischer, 381 F.2d 509 (2d Cir. 1967).

87. Baker v. United States, 388 F.2d 931 (4th Cir. 1968).

88. Williams v. New York, 337 U.S. 241 (1949).

89. *Id.* at 249-50.

90. United States *ex rel.* Robinson v. Myers, 222 F. Supp. 845 (D. Pa. 1963), *aff'd*, 326 F.2d 972 (3d Cir. 1964).

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could be relevant to judging him as a person and applying the appropriate sentence. So, as a practical matter, the question of relevance does not often arise.

Because the jury may be tempted to convict the defendant for his bad character, instead of on the facts of the case, it is the rule at the trial stage that evidence as to a character trait of a defendant may not be received. But at the sentencing stage, it is precisely this bad character which is the issue: how to dispense "treatment" to this individual in conformity with the prevailing philosophies of sentencing to make the punishment "fit the offender and not merely the crime."

> Highly relevant—if not essential—to [the judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.[91]

What kind of evidence comes in at this time? The accumulation of information, of course, varies with the seriousness of the crime. Hence, for better or for worse, a convicted minor sneak thief may receive no more attention than the few minutes it takes to review a list of prior convictions; while a convicted bank robber may receive intense scrutiny terminating in a multi-page probation report put together by either the prosecutor's office or an office of probation attached to the court.

As a rule, character and background evidence falls within the four categories of: (1) prior convictions; (2) prior arrests; (3) psychological evaluations; and (4) interviews with employers, relatives, friends, and others who have associated with the defendant.

(1) *and* (2) *prior convictions and arrests.* At the trial stage such evidence was allowed only if the defendant testified or where the prior conviction was an element of the crime. At the sentencing stage the importance of this evidence increases because it indicates the kind of person the defendant is. It indicates whether he has been unresponsive to measures previously imposed for past

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91. Williams v. New York, 337 U.S. 241, 247 (1949). In a footnote the Court cites: Glueck, *Principles of a Rational Penal Code*, 41 HARV. L. REV. 453 (1928); Myerson, *Views on Sentencing Criminals*, 7 LAW SOC. J. 854 (1937); Warner & Cabot, *Administration of Criminal Justice*, 50 HARV. L. REV. 583, 607 (1937); Comment, *Reform in Federal Penal Procedure*, 53 YALE L.J. 773 (1944). 337 U.S. at 247, n. 8.

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misdeeds. Furthermore, the possibility of prejudice, which was so great at the trial stage, while still present, has, in contrast to the importance of the evidence, become acceptable. Moreover, this evidence is not before a lay jury, but rather a judge who is assumed to give proper probative weight to such evidence.

(3) *Psychological evaluations.* At the trial stage, with rare exception, and absent a plea of insanity, such information can not be introduced by the prosecution unless the defendant has first raised the issue. This information, however, can be of great aid to the judge in determining the probability of effective special deterence, need for neutralization, and the possibility of resocialization. For that reason, psychological data is admissible at this stage.

(4) *Interviews with employers, etc.* Presentence reports can also include the results of interviews with employers, relatives, friends, and others who have come in contact with the defendant. Most commonly not experts, they are often called upon to give an opinion as to the probable effects of punishment on the defendant. These difficult judgments which are here made by laymen would be excluded at the trial stage as opinion testimony. However, at the sentencing stage such testimony is allowed and actively sought by the probation officers.

In addition, the sentencing judge may also consider the conduct of the defendant while he was on bail, and also whether or not he was cooperative in the apprehension of others. Such data is considered unduly prejudicial at the trial stage, but again because they are indicative of personality, these items are admitted at the sentencing stage.

It should be borne in mind, however, that not all these sources are pursued in every case. And even when a source is utilized, the person making the presentence report is not required to include all information gathered. In other words, he is free to delete any data that might be contrary to his own conclusions.

Finally, there are certain categories of evidence which even in the sentencing stage remain inadmissible. The privileged communication exception is continued, as are the exclusions based on constitutional policy.[92] In both cases it is clear that the policy

92. Armpriester v. United States, 256 F.2d 294 (4th Cir. 1958).

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reasons for the rule are as relevant to the sentencing stage as they were to the trial stage.

C. *Federal Sentencing Procedures*[93]

To avoid continuous discussion of generalities which are not positive law anywhere in the United States, although approximately the average of the law throughout the nation, we should like to briefly present a picture of sentencing procedures under federal law, particularly as applied in some federal districts, as a concrete example.

To begin with, as regards convicted defendants up to age twenty-two, the federal judge has the initial option of imposing a correctional measure specially designed for young adults instead of one provided under the laws applicable to adults. If the sentence is to be served in an institution, then it will be served in a special institution for young adults.[94] Judging by American statistics, this provision is potentially applicable to a considerable portion of American federal offenders. By way of example, the majority of automobile thefts are committed by offenders below the age of twenty-two.[95] Nevertheless, judges prefer to sentence the majority of these young offenders under the sentencing alternatives for adults.

As regards adult treatment, the federal judge basically has the following three sentencing choices:

(1) *Probation*. Under federal statute, for any offense which is not punishable by death or life imprisonment, the judge may place the defendant on probation when he is "satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby . . . ."[96] The court has another option under what may be termed probation. If the offense is one punishable by more than six months, but less than death or life imprisonment, the judge may "provide that the defendant be confined in a jail-type institution or treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best."[97]

93. The federal practice is summarized in the chart in Appendix A, p.653 *infra*.

94. 18 U.S.C. §§ 5010-11 (1964).

95. J. HOOVER, UNIFORM CRIME REPORTS 107-10 (1967).

96. 18 U.S.C. § 3651 (1964).

97. *Id.*

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Probation cannot be demanded as a matter of right.[98] The granting of probation is discretionary with the district court judge and is not reviewable on appeal, except for capricious action on the part of the judge which amounts to an abuse of discretion.[99] Although, in relation to the convicted prisoner, probation may be termed an act of grace, the act of probation itself is based upon sound policy considerations.

(2) *Penal Sanction.* The second disposition of a prisoner which is available to the judge is what may be termed penal sanction: imposition of a fine or term of imprisonment, or both; or a death penalty. If the judge decides that punishment is required, he must make still another decision. He must decide how much of the maximum sentence to impose. For example, if a defendant has been convicted of involuntary manslaughter, the judge must first determine whether to place the defendant on probation. If the judge decides otherwise, he must choose what sentence, within the limits prescribed by law, he shall impose. In the case of involuntary manslaughter, the applicable statute[100] provides that a defendant shall not be fined more than $1,000 nor imprisoned for more than three years. Thus, the discretionary power of the judge within the punishment disposition is demonstrated.

In rendering the sentence the court also has power to control the convict's eligibility for probation. The court may designate a "minimum term at the expiration of which the prisoner shall become eligible for parole, which term may . . . not be more than one-third of the maximum sentence imposed by the court . . . ."[101] In line with this, the court may fix the maximum sentence of imprisonment to be served and specify that the parole board determine eligibility for parole.

(3) *Commitment for Further Study.* There is a third possible disposition of a prisoner which, although it is temporary and later demands reconsideration by the judge, is initially available to the sentencing judge. Under federal statute, the sentencing judge, if he desires more information to aid in sentencing, "may commit the defendant to the custody of the Attorney General . . . for a study

98. United States v. Banks, 108 F. Supp. 14 (D. Minn. 1952).
99. United States v. White, 147 F.2d 603 (3d Cir. 1945).
100. 18 U.S.C. § 1112 (1964).
101. 18 U.S.C. § 4208(a) (1964).

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. . ."[102] and that such a commitment shall be deemed to be for the maximum period. The section further provides that the results of the study along with recommendations are to be made available to the court within three months after commitment. The contents of the report are controlled by a provision stating that the "report may include but shall not be limited to data regarding . . . previous delinquency . . . , pertinent circumstances of his social background, his capabilities, his mental and physical health, and such other factors as may be considered pertinent."[103] With this information the judge may grant probation, affirm the sentence originally imposed (commitment under this section is conceptually for the maximum time), or reduce the sentence. This temporary disposition seems to be rarely used by federal judges.

In order to make an intelligent choice among the available sentencing alternatives, federal judges rely on a *presentence report* and a *sentencing hearing*, pursuant to Federal Rules of Criminal Procedure 32 (c), which provides as follows:

> (1) The probation service of the court shall make a presentence investigation and report to the court before imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or been found guilty.
>
> (2) The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and circumstances affecting his behavior as may be helpful in imposing sentence or granting probation or in correctional treatment of the defendant, and such other information as may be required by the court. The court before imposing sentence, may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to defendant and his counsel to comment thereon. Any material disclosure to the defendant and his counsel shall also be disclosed to the attorney for the government.

The presentence report is the primary, and in some cases the only source of information which the federal judge has to consult. For example, in the Eastern District of Kentucky, it is normally the

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102. 18 U.S.C. § 4208 (b) (1964).
103. 18 U.S.C. § 4208(c) (1964).

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only source of information used by the judge.[104] If the defendant denies some specific item in the report, the judge may seek other information. This, however, is the exception rather than the rule.

At the first Philadelphia Judicial Sentencing Institute, the Chief Probation Officer for the Courts of New York City outlined the elements of the presentence report as follows:

> When viewing the investigation process, you will find that the probation officer will be exploring such areas as family history, marital history, education, employment, military service, religion, social activities, economic status, health, prior record, and any other areas which appear significant. . . . These areas of the defendant's life history will be explored in order to gain some understanding of who the defendant is now and how that defendant has come to be what he is.[105]

Thus the emphasis of the report is upon the history and character, *i.e.*, the total personality, of the defendant.

While use of a presentence report is not mandatory, it has been held that the refusal to use a presentence report may, in certain circumstances, amount to an abuse of discretion by the judge. In *Peters v. United States*,[106] two defendants, ages nineteen and twenty-one, were given a maximum sentence immediately after a verdict with no presentence report and with no chance for them to make a statement. In remanding the case, the circuit court instructed that the "sentences be vacated, followed by presentence investigations and reports as authorized by Rule 32(c) Fed. R. Crim. P., 18 U.S.C., with opportunity to defendants and their counsel to make statements and present information in mitigation of punishment, as authorized by Rule 32(a) Fed. R. Crim. P., before final decision as to the sentences to be imposed."[107]

Although the presentence report is the primary source of information utilized by the sentencing judge, there are other available sources of information. James Benton Parson, Judge, United States District Court for the Norhtern District of Ohio,

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104. Interview with Mr. George Cline, United States Attorney for the Eastern District of Kentucky, in Lexington, Kentucky, March 20, 1968.

105. Wallace, *Aids in Sentencing*, 40 F.R.D. 433, 434 (1965).

106. 307 F.2d 193 (D.C. Cir. 1962).

107. *Id.* at 194.

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recognizes the availability of the following sources of information, emphasizing that the desirability of using some is controversial:

> (a) Transcript of preliminary hearing on sentence.
> (b) The prosecution file.
> (c) Formal written statements in aggravation and mitigation . . . .
> (d) Form report of investigative agency on the type of crime involved (not the particular crime at issue nor the party or parties involved in it), relative to its current prevalence, its increase or decrease during the prior period, and its relationship to other types of crime . . . .
> (e) The presentence report . . . .
> (f) Reference to a district sentencing counsel . . . .
> (g) Conference with probation officer.
> (h) Related published materials . . . .[108]

In determining what the presentence recommendation to the judge will be, James V. Bennett, House Director of the United States Bureau of Prisons, has indicated that one of his office's chief concerns is what he refers to as the "risk indicators." These are "tendencies toward violence, a pattern of action that is repeatedly anti-social, an inability to control the sex drive, mental deviation, pathological hostilities . . . ."[109] All these seem to fit within the rehabilitative and neutralization theories of sentencing.

> The reports contain verified basic data about the defendant and his offense, something about his family background and social history, and his medical and psychiatric status. They also summarize his educational achievements and deficiences, his vocational assets and needs and a religious report reflecting any moral qualities the defendant may have.[110]

It appears that there is some overlap between this and the presentence report. However, it should be noted that this opportunity for psychological analysis of the defendant afforded by the committal is extremely valuable to the sentencing judge.

Although technically not a source of information about the defendant, one sentencing aid which is used by judges in the Eastern District of Michigan and the Eastern District of New York is a multi-judge sentencing panel. Under this system, the final

108. Parsons, *Aids in Sentencing*, 35 F.R.D. 423, 427 (1964).
109. Bennett, *Individualizing the Sentencing Function*, 27 F.R.D. 359, 363 (1960).
110. *Id.* at 362.

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decision as to disposition is still left with one judge. A week before sentencing the judges meet to discuss the various cases, and each judge is furnished with a copy of the presentence report. These are studied and each judge records a recommendation. The panel of judges then convenes and discusses the various recommendations. The value of this system is that it affords the sentencing judge the opportunity to put his opinion to the acid test of honest, forthright discussion with equals whose opinion he can hardly ignore. This device, although used in only a few jurisdictions, appears to be a major improvement in sentencing procedure.

There are other "aids" (as opposed to actual sources of information) available to the sentencing judge. Judge Parsons, of the Northern District of Illinois, lists the following as "general aids available at the preliminary hearing on sentencing:"

> (a) Prosecutor's statement in aggravation of the offense, including his statement of prior offenses. . . .
> (b) Statement of defense counsel in mitigation. . . .
> (c) Prosecutor's recommendation statement as to what the sentence should be, and why . . . .
> (d) [A] recommendation statement by the victim of the offense as to what sentence should be and why.
> (e) [A] recommendation statement by the investigative agent as to what the sentence should be and why.
> (f) [T]he defendant through counsel should always be permitted to make a recommendation statement also.[111]

D. The California Model

Although federal law and practice on sentencing is fairly representative of that of the more progressive states of the United States, California has what some experts regard as an even more progressive system. In many respects the California procedure conforms to the federal model, with some modifications, *e.g.*, the defendant has the right to see the presentence report,[112] and may attempt to refute it. Moreover, the defendant has the clearly defined right to call witnesses to testify in mitigation of sentence.[113]

In contrast to federal law, however, California has a

111. Parsons, *supra* note 108, at 426-27.
112. CAL. PENAL CODE § 1203 (West Supp. 1967).
113. *Id.* § 1204.

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mandatory indeterminate sentence law which requires the judge to surrender the responsibility of sentencing to an administrative body, the California Adult Authority, in all cases in which the judge has not placed the defendant on probation or granted a suspended sentence. The statute provides as follows:

> Every person convicted of a public offense, for which imprisonment in any reformatory or State prison is now prescribed by law shall, [unless granted probation, granted a new trial, or granted suspended sentence] be sentenced to be imprisoned in a State prison, but the court in imposing the sentence shall not fix the term or duration of the period of imprisonment.[114]

This is in direct contrast to the federal sentencing model where the judge not only determines whether or not to grant probation, but also fixes, within the limits provided by law, the length of the defendant's sentence. In California, however, the judgment consists only of a recital of the offense for which the prisoner stands convicted. With this judgment the trial ends. The sentence imposed under this law has the legal effect of a sentence for the maximum term.[115] From this point, any decision as to the prisoner's future is an administrative decision made by the California Adult Authority. This is a board of nine men appointed by the governor with the advice and consent of the senate.[116] The function of the Adult Authority is defined by the California Penal Code as follows:

> In the case of all persons heretofore or hereafter sentenced under the provisions of Section 1168 of this code, the Adult Authority may determine and redetermine, after the actual commencement of imprisonment, what length of time, if any, such person shall be imprisoned . . . .[117]

This initial determination of sentence is not the sole function of the Adult Authority. In addition, the Authority functions as a parole board: "The granting and revocation of parole and the fixing of sentences shall be determined by the Adult Authority . . . ."[118] The appearance before the Adult Authority is an

114. *Id.* § 1168.
115. People v. Leiva, 134 Cal. App. 2d 100, 285 P.2d 46 (1955).
116. CAL. PENAL CODE § 5075 (West Supp. 1967).
117. *Id.* § 3020.
118. *Id.* § 5077.

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"administrative proceeding" to determine what sentence, within the limits prescribed by law, the defendant should be required to serve.[119] Because this is an administrative proceeding, the California Supreme Court has held that it does not deprive the court of the right to make a final determination of the rights of defendant,[120] and it does not confer judicial power on the Adult Authority.[121]

Since this is not a judicial proceeding, the trial rules of evidence do not apply, and the California Penal Code specifically provides for supplemental sources:

> The Director of Corrections shall keep complete case records of all prisoners under custody of the department, which records shall be made available to the Adult Authority . . . .
> Case records shall include all information received by the Director of Corrections from the courts, probation officers, sheriffs, police departments, district attorneys, State Department of Justice, Federal Bureau of Investigation, and other interested agencies and persons. Case records shall also include a record of diagnostic findings, considerations, actions and dispositions with respect to classification, treatment, employment, training, and discipline as related to the institutional correctional program followed for each prisoner.[122]

The California Supreme Court has held that since the Adult Authority's determination of the term of imprisonment is not a judicial act, the "prisoner has no constitutional right to notice, a hearing or counsel in the proceedings of the Adult Authority . . . ."[123] This administrative body can, therefore, determine the length of the prisoner's sentence without his presence, and with no chance for him to introduce any evidence or testimony in mitigation. In 1960 the California Supreme Court held such procedure not violative of due process:

> There is certainly no statute requiring the Authority to grant an inmate notice or hearing upon a redetermination of sentence. . . . [The Penal Code] provides that the Authority shall have power "to suspend, cancel or reduce any parole without notice." . . .

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119. People v. Kostal, 159 Cal. App. 2d 444, 323 P.2d 1020 (1958).

120. *Id.*

121. *Id.*

122. CAL. PENAL CODE § 2081.5 (West Supp. 1967).

123. People v. Ray, 181 Cal. App. 2d 64, 68, 5 Cal. Rptr. 113, 115, *cert. denied*, 336 U.S. 937 (1960).

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> The provisions for determining or redetermining sentence and for granting, suspending or revoking parole do not violate due process because of the absence of a requirement for notice or hearing.[124]

California, thus, has provided for a further segmentalization of criminal proceedings into three stages: the trial stage; the probation hearing; and sentence determination by the Adult Authority. The California model has two advantages. First, the Adult Authority may be more qualified to determine sentence length than a trial judge. On this point the California Penal Code provides:

> Persons appointed to the Adult Authority shall have a broad background in and ability for appraisal of law offenders and the circumstances of the offense for which convicted. Insofar as practicable, members shall be selected who have a varied and sympathetic interest in corrections work including persons widely experienced in the fields of corrections, sociology, law, law enforcement and education.[125]

The second advantage which the California procedure has over the federal procedure is the right to cross-examine witnesses in the probation hearing. This is essential to insure truth. It does seem, though, that the procedural safeguards of the trial and probation stage should be carried over to the sentencing stage.

While the California model has certain criminological advantages, it also seems to have one clear disadvantage; namely the split-up of the sentencing phase between judge and Adult Authority. If the Adult Authority is a more competent and appropriate body to deal with disposition, it ought to be delegated the whole of it.

E. Other Behavioral-Science Oriented Models

Despite often vehement opposition of the judiciary, the trend in America is clearly toward greater involvement of behavioral specialists in the sentencing process. Rather than lose an important and traditionally judicial function to persons with little commitment to the preservation of procedural due process, the

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124. *In re* McLain, 55 Cal. 2d 78, 84-85, 357 P.2d 1080, 1084-85, 9 Cal. Rptr. 824, 828-29 (1960).

125. CAL. PENAL CODE § 5075 (West Supp. 1967).

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judiciary would prefer to acquire a greater behavioral expertise. Thus, recent history in this area has been a story of constant political give and take as to who is to make the dispositional decision. Although a compromise between these competing forces, the California procedure is an attempt to find a more suitable means of making correctional dispositions.

A recent proposal for a move in the behavioral direction is that by Dr. Dale C. Cameron, the director of Saint Elizabeth's Hospital in Washington, D.C.—the federal institute for the criminally insane.[126] Dr. Cameron recommends that the issue of mental responsibility (mens rea) be removed from the trial stage. It would be determined by a panel of experts only after a finding by the trial jury that the act was committed as charged. This panel would decide whether special mental treatment was warranted in those cases where a mental disorder was raised as a defense. For the purposes of this proposal, Dr. Cameron defines a mental disorder as any mental illness or defect of sufficient severity to warrant treatment or care, which would include but not be limited to custodial care and management. In essence this is his proposal. It separates the issue of mental responsibility from factual responsibility, liberalizes the test for criminal responsibility, and increases treatment possibilities for those so adjudged.

This model, however, has some logical and practical shortcomings: disregard of the issue of mens rea (criminal guilt—capacity to form *dolus* or *culpa*, and actual presence of the forms of guilt) would logically result in a finding and imposition of power over those who may not have effectuated the elements of the crime charged. As to those, the state should have *no* dispositional power, except perhaps through civil commitment proceedings of those who, for psychiatric reasons, are dangerous to themselves or others.

Perhaps Dr. Cameron ought to change his proposal to simply provide that the question of mental illness and its impact on the alleged criminal act should not be decided at the trial level. This, incidentally, has been held unconstitutional.[127] But if that could be

126. Cameron, *Did He Do It? If So, How Shall He be Managed?*, 29 FED. PROB. 3 (June 1965).

127. Abolition of the insanity defense has been held unconstitutional in the following cases: State v. Lange, 168 La. 958, 123 So. 639 (1929); Sinclair v. State, 161 Miss. 142, 132

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done, we would have gained little since even under current law (1) persons acquitted by reason of insanity may be committed to treatment centers for mentally disturbed offenders; and (2) persons found guilty, but subject to some mental or emotional disturbances, have these factors fully considered at the sentencing hearing, in mitigation of punishment, and as indicia for commitment for special treatment. The trend in this respect is rather strong.[128]

And so the search for preferable methods and reasons for trial-sentencing bifurcations continues, hampered by the lack of human ingenuity and the lack of facilities and techniques to implement any modern method in practice.

IV

CONCLUSION

This, then, is an American model of the bifurcated criminal trial, which seems to stand in stark contrast to the continental model of the compact and concentrated trial. As Americans we are naturally pleased that the American model has found some attention in the civil law world. We were indeed so pleased that our first reaction triggered the advocates within us and tempted us to proffer our model. But are we ready to advocate a model which may well be the result of pure historical accident?

We have examined our model from a number of perspectives and have reevaluated its frequently asserted advantages. Principally, these are two:

(1) By carefully excluding any evidentiary item on the defendant's potentially negative character and background during the trial, we prevent possibly misleading inferences to be drawn regarding the defendant's guilt of the particular offense. How easy is it to convict a defendant of larceny after it becomes known that he has stolen six times before? Yet this line of argument imposes an impossible burden of proof upon us: we would have to prove that in the continental trial—which does not have that safeguard—more innocent defendants are convicted than in the American trial. This

So. 581 (1931); State v. Strasburg, 60 Wash. 106, 110 P. 1020 (1910).

128. *E.g.*, People v. Henderson, 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963); State v. DiPaolo, 34 N.J. 279, 162 A.2d 401 (1961); Washington v. State, 165 Neb. 275, 85 N.W.2d 509 (1957).

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we do not stand ready to prove. Moreover, as we have documented, in really essential situations, American law does permit character and background evidence at the trial stage (*e.g.*, to establish motive and intent, to negate the defense of mistake or accident, and to establish a common scheme or plan). These instances may correspond to precisely the same situations in which a European court demands evidence on the defendant's character and background. In essence, the difference between the continental and American systems may well be negligible on that score.

Further, perhaps the danger of potential prejudice at a European trial does not loom nearly as large in the first place, since most European trial courts lack the untrained jury of laymen and are thus presumably more alert to giving unwarranted or prejudicial weight to dangerous evidence.

(2) Bluntly stated, the second reputed advantage of the American bifurcated system amounts to saying that government has no right to pry into the private life of an individual who has not yet forfeited his civil right to privacy as a result of conviction. The right to be left alone, to draw the curtain of secrecy over one's private life, background, and personality are cherished in America. These values are protected by several of the provisions of the Bill of Rights, particularly the fourth and fifth amendments.

> The Fourth and Fifth Amendments were described in *Boyd v. United States*, 116 U.S. 616, 630, as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life." We recently referred in *Mapp v. Ohio* . . . to the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people." See Beaney, The Constitutional Right to Privacy, 1962 Sup. Ct. Rev. 212; Griswold, The Right to be Let Alone, 55 Nw. U.L. Rev. 216 (1960).[129]

In essence this amounts to saying that we regard our procedure as more humane, more civilized, and more concerned with personal rights than the continental model. One might say that American society has thus decided to run the risk of more difficult convictions in order to protect this basic human value. Of course, it is also argued that denying resort to background evidence

129. Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965).

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in the first phase of the trial requires law enforcement officers to be more diligent in their search for more reliable and more persuasive indicia of guilt. Conceivably, this search may even turn up evidence beneficial to the defendant which might not be otherwise sought or uncovered. Naturally, we expect our continental colleagues to retort that police diligence in the search for all relevant evidence is mandated anyway and can be secured more directly.

While expressing our clear personal preference for the American model for the second reason, we hesitate to charge the continental model with lacking ethics and lacking concern for human dignity, or to even advocate the American model on a ground so tenuous and so incapable of scientific documentation. Moreover, a recommendation on that basis for division of the continental trial into two phases necessarily would have to carry with it the introduction of some exclusionary rules of evidence during the first stage. This indeed would amount to a fundamental tampering with a proven model.

Are there, then, any other reasons for professing the American model of bifurcation? First of all, the two-stage structure does not place counsel in the awkward position of arguing in the alternative. The difficulty of presenting factors in mitigation of sentence (for example, family history or economic background), while at the same time claiming innocence, is obvious.

More importantly, it appears to us that the American sentencing phase may well be adept at creating a special atmosphere conducive to a consideration of behavioral factors and social science methods of predicting the impact of differential treatment methods on human beings. The emphasis here is on the use of specialists concerned solely with the future of this one human being in his society, who have no stake in the proof of facts to establish the underlying crime that justifies governmental interference in the first phase. By unmistakably labelling the second stage a dispositional one, the American system documents its commitment to a behavioral science approach in which law is relegated to the subsidiary function of protecting the defendant from illegal processes, while at the same time facilitating behavioristically proper dispositions within the legal framework. Perhaps these considerations, this methodology, tend to be obscured where issues of liability are intermingled with issues of disposition, as in the continental model. It is difficult to predict the future, but

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it appears highly likely to us, that in America, with the existence of the second phase, the stage has already been set for an even greater admission of behaviorists into the sentencing process, perhaps even an ultimate phasing out of judicial responsibility in this field, save for playing the role of watchdog. As noted, California has already moved in this direction.

For these reasons we do feel impelled to recommend to our continental colleagues that they view the American bifurcated model for potential introduction into their own system. It appears to us that the advantages are not counterbalanced by any material disadvantages that would accrue from such a change.

As we mentioned initially, bifurcation is a popular topic in the United States. The President's Crime Commission report recommended bifurcation for juvenile delinquency proceedings, using the vague phrase "inappropriate considerations" to describe the reasons why criminal proceedings should not be compact or concentrated.[130] A recent Supreme Court decision raises the possibility that bifurcation may be constitutionally mandated for juvenile proceedings by way of the equal protection clause of the fourteenth amendment, on the premise that character evidence at trial may be as prejudicial to a juvenile as it is to an adult, and thus can not be used in a juvenile proceeding when it is not equally admissible in an adult criminal proceeding.[131]

We find the reasons for bifurcation offered by the President's Crime Commission and by the United States Supreme Court hardly more persuasive than those we can offer ourselves. We are convinced, however, that what may have started as historical accident has now become a conscious choice in the United States. We are convinced of its ethical soundness, and its rightness in the criminological world of today. Is it not a paradox that criminology has progressed no further than faith in its rightness? Yet, perhaps this faith has led us to a system of criminal procedure in which scientifically sound determinations for the betterment of erring mankind ultimately will be achieved.

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130. PRESIDENT'S COMMISSION, *supra* note 83, at 87.

131. *In re* Gault, 387 U.S. 1, 30-31 (1967).

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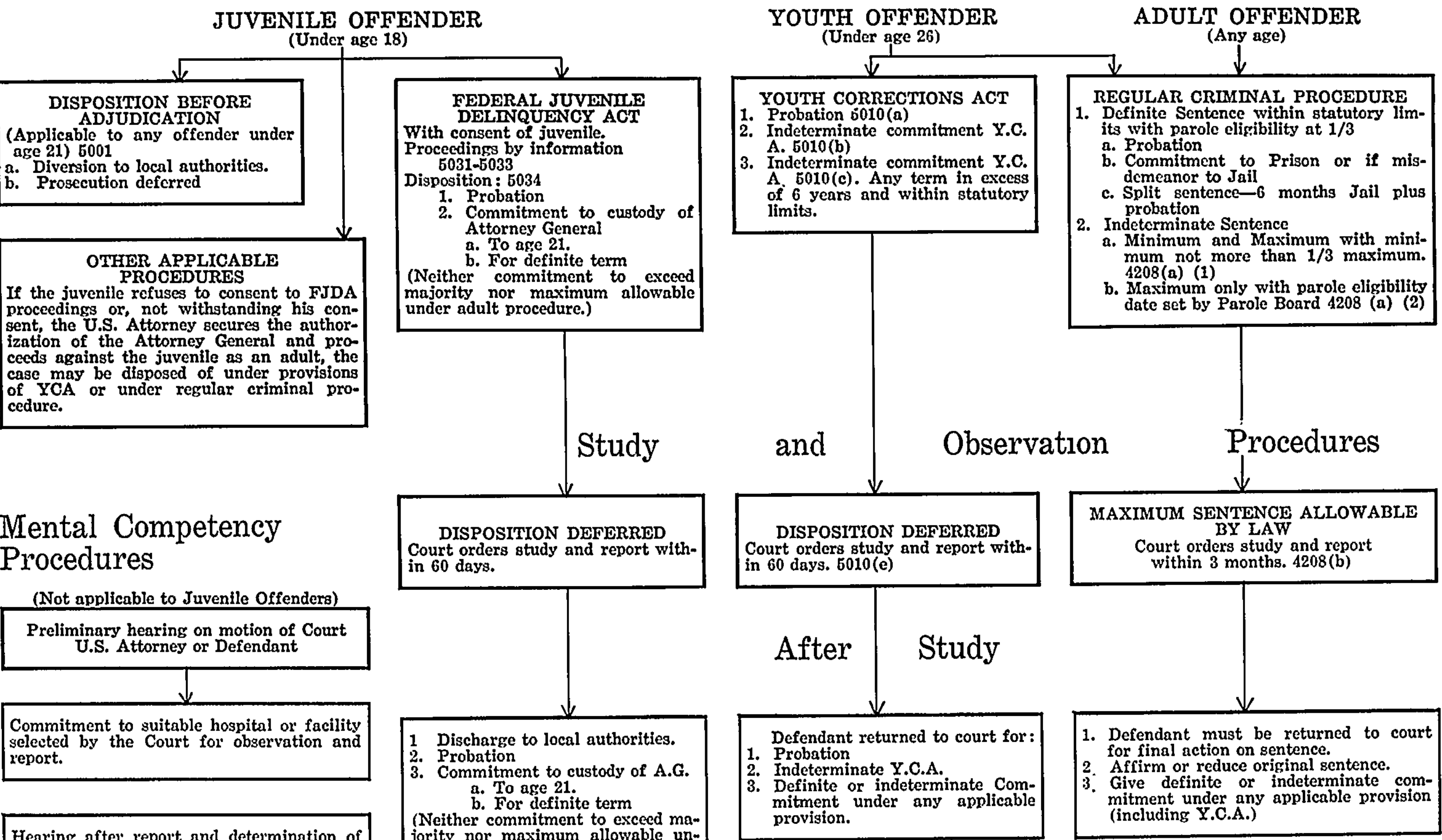
APPENDIX A

FEDERAL SENTENCING ALTERNATIVES



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