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ON WITNESSES: A RADICAL CRITIQUE OF CRIMINAL COURT PROCEDURES

Michael Ash*

"I tell you, I didn't see no mugging . . . and I didn't see it, 'cause if you see somethin' you're a witness, and I don't wanna be a witness, so I didn't see nothin'."

Arch, if you saw anything, it's your duty as a citizen to come forward and be a witness.

"That's great for your students and your unemployed, which for you is one and the same. But I'm a working man. I don't get paid if I show up for work absent. . . .

"Lemme tell you somethin'! Do you know what you gotta go through if you're a witness? You gotta put on a shirt and tie, drag myself downtown and hang around till the case comes up, which you never know when. And by the time it does, you forget what you was gonna say, and the other lawyer makes a monkey outta you! And it all goes on your record!"¹

* * *

"Let's face it. You go down there (as a witness) and you're the one on trial. You get into an accident on 14th and U, and forget it, man, you ain't gonna get no one to go down there for you."²

* * *

"Let me get to the fundamental moral issue involved: a legal system should not treat people like this. . . ."³

I. Introduction: Some "Previously Identified Goals"

Thirty-three years ago the American Bar Association called attention to the way witnesses were then being treated.⁴ Witness fees were described as inadequate and not "commensurate with modern wage standards." Incongruously low fees were said to excite the witness' "ridicule at the methods of justice."⁵ Intimidation of witnesses was said to be a problem and, where it existed, "the supreme disgrace of our justice."⁶ Courthouse accommodations for witnesses

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1 Archie Bunker (fictional), "Archie Sees a Mugging," *All in the Family*, copyright, Tandem Production, Inc., telecast on CBS-TV, January 29, 1972 (all rights reserved).

2 Unidentified black student. Bell Vocational High School, Washington, D.C. (to the author during question-and-answer period on "Bill of Rights Day"), November 1971.

3 J. FRANK, *AMERICAN LAW: THE CASE FOR RADICAL REFORM* 9 (1969).

4 *RECOMMENDATIONS OF THE COMMITTEE ON IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE OF THE SECTION OF JUDICIAL ADMINISTRATION OF THE AMERICAN BAR ASSOCIATION* (as approved by the Assembly and House of Delegates, July 27, 1938) [hereinafter cited as *RECOMMENDATION*].

5 *Id.* *RECOMMENDATION* 11.

6 *Id.* *RECOMMENDATION* 10.

were portrayed as inadequate and uncomfortable. According to the ABA, "the state owes it to the witness to make the circumstances of his sacrifice as comfortable as possible."⁷ Too frequently, it was said, witnesses were being summoned back to court again and again without ever being asked to testify. The committee pointed to an incident involving a burglary case "in a certain city" in which

there was no real doubt about the accused's guilt; but there were 19 continuances before he was finally tried and convicted. Meanwhile, the witnesses were forced to come ten miles to the court, on 19 occasions, each time being sent home to reflect upon the course of justice.⁸

"Promptness of trial," one of the recommendations concluded, "is essential to the preservation of testimony and to securing the good will and dependable mentality of witnesses."⁹

In 1948 Phillip L. Graham, a non-lawyer, reported on the impressions he gleaned from being part of "the Washington Experiment in judicial administration."¹⁰ Graham wrote that there "seems to be widespread reluctance by many Americans to undergo the ordeal of being a witness."¹¹ He claimed that witnesses perceived themselves as "being forced into a contest against skillful opponents while knowing none of the rules."¹² He noted that many witnesses were outraged at court delay in the criminal courts and dismayed by the lack of accommodations for their comfort. He concluded that "those individuals among the public who may be called as witnesses need to be assured of fair treatment. . . ."¹³

In 1954 Professor Fannie J. Klein, the noted bibliographer,¹⁴ wrote a short report on witnesses for The Institute of Judicial Administration.¹⁵ In this report she referred to reforms benefiting witnesses as "a neglected area in judicial administration."¹⁶ She wrote:

In recent years, the distinction of being the "Forgotten Man of the Judicial System" seems to have devolved on the trial witness. Although the literature of the law bursts with erudition concerning methods of examining, cross-examining, impeaching, discrediting his reliability and indeed trying and convicting him, there is an astonishing paucity of material with regard to the attitude of the witness toward the judicial process, his criticisms of it and his suggestions for its improvement. But the trial witness, despite his silence, does have some complaints against the system which deserve review.¹⁷

7 *Id.* RECOMMENDATION 9.

8 *Id.* RECOMMENDATION 8.

9 *Id.* RECOMMENDATION 8.

10 On the program and concept see ABA SECTION ON JUDICIAL ADMINISTRATION, CO-OPERATION WITH LAYMEN IN IMPROVING THE ADMINISTRATION OF JUSTICE (1952); *Laws, Participation of Judges and Laymen in Improving the Administration of Justice*, 32 VA. L. REV. 89 (1945); and *Laws, Lay Assistance in Improving Judicial Administration, Symposium on Judicial Administration and the Common Man*, THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 169 (1952).

11 Graham, *Treatment of Witnesses: Laymen's Suggestions for Better Handling*, 34 A.B.A. J. 23, 24 (1948).

12 *Id.*

13 *Id.* at 23.

14 See F. KLEIN, JUDICIAL ADMINISTRATION AND THE LEGAL PROFESSION: A BIBLIOGRAPHY (1963).

15 INSTITUTE OF JUDICIAL ADMINISTRATION, TRIAL WITNESSES 1-5 (Unofficial IJA Study 2-066, July 1, 1954).

16 *Id.* at 5.

17 *Id.* at 1.

Indeed, through all these years and to the present, little has been written on the problems, interests, and rights of witnesses.¹⁸ On the basis of the quantity of relevant materials, one would think that the eradication of the problems delineated back in 1938 had proceeded a pace, that the witness is no longer the forgotten man of our criminal justice system, and that we should all be enjoying an orgy of self-congratulation. In fact, the precise opposite is true and the witness, especially the witness in criminal courts,¹⁹ is more abused, more aggrieved, more neglected, and more unfairly treated than ever before. Moreover, the treatment of witnesses in our criminal justice system has a deleterious impact on the prevention and deterrence of crime in at least three ways: First, the exposure to the criminal court process as it actually exists discourages countless numbers of witnesses from ever "getting involved" again, that is, from reporting crime, from cooperating with investigative efforts, and from providing testimony crucial to conviction; second, many crimes are committed by persons who might have been "rehabilitated" by correctional processes or at least "incapacitated" or "neutralized" by prison terms but for convictions that were "lost" because of delay and the "wearing out" of witnesses;²⁰ third, as Kenneth Lawing Penegar has said:

[T]hat not only does delay adversely affect the individual's perspective of justice and not only is the habit of keeping people waiting (the accused as

18 In 1967 the President's Commission on Law Enforcement and Administration of Justice devoted approximately one third of one page (out of 340 pages) of its report to "jurors and witnesses," lumping the two in the same category. Substantially, the same problems—repeated, unnecessary appearances, poor facilities, inadequate compensation—were alluded to as in the earlier reports mentioned. See PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND CRIMINAL JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 156-157 (1967); but see Cutler, *Why the Good Citizen Avoids Testifying*, *Symposium on Judicial Administration and the Common Man*, *THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE* 103 (1952).

19 For the purpose of this article, a witness may be defined as one who is summoned to testify at a judicial inquiry. This paper will focus on witnesses in criminal cases in state courts. Thus, I leave to the side the problems of witnesses (1) in all civil cases, (2) in federal criminal cases, and (3) in all non-judicial proceedings, including investigative grand juries and legislative hearings.

Obviously, much that is said will be applicable to persons falling within each of the above three categories. For example, for discussion of some very similar problems facing grand jury witnesses and for some suggested solutions similar to the ones advanced in this article, see H. EDELHERTZ, *THE NATURE, IMPACT, AND PROSECUTION OF WHITE COLLAR CRIME* 32-33, 36 (1970).

Testifying before a grand jury will, of course, be considered to the extent that such testimony is part and parcel of state court criminal proceedings, as it often is.

I am excluding witnesses in federal court criminal cases because I have become convinced that state courts and federal courts play two entirely different ball games and that there is very little basis for comparing the operations of the two. In general, United States District Courts are incomparably richer in resources, manpower and facilities than their state counterparts. With respect to "crime" nationwide, federal trial courts have, of course, proportionately only a minor role.

20 In partial support of my "belief," consider the following:

First, when perpetrators of crimes "solved" are apprehended and turned over to the courts, they are quite frequently not convicted of any crime and often convicted only of a lesser charge. According to the *F.B.I.'s Uniform Crime Reports for the United States—1970* (1971) [hereinafter referred to as U.C.R.—1970], of adults prosecuted for "Crime Index" offenses (murder, rape, robbery, aggravated assault, burglary, larceny, and auto theft) in 1970, 61 per cent were found guilty as charged and 10 per cent of a lesser charge. U.C.R.—1970, at 36. Thus, 29 per cent were acquitted or their cases were dismissed. U.C.R.—1970, at 36.

Several things must be noted about these statistics. For one thing, the percentage of "unsuccessful" prosecutions varies considerably with the type of crime charged. U.C.R.—1970, Table 15, at 114. Generally, it appears to be harder to secure convictions on the more violent crimes

well as witnesses, attorneys, policemen, etc.) expensive; more importantly, it could quite conceivably have detrimental effects on the effectiveness of the whole system in terms of the goal of deterrence. Seen as a form of communications between the system and the general public, particularly potential violators, the syndrome of delay tells these audiences in effect that crime and its participants are not really urgent public business, that not much store is set by it in practical terms however much well meaning judges may

than on those less violent ones. U.C.R.-1970, Table 15, at 114. Thus, "[i]n 1970, 41 per cent of the murder defendants were either acquitted or their cases dismissed at some prosecutive stage. Forty-six per cent of those charged with forcible rape were acquitted or had their cases dismissed, and 39 per cent of the persons charged with aggravated assault won their freedom through acquittal or dismissal." U.C.R.-1970, at 36. When one looks to the percentage of convictions on the original charge, "[l]arceny, 71 per cent, recorded the highest percentage for persons found guilty on the original charge in 1970. This was followed by 53 per cent on the original charge for burglary, 50 per cent for auto theft, 47 per cent for robbery, 44 per cent for aggravated assault, 44 per cent for murder, and 36 per cent for forcible rape." U.C.R.-1970, at 36.

Convictions on lesser charges usually mean, in effect, that short prison terms are substituted for longer ones, probation for short ones, fines for probation, and suspended sentences for fines. They mean, in other words, that society's capacity to neutralize, rehabilitate, or simply punish criminals has so much the less chance to operate.

Though this cannot be demonstrated by the FBI statistics that are published, it seems certain that conviction rates also vary considerably from jurisdiction to jurisdiction. Thus, the percentage of acquittals may be much higher in certain cities than the average, creating so much the greater problem. Moreover, there is some impressionistic evidence to suggest that conviction rates may be lower in larger communities where the crime problem is already greater.

Obviously, some of those acquitted have in fact not performed any criminal act. However, I believe that anyone closely associated with the actual operation of the criminal court system, including defense attorneys and prisoners, in candid moments, would describe the percentage of truly guiltless defendants to be very small. Many "guilty persons," they would acknowledge, cannot be convicted solely because of legal reasons or problems of proof beyond a reasonable doubt.

Thus, in summary, I suggest, first, that substantial numbers of criminals (for reasons good and bad) "slip through the net," "escape justice," and are left unrehabilitated, unpunished, and unrestrained to roam the streets and commit crimes.

Second, the likelihood of successful prosecution seems to decrease, generally, with (1) the length of time between apprehension and disposition, (2) the number of appearances in court by the defendant, and (3) the number of witness appearances. At least, this is the suggestion of Banfield & Anderson, *Continuances in the Cook County Criminal Courts*, 35 U. CHI. L. REV. 259, at 287-88 nn. 93 & 94 (1968). Tables 3, 4, and 5, at 300-301, and Table 12, at 303. Note 32, *infra*. It is also the firmly held belief of most of those closely associated with the operation of criminal courts. In other words, dilatory tactics and the "wearing out of witnesses," I suggest, produce results beneficial to accused criminals, but detrimental to anyone victimized by their future misdeeds.

Third, of those who do commit crimes, amazingly large percentages seem to have been recently embroiled in criminal court processes. By extrapolating from the analysis of the FBI in U.C.R.-1970, at 37-38, it can plausibly be suggested that approximately 68 per cent of all crimes are committed by those who have come before criminal courts sometime in their recent past. Some of these persons, of course, were convicted. Hence, their recidivism reflects the failure of prisons and correctional processes rather than courts.

But, fourth, of those brought before criminal courts, the worst recidivists by far seem to be those who have been acquitted or whose cases have been dismissed. U.C.R.-1970, at 38-42. The FBI reports that of "offenders released to the community in 1965, 63 per cent had been rearrested by the end of the fourth calendar year after release. Of those persons who were acquitted or had their cases dismissed in 1965, 85 per cent were rearrested for new offenses. Of those released on probation, 56 per cent repeated, parole 61 per cent, and mandatory release after serving prison time 75 per cent. Offenders receiving a sentence of fine and probation in 1965 had the lowest repeating proportion with 37 per cent rearrested." (Emphasis added) U.C.R.-1970, 38-39.

I emphatically do not intend the above analysis to stand as "proof" of the textual proposition to which this footnote refers. In one or two instances, I have plugged statistical interstices with what amounts to informed conjecture. Even if this were not so, I am fully aware of the fact that the reasoning above falls considerably short of what is required for rigorous logical demonstration. Nevertheless, the above analysis, I believe, at least strongly suggests that there might be something more than emotion and rhetoric behind the theory I espouse in the text.

huff and puff from the bench when the accused finally comes before it. The English courts have long prided themselves on the practice of providing sure and swift apprehension and trial as one, if not the most effective, way to communicate to its citizenry that the system should really be taken seriously. Whether or not the individual is convicted, regardless of the sentence he receives (whether imprisonment for a short or long period or probation), the most important messages to the individual about society's disapprobation of his conduct will be conveyed to him in the first weeks of apprehension, charging and trial with efficient, deliberate progress throughout.²¹

II. Progress or Regression: Witnesses in Criminal Courts Today

In the typical situation the witness will several times be ordered to appear at some designated place, usually a courtroom, but sometimes a prosecutor's office or grand jury room. Several times he will be made to wait tedious, unconscionably long intervals of time in dingy courthouse corridors or in other grim surroundings. Several times he will suffer the discomfort of being ignored by busy officials and the bewilderment and painful anxiety of not knowing what is going on around him or what is going to happen to him. On most of these occasions he will never be asked to testify or to give anyone any information, often because of a last-minute adjournment granted in a huddled conference at the judge's bench. He will miss many hours from work (or school) and consequently will lose many hours of wages. In most jurisdictions he will receive at best only token payment in the form of ridiculously low witness fees for his time and trouble. In many metropolitan areas he will, in fact, receive no recompense at all because he will be told neither that he is entitled to fees nor how to get them. Through the long months of waiting for the end of a criminal case, he must remain ever on call, reminded of his continuing attachment to the court by sporadic subpoenas. For some, each subpoena and each appearance at court is accompanied by tension and terror prompted by fear of the lawyers, fear of the defendant or his friends, and fear of the unknown. In sum, the experience is dreary, time-wasting, depressing, exhausting, confusing, frustrating, numbing and seemingly endless.

Despite its seriousness, one can find in published materials only tidbits descriptive of the situation.

The Task Force on the Administration of Justice²² reported:

In courts in many cities witnesses must come to court each time the case is called and must sit through the entire calendar call, although most cases on the calendar will be settled by a guilty plea. Only a small number of the scheduled cases could possibly be tried that very day because of the shortage of judges. Adjournments are frequently requested and almost routinely granted. Rarely is an attempt made to notify the witnesses that the trial will not proceed as scheduled.²³

21 See Penegar, *Appraising the System of Criminal Law, Its Processes and Administration*, 47 N.C.L. Rev. 69, 150 (1968).

22 TASK FORCE ON ADMINISTRATION OF JUSTICE, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS (1967).

23 *Id.* at 90.

It also quoted from a letter from Edward S. Silver, the former King's County (Brooklyn, New York) District Attorney, to James Vorenberg, the Executive Director of the Commission's staff:

[I]n my job as District Attorney I frequently received serious complaints from witnesses who were greatly inconvenienced, and at times their jobs were put in jeopardy because of the necessity of coming back again and again when cases appeared on the calendar and were adjourned. In addition to that, there is never proper provision made for their full compensation for loss of time. Of course, I realize some limit must be put on compensation, but today any worthwhile mechanic can earn anywhere from \$25.00 to \$40.00 a day at his regular job.

[I]n many instances, witnesses . . . develop an attitude that henceforth they will never act as witnesses again. Complainants and witnesses are innocent victims in these situations, and some real thought should be given as to how to minimize the inconvenience to which they are subjected and to make them feel that what they are doing is appreciated by the people and the authorities.²⁴

The Task Force, in its report, pointed out that "[f]acilities for witnesses, as a rule, are either inadequate or nonexistent"²⁵ and that:

Witnesses and jurors must often spend idle hours in crowded courtrooms or noisy corridors because many of these courts do not provide lounges or other facilities. Telephones for those who could conduct some of their business at the courthouse and reading material for those in forced idleness are lacking almost everywhere.²⁶

"Compensation," it was said, "is generally so low that service as a . . . witness is a serious financial burden."²⁷

Repeated court appearances occasioned by adjournment of trials interfere with the private and business lives of witnesses and jurors. This waste of time, compounded by inadequate compensation, cannot be justified.

. . . .

The full impact of these problems does not become apparent until one realizes that a witness may be the victim of the offense and that he is often from the same low stratum of the community as the defendant.²⁸

Starting with the week of January 10, 1972, the office of the District Attorney of Wayne County (Detroit and suburbs), Michigan, began collecting weekly statistics on witness appearances in felony and "high misdemeanor" cases in the Recorder's Court, which handles crimes committed within the limits of the city of Detroit.

24 *Id.*

25 *Id.*

26 *Id.* at 91.

27 *Id.* at 90.

28 *Id.*

In Detroit, as in most jurisdictions, each time a case is set for trial, all witnesses are subpoenaed. In some instances, trials are held and witnesses are required to testify. In many other instances, either a plea of guilty is accepted, the trial postponed or the case dismissed for any of a variety of reasons. In none of these events are any of the witnesses subpoenaed asked to testify. In practically all instances they do in fact appear and usually spend between a half day to a day in the court environs.²⁹

According to these statistics, between January 10, 1972 and March 17, 1972, a total of 1,360 cases were set for trial, subpoenas were issued for all police and civilian state's witnesses—as well as an undetermined number of defense witnesses. During the same period, only 227 trials were actually held. In the remaining 1,133 instances, nothing happened that required the testimony of any witnesses.

In an average week, although 151.1 cases were set for trial (with witnesses ordered to appear and stand ready) only 25.2 trials were actually held. Thus, between January 10, 1972 and March 17, 1972, 2,055 civilian witnesses and 5,048 police witnesses were ordered into court for trials that were not held. A total of 7,103 witnesses were ordered into court and then, in effect, told to go home. In an average week, 560.8 police and 228.3 civilian witnesses were subpoenaed to no purpose, for an average weekly total of 789.2. These figures do not reflect the number of witnesses who were subpoenaed for trials that were held. An average of 6.3 witnesses per trial were subpoenaed for trials not held. If one makes the reasonable assumption that the average is approximately the same for trials held, then 5.0 witnesses are unproductively subpoenaed for every *one* that is subpoenaed for trial.

This five-to-one ratio of "wasteful" to productive appearances probably understates the situation. It takes no account, for example, of witnesses who were subpoenaed for a trial that was held, but who never actually testified and defense witnesses unnecessarily subpoenaed. Like all statistical representations, it does not capture the anger, anguish, and frustration that such a situation engenders.

If it were atypical there would be little to worry about, but it is not. In February, 1972, the Center for Prosecution Management distributed questionnaires to prosecutors attending an Office Management Seminar sponsored by the National District Attorneys Association. Because the seminar was geared to middle-sized offices, only three or four of the thirty or so largest offices responded. One assumes that larger jurisdictions have greater problems with court delay and witness disaffection than smaller ones. Therefore, the 44 responses to the questionnaire which were received are all the more striking.

The significant question asked the prosecutors to "describe disaffection of prosecution witnesses (*e.g.*, because of court delay, continuances, repeated appearances, etc.) in your jurisdiction." Of the replies, thirty described witness disaffection as being *more* than "a minor problem." Twenty said that in their

²⁹ Conversation with James Garber, Chief Assistant to William L. Cahalan, District Attorney of Wayne County, April 20, 1972. I am much indebted to Mr. Garber and Mr. Cahalan for letting me use these statistics.

jurisdictions there was "substantial disaffection" among witnesses. Six acknowledged that the witness situation was a "serious problem affecting overall ability to prosecute effectively." *None* described witness disaffection as being "non-existent."

In many, if not most, criminal courts throughout the land, the system actually works in a manner nicely captured by the authors of *Criminal Justice Administration*:

It is standard procedure for the defense counsel . . . to employ every means at his disposal to frustrate the efforts of the prosecution in bringing the case to trial. Chief dependence is placed upon the continuance, the objective being to wear out the state's witnesses.

The case is routinely continued on the first occasion that it is up for trial. This continuance is termed "automatic" by police officers, because the request for it is rarely, if ever, turned down by the judge.

. . . .

Among the most common reasons provided by the defense in seeking repeated continuances are the claim that the attorney has a commitment in another court at the same time (sending a law clerk to offer the explanation and request the continuance); that the attorney has not yet received any or all of his fee; or that the attorney simply requires more time in which to prepare his defense. Attorneys employing this tactic will ask for as many continuances as the judge will allow. If the judge refuses additional continuances, the attorney will request a change of venue so as to start a series of hearings on motions or a new string of continuances in another court. As witnesses fail to appear, the state is forced into the position of agreeing on some occasions to a continuance.

. . . .

Several other methods are employed by defense counsel in frustrating the efforts of the state to bring a case to trial: requests for separate trials are frequently made in those cases in which multiple defendants are being prosecuted; defendants free on bond are not produced in court on the date of trial; and a request to stipulate ownership of stolen property is refused, thereby requiring the prosecution to produce the owner of the stolen property at each hearing regardless of whether he was a witness to the burglary, and even though the ownership may be only formally disputed.

The results of the several delaying tactics are obvious. Victims or witnesses are lost—moving out of the state, going on extended vacations, or dying. Cooperative victims and witnesses become hostile, refusing to appear and, if summoned, unwilling to provide the testimony needed for conviction. Some, unfamiliar with the operations of the criminal process, become firmly convinced that a conspiracy exists in the particular case to block justice—a conspiracy entered into by the presiding judge, the state's attorney, and the arresting officer. Even cooperative witnesses find their memories dimmed by the passage of time, making them vulnerable to grueling cross-examination on the smallest details.³⁰

Minor criminal courts, which often have responsibility for conducting pre-

30 F. REMINGTON ET AL., *CRIMINAL JUSTICE ADMINISTRATION 1325-1326* (1970).

liminary hearings in more serious cases, are probably the most serious offenders. The chaotic atmosphere in one such court was described by Howard James as follows:

Roughly the time court is scheduled to begin Judge C——— ambles from his office to the desk in the courtroom, sits down, and lights a cigarette. Then he tells those who are interested enough to listen that he will call four cases first—apparently the result of the conversations I had watched in his office.

People still stand around the bench, block the doorways, talk to each other, mill noisily in the hall.

Judge C——— calls the four cases and does not seem surprised when the parties are not present. He tells the witnesses to go home, explaining they will be told when to return again.

. . . .

Another case is called. Nobody is present. Some witnesses ask about their case. They are told it has been rescheduled for 1:30 p.m. and so they go home.

It is 9:15 a.m. and the noise in the hall continues. Two cases "hanging fire since last September" (this was February) will be tried together, the judge announces. Several policemen are sworn together.

The defendant asks for a continuance of two weeks so that he can finish paying off the bad checks, which are "90 percent paid." The policemen leave with the other witnesses. More people come in from the hall and fill up the seats.

. . . .

The next case is called, including a long list of witnesses. One policeman is present, along with the defendant. Judge C——— says that since the witnesses are not present (the case is not described) it will be dismissed—if the defendant agrees to pay court costs.

. . . .

Finally at 9:41 the first witness, a white factory worker, is sworn. He testifies that he was awakened by police "about 6 a.m." one day and was told they had recovered his pink and white '55 Cadillac with a fender smashed.

He is asked if he knows who took it and he points at one of the youngsters and says, "That one." But according to the police, he was not present when the youth was picked up.

The judge calls for the arresting officers to testify. Somebody says, "They called in and said they're on their way." Judge C——— announces he will "hold the case in abeyance" until they arrive.

. . . .

In the next case the defense attorney tells Judge C——— his client has been in court "each time the case was called since October," but so far the police officers have not been in court. The judge orders subpoenas issued again, and the case is rescheduled.

Then one of the white youths who arrived in handcuffs is told his case was "set by error" for this day, and that it is being reset for the following Tuesday. The boy is returned to jail.

. . . .

The next case is called and a policeman takes the stand. The case is postponed because the complaining witness has not been subpoenaed.

And so the morning goes: a man charged with using somebody else's credit card; more missing policemen, witnesses, and defendants, the two defense lawyers getting more assignments.³¹

Laura Banfield and C. David Anderson³² have described Chicago practice:

In both the Criminal Division and the misdemeanor courts, all cases scheduled to be heard on a given day are called for 10 A.M. Since court calls are not staggered, witnesses, defendants, and police officers must all be on hand early in the day regardless of when the case is actually called. Some judges make a practice of calling cases which are to be continued first, or of giving preference as a matter of professional courtesy to those in which retained lawyers are present. In general, however, those required to appear in a case have no way of knowing when it will be called. In the preliminary courts, witnesses come to court on every scheduled court date. In the Criminal Division, the system is somewhat more selective; witnesses are subpoenaed by the state's attorney or by the defense when it is anticipated that they will be needed. Witnesses are not subpoenaed, and do not attend, court appearances at which testimony is not taken, as, for example, the arraignment or the filing of discovery or other preliminary motions. Even when witnesses are subpoenaed, however, there is no guarantee that the case will go forward as scheduled; if it is continued, the witness will have come to court for nothing unless notified informally in advance of the continuance. Particularly in the crowded misdemeanor courts, the observer's impression is one of great haste and confusion; it is not surprising that witnesses sometimes do not realize that the case has been continued, or do not hear the date of the next court appearance. Commentators have criticized these features of the daily rat race in the criminal courts both for their inefficiency and for the burdens which they impose upon witnesses.³³

Motions for continuance, according to the authors, were handled simply, informally, routinely, and casually, even when witnesses were present and presumably prepared to testify.

Rather than inquire closely into the reasons, many judges say that they apply a standard policy of granting one or two continuances to either party on request; "after that, they'd better have a good reason." Other judges are willing to permit as many "by agreement" continuances as the parties are willing to arrange; close scrutiny is called for, they contend, only when one side is losing its witnesses or otherwise objects to further delay.³⁴

31 H. JAMES, *CRISIS IN THE COURTS* 39-41 (1967).

32 Banfield & Anderson, *Continuances in the Cook County Criminal Courts*, 35 U. CHI. L. REV. 259 (1968).

33 *Id.* at 276.

34 *Id.* at 277.

"Wearing down witnesses," said the authors, is an accepted, frequently utilized, and generally successful defense technique.³⁵ They found that the number of witness appearances set is, in general, directly related to the length of time it takes to dispose of a case³⁶ and that:

The most salient relationship between the number of court appearances and convictions is that, with few exceptions, the conviction rate decreases as the case length increases. For the whole sample, the percentage found guilty drops from 92% in cases taking between one and four court appearances to 48% in cases taking 17 or more court appearances.³⁷

In reaching its conclusions about the real costs of the Cook County system, the authors report:

Delay may . . . lessen public willingness to cooperate with the police and court system. Witnesses "worn out" by repeated and, in their eyes, fruitless trips to court become disaffected and unwilling to "get involved" on future occasions.

. . . .

Continuances also impose the burden of fruitless trips to court on witnesses and attorneys. The cost of such trips to the Police Department is measured both in the salaries paid to officers and in time taken away from police work. Private citizens incur these losses as well, since a day in court may often result in lost earnings.

. . . .

These time and money costs to private witnesses and attorneys may eventually be translated into costs to the system of criminal justice when witnesses and attorneys who find trips to court overly burdensome decline to return.

. . . .

Continuances may compromise the fairness of criminal proceedings if a delayed trial has a different, and less just, outcome from a speedy one. Witnesses may die. Their memories may fade. Their testimony may become more vulnerable to cross-examination. They may be "worn out" by repeated trips to court and refuse to appear again, or become less cooperative. A cynic, or a vigilant law enforcement officer, would add that opportunities for intimidating witnesses or bribing officials increase as a function of time. Although these consequences of delay can disadvantage either the prosecution or the defense, observers insist that "staleness" is far more likely to injure the prosecution, which is responsible for the production of most witnesses and has the burden of proving guilt beyond a reasonable doubt. Thus a prosecutor, aware that his case is growing weaker with the passage of time, may be forced to consent to a reduction of the charge or to end prosecution altogether. To those critical of the court system, "lost convictions" are the most significant cost of continuances.³⁸

35 *Id.* at 265, 283, 291.

36 *Id.* at 290.

37 *Id.* at 287-288.

38 *Id.* at 261-263.

Victimized "by administrative run-around, the witness' lot is not made any easier by the law. For example, he will likely be ordered excluded from the courtroom, and he may be subject to penalties for contempt of court if he violates the exclusionary order.³⁹ He is compelled to testify even if his testimony will bring him into "disgrace."⁴⁰ If he refuses to answer he may be punished for contempt. If a witness is once punished for contempt in refusing to answer a question and is then recalled and asked the same or a similar question which he again refuses to answer, he may again be punished without violating the prohibition against double jeopardy.⁴¹

Certain "testimonial privileges" theoretically preclude testimony emanating from certain confidential relationships; but they are regarded, not as privileges of *witnesses*, but as privileges, waivable and claimable only by parties.⁴² A recalcitrant or uncooperative witness may be held in contempt for any number of reasons.⁴³ If the judge decides he is lying, not only can he be held and punished for contempt, but he can also, *in addition*, be charged, convicted, and sentenced for the *crime* of perjury.⁴⁴

In certain states he may be liable for the costs of criminal proceedings; "[s]tatutes imposing costs on prosecution witnesses, under certain circumstances, on failure of the prosecution, and authorizing imprisonment until they are paid, generally have been upheld as constitutional."⁴⁵ If adjudged to be a "material witness" who cannot be trusted to appear, he may be compelled to post bail to assure his appearance and, in its absence, he may be, and frequently is, jailed until there is no need for his testimony.⁴⁶ If he is jailed, he may not be entitled to witness fees.⁴⁷ As recently as December 1971, the United States Court of Appeals for the Fifth Circuit issued an opinion reiterating this rule.⁴⁸

In the hallowed halls of the courtroom itself, he may be subjected to verbal abuse without there being much concern for his protection.⁴⁹ He may be threatened or assaulted by those concerned with the outcome of the prosecution—perhaps this danger is all the greater in view of the rapid expansion of discovery in criminal cases—especially the practice of early disclosure of the names and ad-

39 See generally Annot., 14 A.L.R. 3d 16, 22-23 (1967).

40 *Brown v. Walker*, 161 U.S. 591 (1896); 25 NOTRE DAME LAWYER 378 (1950).

41 17 AM. JUR. 2d *Contempt* § 29 (1964). See *Yates v. United States*, 355 U.S. 66, 72-75 (1957).

42 See *Hawkins v. United States*, 358 U.S. 74 (1958); *Wyatt v. United States*, 362 U.S. 525, 528-529 (1960). For anyone interested in following up on the rather subtle point of legal doctrine adverted to in the text, I would suggest referring to the briefs of the parties in the above Supreme Court cases.

43 See 3 R. ANDERSON, *WHARTON'S CRIMINAL LAW AND PROCEDURE* § 1336-1339 (1957).

44 Annot., 89 A.L.R.2d 1258, 1266 (1963). See 5 R. ANDERSON, *WHARTON'S CRIMINAL LAW AND PROCEDURE* § 2027 (1957).

45 20 AM. JUR. 2d *Costs* § 111 (1965).

46 See *Carlson, Jailing the Innocent: The Plight of the Material Witness*, 55 IOWA L. REV. 1 (1969); Comment, *Pretrial Detention of Witnesses*, 117 U. PA. L. REV. 700 (1969); and comment, *Witnesses: Imprisonment of the Material Witness for Failure to Give Bond*, 40 NEB. L. REV. 503 (1960).

47 Annot., 50 A.L.R.2d 1439 (1956).

48 *Hurtado v. United States*, 452 F.2d 951 (5th Cir. 1971).

49 E.g., "[W]hen the evidence justifies severe and rigorous criticism of a witness, it is not reversible error to allow an attorney to use invective in denouncing him." 5 R. ANDERSON, *WHARTON'S CRIMINAL LAW AND PROCEDURE* § 2078 (1957).

dresses of witnesses.⁵⁰ In some limited circumstances a complaining witness may be ordered to undergo a mental examination.⁵¹ He is deemed to be under a strong obligation to appear at court when summoned and to answer the questions asked.⁵² Conversely, he has no general right not to testify. Limitations on his testimonial duty are few and exceptional and, in the words of the leading authority on the law of evidence, "therefore to be discountenanced."⁵³ At grave financial loss he may be compelled to venture the length of the country should his testimony be thought to be required.⁵⁴ *His* interests, *his* convenience will not dictate a change in the location of a trial. In legal terms, "[a] change of venue will not be allowed merely for the convenience of witnesses."⁵⁵ In practical terms, he has neither the means of preventing his being subpoenaed unnecessarily or even frivolously, nor the means of obtaining redress for the wrong committed against him.⁵⁶ In one remarkable instance in which *167 witnesses*, most of whom knew *nothing whatsoever* about the case, were subpoenaed, it was held that causing the subpoenas to issue was *not* contempt of court.⁵⁷

In criminal cases the witness is often the victim of the crime, that is, the person raped, robbed, beaten, or shot at by the accused. Courthouse contacts (not to mention contacts in the street) with the defendant, especially if he is free on bond or recognizance, are difficult and sometimes traumatic. When courtroom contacts are repeated, the experience may be so much the more unpleasant. Testifying, for the average witness, is terrifying; the more aggressive the cross-examination, the more uncomfortable the witness may be. The more heinous the crime, the more the fear and embarrassment there may be in recounting the details.

For all this, the witness is paid little or nothing. Mileage fees generally range between three cents per mile up to approximately ten cents per mile. Hawaii, Idaho, and Nebraska appear to be the only states offering mileage fees that are in excess (by a few cents) of this range. Typically, five cents per mile, round trip, from home to court is allowed. Out-of-state mileage, if any, is usually not counted. As for daily fees, Alabama, Colorado, Connecticut, Delaware, Kentucky, Maryland, Minnesota, Mississippi, New Jersey, New York, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia compensate their criminal court witnesses at two dollars per diem or less; Idaho, Illinois, Michigan, Montana, Nevada, and Wyoming at from eight to twelve dollars and the remaining states between three and six dollars per day.⁵⁸

50 21 AM. JUR. 2d *Criminal Law* § 328 (1965).

51 See Annot., 20 A.L.R. 2d 684, 691-92 (1968) and Annot., 18 A.L.R. 3d 1433 (1968).

52 E.g., *Blair v. United States*, 250 U.S. 273, 281-282 (1919) (pertaining to grand juries).

53 8 J. WIGMORE, *ANGLO-AMERICAN SYSTEM OF EVIDENCE* § 2192, at 67 (3d ed. 1940).

54 *People v. O'Neill*, 359 U.S. 1 (1959).

55 R. ANDERSON, *WHARTON'S CRIMINAL LAW AND PROCEDURE* § 1517, at 110 (1957).

56 See generally Annot., 37 A.L.R. 1112 (1925).

57 *Ex parte Stroud*, 268 S.W. 13, 37 A.L.R. 1111 (1925).

58 "From all of this data on conclusion is obvious: the witness will usually be attending a trial at a financial sacrifice." Comment, *Compensation of a Witness in a Civil Action*, 52 MICH. L. REV. 112, 115 (1953). See also WISCONSIN LEGISLATIVE REFERENCE BUREAU, *COURT WITNESS FEES AND MILEAGE ALLOWANCES IN THE 50 STATES* (unpublished, 1966).

The textual material on witness fees is based in small part on the *Michigan Law Review* article cited above and in large part on a survey of the statutory provisions on witness fees, done at my request by Charles N. Clevert, who is at this writing a third-year law student at

Even these are, in some instances, not being paid. The author is aware of two major jurisdictions (and I suspect there are scores of others) where it is very uncommon for witnesses in criminal cases to receive any fees at all. The expedient by which this is accomplished is simple. Witnesses are simply not told that they are entitled to fees. In the unusual instances when they are told or somehow find out, they are required to produce subpoenas or some "proof" of having been present in court. By this time most witnesses have deposited their subpoenas in the trash and find it just too much trouble to scrounge for the paltry sums involved. As a result, few actually collect the sums available.

III. Witnesses: A Pattern of Blindness and Neglect

Nowhere is there hard data on witnesses in criminal cases. This absence is part of a larger pattern of blindness and neglect. In a real sense, our system does not "see" witnesses in their human dimension. Consequently, we are neglectful of their interests and problems.

Illustrative and expressive of the pattern are the references under "witnesses" in any edition of the *Index to Legal Periodicals*. Compared with hundreds of seemingly more arcane headings, the number of articles listed will be few. More-

Georgetown University's Law School in Washington, D. C. and a part-time LEAA employee. Per diem and mileage compensation rates throughout the country are, respectively, as follows:

28 U.S.C. § 1821 (1970) (\$20.00; \$.10 per mile). ALA. CODE tit. 11, § 103 (1940) (\$0.75; .05 per mile) ARIZ. REV. STAT. ANN. § 12-303 (1956) (\$5.00; .20 per mile); ARK. STAT. ANN. § 28.524 (1962) (\$3.00); CAL. GOV'T CODE § 68093 (West, 1964) (fees are discretionary and are allowed upon a showing of need; .20 per mile one way); COLO. REV. STAT. § 56-6-2 (1963) (\$2.50); CONN. GEN. STAT. § 52.260 (1960) (\$0.50; .10 per mile); DEL. CODE ANN. tit. 10, § 8903 (1953) (\$2.00; .03 per mile); D.C. CODE ANN. § 15-714 (1967) (\$20.00; .10 per mile); FLA. STAT. ANN. tit. 7, § 90.146 (1960) (\$3.00; .06 per mile); GA. CODE ANN. § 38-801 (c) (1954) (\$4.00; .08 per mile); HAWAII REV. STAT. tit. 32, Ch. 607-12 (1968) (\$4.00; \$6.00 if inter-island travel is required; .20 per mile); IDAHO CODE ANN. § 9-1601 (1948) (\$4.00; .25 per mile); ILL. STAT. ANN. ch. 53, § 65 (Smith-Hurd 1967) (\$10.00; .08 per mile); IND. STAT. ANN. § 2-1710 (Burns, 1968) (\$5.00; .08 per mile); IOWA CODE ANN. § 622.69 (1950) (\$3.00; .07 per mile); KAN. STAT. ANN. § 28.128 (1971 Supp.) (\$5.00; .09 per mile); KY. REV. STAT. § 421.010-421.020 (1971) (\$1.00; .04 per mile); LA. REV. STAT. § 15:252 (1967) (\$3.00; .05 per mile); ME. REV. STAT. ANN. tit. 16, § 251 (1965) (\$5.00; .08 per mile); MD. CODE ANN., art. 35, § 18 (1971); (\$1.00; .05-10 per mile); MASS. ANN. LAW., ch. 262, § 29 (1968) (\$3.00; .05 per mile); MICH. STAT. ANN., § 27A.2552 (1967) (\$12.00; .10 per mile); MINN. STAT. ANN., § 357.22-357.24 (1966) (\$1.00; .06 per mile); MISS. CODE ANN., § 3953 (1957) (\$1.50; .05 per mile); MO. STAT. ANN., § 491.280 (1952) (\$3.00; .07 per mile); MONT. REV. CODE ANN., § 25.404 (1967) (\$10.00; .08 per mile); NEB. REV. STAT., § 33.139-33.140 (1968) (\$6.00; .08 per mile); NEV. REV. STAT., § 48.290 (1967) (\$10.00; .15 per mile); N.H. REV. STAT. ANN., § 516.16 (1971 Supp.) (\$5.00; .06 per mile); N.J. STAT. ANN., § 22A:1-4 (1969) (\$2.00); N.M. STAT., § 20-1-4 (1953) (\$5.00; .08 per mile); N.Y. CIV. PRAC. LAW § 610.50 [C.P.L.R. 8001] (McKinney, 1971) (\$2.00; .08 per mile but no mileage for travel wholly within a city); N.C. GEN. STAT., § 6-51-6-63 (1962) (witness is merely entitled to mileage at unspecified rate); N.D. GEN. CODE, § 31-01-16 (1960) (\$6.00; .10 per mile); OHIO REV. CODE ANN., § 2335.06 (Page 1954) (\$0; .05 per mile); OKLA. STAT. ANN., tit. 28, § 81 et seq. (1955) (\$2.00; .05 per mile); ORE. REV. STAT., § 44.410-44.430 (1953) (\$5.00; .08 per mile); PENN. STAT., tit. 28, § 416.2-416.4 (Perdon 1955) (\$5.00; .07 per mile); R.I. GEN. LAWS § 9-29.7 (1968) (\$5.00; .10 per mile); S.C. CODE § 27-611 et seq. (1968) (\$0-0.50; .10 per mile); S.D. COMP. LAWS § 19-5-1 (1961) (\$4.00; .15 per mile); TENN. CODE ANN. § 24-401 (1955) (\$1.00; .10 per mile); TEX. STAT. art. 3708 (Vernons, 1926) (\$1.00; .06 per mile); UTAH CODE ANN. § 21-5-4 (1953) (\$6.00; .20 per mile); VT. STAT. ANN. tit. 32, § 1552 (1970) (\$10.00; .08 per mile); VA. CODE ANN. § 14.1-189-14.1-190 (1950) (\$1.00; .07 per mile); WASH. REV. CODE ANN. § 2.40.010 (1961) (\$4.00; .10 per mile); W. VA. CODE § 59-1-16 (1966) (\$1.00; .05 per mile); WIS. STAT. ANN. § 885.05 (1966) (\$5.00; .05 per mile); WYO. STAT. ANN. § 1-195 (1957) (\$10.00; .10 per mile).

over, there will be practically nothing on the treatment or rights of witnesses. To find what little exists on those subjects, one must search laboriously through a battery of other headings, *e.g.* "administration of justice," "continuances," "victims of crime," which contain much unrelated material. The impression created is that the legal indexing system is simply not geared to finding out about the treatment of witnesses. Like the rest of the system, it is blind to the problems of witnesses.

What one does find under the heading "witnesses" are articles on how to interview witnesses, cross-examine them, subject them to lie-detector tests, prepare them for the "courtroom ordeal," prevent their untruthful testimony from convicting innocent defendants, provide them with immunity so as to extract the information they possess, etc. One finds, in other words, articles on how to handle, manipulate, or exploit witnesses, but little more.

In one especially noteworthy article entitled "Some Things About Witnesses,"⁵⁹ attorney E. H. Smith wrote of how the appearance of witnesses may influence a jury and how he used this knowledge in defending a noted bootlegger. It was apparently the custom in his jurisdiction for each side's witnesses to be sworn collectively at the outset of trial, first the prosecution's, then, the defendant's. Attorney Smith relates:

I knew that when the case was called the witnesses for the prosecution would be called and sworn as a body, and that then the witnesses for the defense would be called and sworn likewise. I also knew that when this was done the appearance of my rough kind of ragamuffins would be a great contrast to the appearance of the prosecution's witnesses and that I would be at a distinct disadvantage; I was fearful of the effect this might have upon the jury.

To try to remedy this I at once had subpoenas issued for several bankers and professional men, two or three ministers of the gospel, and one or two merchants.

When the case was called and the witnesses stood up to be sworn I had just as good a looking a bunch of witnesses as the prosecution and in this manner avoided any ill effect from first opinions.

Incidentally I succeeded in acquitting that client.⁶⁰

To trial attorneys, the author offered this bit of advice:

To have a witness present in court and not need him is much safer than to permit him to be absent and then to need him.

In cases where there are many witnesses, witnesses sometimes have to wait hours and sometimes days before being called. Each wants to know of the attorney, if he cannot be excused, stating, "I don't know anything anyway." When this is refused then he wants the attorney to have him called over the telephone when he is needed. If there were only one witness to be called this

59 Smith, *Some Things About Witnesses*, 8 Ky. S.B.J. 37 (1944).

60 *Id.* at 39-40.

request might be easily complied with, but to have to call each witness over the telephone and wait for him to get into the courtroom would cause unnecessary and expensive delay and furthermore burden the lawyer with the responsibility of remembering to call them. Witnesses are inconvenienced, yes, but there are many inconveniences to be put up with as we travel through life.

A lawyer has to subpoena many witnesses sometimes, to get one he wants [*sic*] he cannot always control the circumstances of his case.⁶¹

Smith goes on to boast that he once subpoenaed *every single employee* of a hospital to obtain a single scrap of information. "I refused to excuse any of them," he writes "and all remained confined in the witness room throughout the trial."⁶² In this room, according to the author,

the witnesses . . . are herded together, closely confined with nothing to do but wait. They are usually uncomfortable, nervous, and restless, [*sic*] after a few hours of this confinement they become miserable.⁶³

More startling even than Smith's total obliviousness to the human character of those infinitely manipulable pawns he calls witnesses is the fact that his article made print. Indeed, it made print without provoking any significant comment from the editors of the journal in which it appeared or any reply from the lawyers and judges who read it. The reason for this is that the attitudes toward witnesses reflected are typical of bench and bar. Smith's article, though a bit more blunt and a shade less delicate, is very much like scores of similar pieces that have appeared in bar journals and lawyers' magazines all over the country. Judges and lawyers generally, though more sensitive to the public relations aspects of what they say, share Smith's myopic one-dimensional view of witnesses.

These views are clearly reflected in the substantive law governing witnesses. As we have seen,⁶⁴ the law imposes upon witnesses onerous duties for which it provides little or no compensation, and none "of right." In contrast to the proliferating number of protections and defenses the law now accords an accused, it accords to witnesses few and none of real consequence. The very concept of "rights of witnesses" seems foreign to the legal mind. To a most remarkable extent, it is simply not the habit of the law to take account of witnesses.

True, legal writing sometimes *seems* to take explicit account of witnesses (though even this is unusual). For example, in discussing the law relating to the asking of "insulting questions" on cross-examination, one author acknowledged that restrictions on "insulting questions" are necessary "to allay the fears of prospective witnesses that their private lives will be subjected to microscopic scrutiny in the public courtroom."⁶⁵ Significantly, the article does *not* support

61 *Id.* at 44.

62 *Id.*

63 *Id.* at 38.

64 See text accompanying notes 39-58 *supra*.

65 26 CORNELL L. Q. 724, 727 (1941). Triggering the inquiry was a ruling on the question: "Have you ever suffered from venereal disease?" in *People v. Kress*, 284 N.Y. 452, 31 N.E.2d 898 (1940). The court has stated that the question, asked of a defendant who had taken the stand, was improper.

such restrictions because "microscopic scrutiny" of "private lives" of witnesses in the "public courtroom" should be discouraged, but because "fears" of such scrutiny by "prospective witnesses" should be allayed. But semantics aside, one might expect that the article's unusual concern for the fears of prospective witnesses might herald the even more unusual espousal of a legal rule truly solicitous of the witness' interest in not being badgered, embarrassed, or psychologically undressed. Instead, he favors the existing rule which requires insulting questions to be answered if it "will assist the jury in finding out whether the witness is telling the truth."⁶⁶

The point is not that this rule is unwise or unjust or even that it burdens significant numbers of witnesses. The point is twofold: First, in a legal system which subordinates fact-finding to a host of other interests (e.g., the right of the accused not to be convicted by "tainted" evidence, regardless of its probative value), this rule entirely subordinates a witness' interest in privacy to fact-finding; second, it is unblinkingly espoused by an article claiming to pay heed to witness interests. Under the rule in question, a witness literally has no right to be free of insulting questions if the judge believes they will assist in testing the witness' veracity.

Similarly, only rarely does legal commentary in general explicitly advert to witness' interests even when they are significantly affected by the topic under discussion. When such reference is made, it is formal and illusory. In the rare instance when witness' interests are considered and weighed on the balance, they are invariably subordinated to what are regarded as "more important interests."⁶⁷

A particularly vivid example of the denigration of witness' interests is the commentary on the question of whether the complaining witness in certain types of sex offense cases should be made to undergo psychiatric examination and whether the results of such an examination should be admissible in evidence. Since this article is not intended to mount elaborate attacks upon particular rules of law, it will suffice to simply state: it is thought that the trend of the law and the tendency of the commentary is that criminal defendants should be afforded some kind of right to have such an examination conducted.⁶⁸

Espousal of such a rule requires the subordination of witness' interests of enormous importance and sympathetic appeal. Is it really fair to a woman who

66 *Id.* at 725.

67 Examples illustrative of the tendency to discount witnesses' interests are: Comment, *Right of the Criminal Defendant to the Compelled Testimony of Witnesses*, 67 *Col. L. Rev.* 953, 966-967 (1967), and 15 *CHI.-KENT. L. REV.* 343, 344, 345 (1936). Hopefully, the reader of this article will become alert to this dismaying tendency and will come to notice similar examples as they appear.

68 *See* Annot., 20 *A.L.R.2d* 684, 691-92. (1968) and Annot., 18 *A.L.R. 3d* 1433 (1968). An excellent example, both of the commentary on this question and its tendency to give short shrift to witnesses, is Comment, *Psychiatric Evaluation of the Mentally Abnormal Witness*, 59 *YALE L. J.* 1325 (1950), a much cited and discussed article which argues for compulsory psychiatric examination of "any witness" who "may be suffering from a 'mental illness' likely to affect his credibility." *Id.* at 1340. I suggest that, in practice, such a rule could only result in massive unfairness and imposition on witnesses. I suggest also that the article in question is typical of much legal writing in that (1) it appears on the surface to reflect reliance on vast quantities of research; (2) it appears on the surface to reach conclusions that are based upon a painstaking, reasoned, explicit consideration of the interests of all concerned; (3) it, in fact, regards the interests of witnesses as being without importance or significance; and (4) it is naive in the extreme about the operation in the real world of the rule it espouses.

has been the victim of a rape, who has been through a horrifying and painful experience of seemingly endless duration, who has been sharply grilled by batteries of police officers, who has been made to look at scores of photographs, who has been summoned to several police line-ups where she finally identified her attacker, who has been interviewed by several assistant prosecutors, who has already recounted the horrifying details of her experience to a grand jury and to the public at a preliminary examination, where she was vigorously cross-examined by her attacker's lawyer, who has made numerous fruitless trips to the courthouse expecting to testify—is it really fair to her to tell her in the end that everyone has doubts about her and that she must divulge her personal and sexual history to a stranger who is said to be a specialist in detecting mental illness? Is the likely result of such examinations such as to justify compelling an innocent human to submit to such an experience?

I think not, but that is not my point. My point is that legal thinking stands so remarkably ready to pour abuse on witnesses in pursuit of some highly fanciful benefits to other components of the system.

The "tunnel vision" afflicting the authors of the previously discussed articles when referring to witnesses is equally apparent in more recent works. Witnesses have been quite neglected and indeed are barely visible in the two major efforts to reappraise the criminal justice system.

In the 1967 report of the President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society*, two thirds of one page out of 340 was devoted, not to witnesses, but to "jurors and witnesses."⁶⁹ Another two paragraphs were directed to the desirability of "residential facilities" for the comparative handful of witnesses in organized crime cases who might desire special protection.⁷⁰ Only two recommendations ("jurors and witnesses" and "residential protection facilities"), out of more than 200, pertained to witnesses.

Similar criticism applies to the American Bar Association's Project on Minimum Standards for Criminal Justice. Among the fourteen volumes published, there is none entitled "Standards Relating to Witnesses in Criminal Cases," though entire volumes were devoted to such comparatively arcane topics as "Electronic Surveillance" and "Appellate Review of Sentences." Scattered here and there are occasional sympathetic remarks, for example, on "repeated impositions on time, energies and talents of judges, jurors, witnesses, law enforcement officers, lawyers, and other court personnel [emphasis added]."⁷¹ And admittedly, there are the standard warnings to lawyers about improper interviewing and excessively aggressive cross-examining.⁷² Nevertheless, taken *in toto*, the ABA Standards reflect no perception of witnesses as persons, no understanding of

69 PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 156-157 (1967).

70 *Id.* at 204.

71 ABA STANDARDS, *DISCOVERY AND PROCEDURE BEFORE TRIAL* 27 (Approved Draft, 1970).

72 ABA STANDARDS, *THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION*, Standards 3.2 and 5.7, at 81, 122 (prosecution) and 4.3 and 7.6, at 228 (defense) (Approved Draft, 1971).

how they are affected by participation in the criminal court process, and very little real concern for their interests.

A few illustrative questions will point up the shortcomings of the Standards.

In spelling out standards for the scheduling of criminal cases and for granting or denying continuances, why was not the time, expense, and convenience of witnesses made one factor to be considered?⁷³

In warning both prosecutors and defenders about embarrassing or humiliating witnesses on the stand,⁷⁴ why were not warnings included about (1) the summoning of unnecessary witnesses; (2) purposeless insistence on all witnesses remaining in waiting at the courthouse all through the many tedious days of a lengthy trial, and (3) lack of maximum diligence in notifying witnesses that a hearing has been postponed or that their testimony will not be required?

Instead of delicately and circuitously slapping the wrist of an attorney who engages in "delay for tactical advantage," why did not the Standards condemn the "wearing out of witnesses" because that, and nothing else, is what "delay for tactical advantage" is all about.⁷⁵

Finally, other than fairness to defendants, there are few considerations more important realistically to questions of joinder and severance than the avoidance of repetitious appearances and repetitious testimony by witnesses; but if so, is the following introduction to the subject adequate?

The interests which so often come into conflict in this area are those which commonly clash in the field of criminal procedure and which receive continued attention throughout the minimum standards: The expeditious handling of criminal cases without excessive demands on *prosecutorial* and *judicial* [but *not* witness'] resources and the protection of defendants from the risk of prejudicial and unfair treatment. The traditional rationale for joinder of offenses and of defendants is that of conserving the time lost in duplicating the efforts of the prosecuting attorney, and *possibly* [!] his witnesses, and of judges and court officials⁷⁶ [emphasis added].

Likewise, the management-oriented authors of the numerous "court studies" appear, like judges and lawyers, to be "witness-blind." Generally, "court studies" are concerned with the following factors: First, the length of time between arrest and disposition; second, the efficiency with which a judge's time is used, *i.e.*, the extent to which it is used in adjudicative activities, as opposed to wasteful activities, like waiting for lawyers, or nonactivities, like golf; and third, the efficiency with which available courtrooms are being utilized. They sometimes contain generalized expressions of concern about the plight of witnesses, however, there is, in general, a lack of appreciation of the full significance of the witness' problems and they fail to see him as anything but an object susceptible to virtually unlimited manipulation and control. No court study makes either the conservation of witness' time or the reduction of "waste appearances" a goal. Not one in

73 ABA STANDARDS, SPEEDY TRIAL, Standards 1.1 and 1.3, at 10-13 (Approved Draft, 1968).

74 See note 73 *supra*.

75 See, *e.g.*, ABA STANDARDS, THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 180 (Approved Draft, 1971).

76 ABA STANDARDS, JOINDER AND SEVERANCE 1 (Approved Draft, 1968).

other words, assesses the operation of courts in terms of the extent to which they protect the interests of witnesses. So concerned are they with "court delay," "valuable judgetime," and "available courtroom space," that they too overlook witnesses and make them, once again, the "forgotten men" of our system.

The United States Supreme Court has not escaped this malady. The revolution in the rights of defendants which the Court has engendered over the past fifteen years has not touched upon the rights of witnesses. And, in certain respects, this "revolution" has had a profound negative impact upon the plight of witnesses.

One of the first and most far-reaching decisions in this field held that indigent defendants were entitled to counsel at the state's expense in serious criminal cases.⁷⁷ Another applied the exclusionary rule to the states and thereby precluded the use by governments in criminal trials of any evidence not obtained in accordance with the letter of the law.⁷⁸ Using these decisions as a starting point, the Court proceeded to set forth a body of new legal rules and, in effect, to require in all states a whole set of new procedures.

In a series of decisions, the Court made the requirements for both a legal arrest⁷⁹ and a valid search warrant more extensive, difficult to meet, complex, and confusing.⁸⁰ It imposed a variety of new prerequisites to the use at trial of a defendant's admissions or confession.⁸¹ It required that a *judge*, rather than a jury, determine if these requirements had been met.⁸² To discourage unfair line-ups and other suggestive police practices, it ruled that eyewitness identifications "tainted" by suggestiveness or line-ups at which the accused's counsel was not present were inadmissible, thus requiring new types of hearings.⁸³ In addition, sharp new limits were placed on the practice of trying together two defendants involved in the same crime.⁸⁴ Consequently, in many instances, at least two trials must be held to determine the facts of what is substantially one criminal event.

Each series of rulings required new kinds of decisions to be made. Each created a new series of uncertainties that had to be resolved by research and reflection, and, often, by a number of new appeals. Each required new kinds of hearings to be held; many necessitating evidence be taken from witnesses. It is now conceivable that a single witness may be required to testify separately before a magistrate on an application for a search warrant (hearsay testimony is suspect), before a magistrate on an application for an arrest warrant, at a "preliminary examination," before a grand jury, at an evidentiary hearing on a motion to suppress eyewitness identification, at an evidentiary hearing on a motion to suppress

77 *Gideon v. Wainright*, 372 U.S. 335 (1963).

78 *Mapp v. Ohio*, 367 U.S. 643 (1961).

79 Evidence seized "incident to arrest" is ordinarily considered legally obtained and admissible. If seized pursuant to an arrest later determined to be "without probable cause" and, hence, illegal, it may be considered the "fruit of the poisonous tree" and thereby inadmissible. See *Wong Sun v. United States*, 371 U.S. 471 (1963).

80 *E.g.*, *Spinelli v. United States*, 393 U.S. 410 (1969).

81 *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964).

82 *Jackon v. Denno*, 378 U.S. 368 (1964).

83 *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *Stovall v. Denno*, 388 U.S. 293 (1967); *Simmons v. United States*, 390 U.S. 377 (1968).

84 *Bruton v. United States*, 391 U.S. 123 (1968).

a confession or admission, at an evidentiary hearing on a motion to suppress physical evidence, and at trial. Some of these might, in certain circumstances, have to be subdivided into separate hearings which could require additional appearances. Should there be two or more defendants whose cases have been severed, the number of testimonial appearances would have to be increased, possibly by severalfold.

The list above is not exhaustive. Neither, of course, does it take account of the number of "waste" appearances witnesses are usually required to make, nor of the numerous non-testimonial interrogations to which they are required to submit, nor of any witness appearances that may be necessitated either by retrial following appellate court reversal of a lower court's judgment or evidentiary inquiries that may be required by a convicted prisoner's applications for post-conviction relief (which, over the long haul, can be and often are addressed to many different courts, both state and federal). The point of the list is not that many witnesses are in practice required to go through so many exhausting and repetitive appearances. Probably few are, though no one knows because the statistical work has not been done. The point is rather that each series of rulings has had a massive impact on criminal court processes in every state, notably on the number and frequency of witness appearances and on the dispatch with which an accused person can be brought to trial. And yet, in none of the decisions cited above did any of the opinions—dissenting, concurring, or for the Court—ever devote anything but cursory attention to the interests of witnesses or even to the entire problem of the administration of the criminal court process in light of the ruling. Each of the Justices proved in his opinions that he could write impressive wisdom about the design of the knot, the texture of the ribbon, the color of the wrappings, and the blending of the colors. None of them, however, proved capable of sitting back and taking a reflective look at the overall design of the whole package. Least of all, none of them thought to lift up the package and look underneath where they might have seen little people, witnesses, being crushed.⁸⁵

The result has been "future shock," as Alvin Toffler might say, a "shattering stress and disorientation that we induce in individuals [and institutions] by subjecting them to too much change in too short a time."⁸⁶ Our criminal processes have not, as of yet, been adjusted to meet the needs, and protect the rights, of its prime contributors—witnesses. Ironically, court administrators have not even been able to cut back the lengthening time between arrest and trial.

This is not to say that each series of Supreme Court rulings has been unwise. Indeed, in sum, they may have done more good than harm. It is to say that the Court's thinking is out of focus, that its perspective is too narrow, that its reasoning is faulty, and that consequently the decisions have had serious repercussions. To

⁸⁵ Since this article was completed the United States Supreme Court took an important first step in the direction espoused in this article. In *Argersinger v. Hamlin*, 407 U.S. 25 (1972) the Court guaranteed to all defendants faced with the possibility of prison terms the right to counsel. The noteworthy aspect of this decision is, however, the explicit attention paid by Mr. Justice Douglas, in his Opinion of the Court, to the question of judicial administration. It is difficult to judge the impact, if any, of these considerations, but, perhaps, this is a harbinger of an awakening consciousness.

⁸⁶ ALVIN TOFFLER, *FUTURE SHOCK* 2 (1970).

legal thinking, generally, and to Supreme Court reasoning, in particular, can be attributed some part of the blame for court delay and some part of the blame for the abysmal way criminal court witnesses are treated.

What accounts for this pattern of blindness and neglect? What causes our criminal justice system to be so oblivious to witnesses and so neglectful of their problems and interests?

First, as one shrewd observer put it, "Let's face it; the complaining witness is rarely John D. Rockefeller." Typically, he is not well off financially. He has often shared with the defendant the same impoverished background. He lacks knowledge of the system, access to those who man it, and confidence in his ability to deal with it. He remains thoroughly intimidated by the trappings of justice—even if disillusioned by his perception of its actual workings—and by the status and reputations of judges and lawyers. He is short, both in the ability to articulate his grievances and in the social and political "clout" necessary to make his anger felt.

Second, unlike every other class affected by criminal courts, including prisoners, witnesses have no way of helping themselves. They are a class whose members are constantly changing. They do not interact much with one another. They are easily led into believing that the frustrations they experience are atypical rather than a manifestation of a weakness endemic to the system. When they leave the class, they rapidly lose interest in its problems. Indeed, most are so happy at the prospect of no longer having to serve as witnesses that their overwhelming disposition is to leave the whole system as far behind as possible. For these reasons, there is no agency, indeed no forum, legal or otherwise, existing to air their legitimate grievances and effectuate their legitimate demands for reform.

Third, fees paid to witnesses do not begin to reflect the real costs of their services. They do not even compensate for lost time and wages, not to mention the other unpleasantnesses that witnesses bear. In effect, the criminal justice system has passed on some of its costs to the shoulders of its witnesses. If the system ceased extracting this tax from acquiescent witnesses and began paying fairly for their time, it would rapidly be forced to become aware of witnesses and mindful of their problems.

Fourth, our court system exhibits the natural human tendency to favor "insider interests" at the expense of "outsider interests." Wherever minor inconvenience to "insiders" (judges, lawyers, court clerks, etc.) is to be balanced against major inconvenience to outsiders (witnesses, jurors, etc.), and the balancing is to be performed by insiders, insider interests will invariably prevail.

Fifth, legal thinking tends to have an unfortunately narrow focus. It tends in two separate respects to focus excessively on those interests that seem most visibly at stake because tradition puts them in the foreground. First, it focuses on the claims of litigants to the exclusion of those of non-litigants. It tends, therefore, to ignore those in the background whose interests are only indirectly affected by rules developed by litigation. Second, it attends excessively to those whose interests have already received a protective coating by having been defined as "rights." Conversely, it may neglect important interests to which tradition has not attached the word "right" with all its connotations and consequences.

It is essential both to the prevention and deterrence of crime and to the fair and effective working of our criminal courts that this pattern be altered.

IV. Witnesses: What Is To Be Done

If there is one thing that results from this article, it is the author's desire that it be "awareness." If judges, lawyers, court administrators, criminal justice planners, and others become more *aware* of witnesses in their human dimension, if they come to see them as living, breathing, *human* beings, deserving of respect and dignity, improvement will follow. No more will witnesses be treated as objects to be manipulated, as unfeeling pawns to be moved about and discarded as other demands may seem to require. The fair treatment of witnesses will ultimately come to be correctly perceived as an indispensable component of a truly just, effective criminal justice system.

From awareness of witnesses, from understanding the actual workings of our system, from seeing its hidden and hard realities, a number of conclusions about what should be done hopefully will follow.

A. *Criminal Justice Research*

Witnesses are crucial elements of criminal courts but their importance has never been appreciated by researchers or by those who fund criminal justice research projects. As we have seen, hard data need to be gathered about criminal court witnesses, their treatment, their responses to their treatment, their attitudes, and the impact of their attitudes on prosecution, on cooperation with law enforcement, and, in general, on the prevention and deterrence of crime. Research of this nature will produce results that will amaze many, shock some, and persuade most. It will thereby provide the essential first step toward the massive change in consciousness that is required.

1. WITNESS APPEARANCES

The initial subject of inquiry should be witness appearances. Specifically, data should be gathered on the number of times witnesses are summoned to appear, the number of times they actually go to court, the total amount of time (including travel and waiting) they expend on such appearances, the number and proportion of "waste" appearances and the number of times, whether testimonial or nontestimonial, that they are asked to relate what they know.

Although "per case," "per appearance," and "per witness" averages would undoubtedly be useful, it is crucial that the reporting of the data reflect distributions on the extremes. It is more important that large numbers of witness appearances and large expenditures of witness time are required in perhaps fewer criminal cases than that the "average" case required an "average" of so many appearances and so much time. In addition, averages may be misleading because so many cases are resolved by prompt guilty pleas.

2. WITNESS COSTS

Second, inquiry should be commenced concerning the *real* cost of witness appearances and, ultimately, measurements of these costs should be devised. This ought to be relatively easy in the case of police witnesses. In most jurisdictions, policemen are paid at an hourly rate for court appearances. To separate "court time" from "police work time" and compute the cost of "court time" ought to be easy, and in many places has already been done. In the case of civilian witnesses, lost wages should be the starting point. Any adequate measure, however, should take into consideration other factors, such as the cost to employers of lost employee services, the cost of the loss of value created by a witness' uncompensated labor, the cost of lost leisure or family time, and, perhaps, the cost of compensating for some of the unpleasantnesses of being a witness, *e.g.*, disrupted vacations, harrowing cross-examinations, eyeball-to-eyeball confrontations with assailants, or grimy and uncomfortable surroundings.

Cost data should then be correlated with appearance data and reported so as to reflect, for example, costs per case, costs per appearance, total systemic costs, costs of "waste appearances," etc.

3. WITNESS ATTITUDES

Third, a study of changes in witness attitudes over the duration of criminal proceedings should be attempted. Included should be components of the clusters of attitudes that determine, for example, the degree of willingness to appear in courts; willingness to cooperate with parties associated with the courtroom proceedings, especially the prosecution; hostility toward the various parties; acquiescence to plea bargains, charge reductions, sentencing concessions, or dismissals; willingness to "get involved," report crime, cooperate with police, and the like; respect for and faith in the criminal justice system; and the relationship between case disposition, promptness of disposition, appearance costs, and these attitudes.

It is essential to avoid testing attitudes by selecting from biased samples of favorably disposed witnesses, for example, from lists of witnesses who have *received* witness fees and who have therefore, presumably, continued to make regular appearances throughout the proceedings. To assure a representative sample, it will be necessary to take into account the attitudes of witnesses who failed to appear and of those who "cannot be found,"⁸⁷ possibly by conducting

87 For an example of research containing both errors, see COMMITTEE ON THE ADMINISTRATION OF JUSTICE, COURT MANAGEMENT STUDY: REPORT FOR THE USE OF THE COMMITTEE ON THE DISTRICT OF COLUMBIA UNITED STATES SENATE, Part I—Summary, Appendix F (Summary Report of Witness Survey) 169-173 (1970). For some reason, the survey seems also to have relied on interviews with U.S. District Court witnesses whereas the real problems with witnesses in the District of Columbia are in the Superior Court (then the Court of General Sessions). Like federal district courts everywhere, the one in D.C. presents far fewer management or operational problems than harried state courts which perform criminal functions similar to that of the D.C. Superior Court.

Generally, the survey suggests that the experience of the witnesses interviewed was favorable. "The time they spent waiting to see and to speak to various legal officials, however, was a source of irritation to many of them . . ." In view of the generally high levels of positive

intensive searches for "lost witnesses" interviewing them, and making projections from those interviews. Moreover, an adequate study must measure some fairly subtle attitudinal shadings. For example, it may not be enough to ask a witness, "If subpoenaed, will you appear?" Most witnesses will say, "Yes." It may be necessary to ask about the kinds of alternative events or circumstances (*e.g.*, a death in the family, a flu, a planned one-day trip, a planned birthday party for a small daughter, a cold, etc.) that might prompt nonappearance. Again, researchers must be wary of the fallacy of the average: changes in the attitudes of "the average witness" may be less important than radical changes in the attitudes of comparatively few witnesses.

4. WITNESS DISAFFECTION, UNSUCCESSFUL PROSECUTION, AND CRIME

Fourth, studies should be begun on the relationships between witness disaffection, unsuccessful prosecution, and the commission of crime. One might learn something about these relationships by focusing on, for example, witnesses who fail to appear and asking why they fail to appear; witnesses who "can't remember" or change their stories and asking why; cases that result in dismissals or acquittals and investigating the possible effect of witness attitudes or behavior on the result; cases that are bargained down by the prosecutor below some specified norm and asking why they were so handled; postdispositional criminal behavior by defendants whose cases were bargained down or resulted in acquittals or dismissals; newly apprehended offenders and finding out how many or what percentage had been defendants in prosecutions that had "failed" either by acquittal, dismissal, or excessive bargaining down; and the factors motivating prosecutors to extend concessions in plea bargaining with special reference to witness' attitudes.

It might also be appropriate to scrutinize cases carefully at the outset of proceedings, locate ones in which the alleged offender is "clearly guilty," and then follow these cases through the system to their eventual outcome. Presumably, some would have become "lost conviction" cases which would then provide a fruitful topic for further study, as would the future conduct of the defendants involved.

5. WITNESS' PERSPECTIVES AND PUBLIC ATTITUDES

If technically feasible at this stage of the development of the social sciences, it would be extremely valuable to test the effect of the communication of witness' experiences and attitudes, through individual conversations, by socialization and

reports concerning the witnesses' experiences one might expect similar high levels of positive reactions in the respondent's ratings of the court, and the process of law. However, the court was rated as good in handling the specific cases of witness involvement and in handling criminal cases in general, by 58 percent and 53 percent of the respondents, respectively. These are hardly mandate percentages. Moreover, exactly one-half of the respondents were negative about the process and procedures of law, based on what they had seen in their roles as witnesses.

Such data suggests that while the court currently enjoys the confidence of a majority of respondents, this support may be tenuous. *Id.* at 172-173.

group interaction, and through the media, on generalized public attitudes toward crime reporting, "getting involved" with the police, rights of the accused, courts, and the capacity of the government to assure public safety, personal security, and an adequate outlet for retributive impulses. If rigorous scientific inquiry into this last set of questions is impossible, then at least thoughtful reflection seems to be in order. It appears that the "Archie Bunker" and "unidentified black student" quotes at the outset of this article strongly suggest that there are dangerous attitudes abroad in the land which may emanate from the witness experience.

B. Specific Proposals for Improvement

To suggest proposals applicable to criminal courts across the land, or even to all "metropolitan" or "urban" criminal courts, requires considerable fortitude. Criminal laws and court procedures vary among the fifty states much more than most observers realize. Even within a single state, criminal court systems differ markedly from one locale to another, reflecting the idiosyncrasies of individual judges.

Hence, these proposals are accompanied with an apology and a request. The apology is that they are not more specific than they are. The request is that the reader stretch his mind a bit, look at my skeletal proposals imaginatively, and try to see how they might be shaped and fitted into a court system with which he is familiar.

1. WITNESS' APPEARANCE-CONTROL PROJECTS

The first suggestion is the establishment of witness' appearance-control projects similar to the one begun by the Vera Institute of Justice and the New York County District Attorney's Office in cooperation with the New York City Criminal Court and the New York City Police Department.⁸⁸ These projects would develop, implement, and test devices for reducing the number of unnecessary trips to court required of both police and civilian witnesses and assuring their timely production at court when their presence is in fact required.⁸⁹ "The overall goal" of such projects would be "to reduce unnecessary delay in criminal court proceedings while at the same time reducing the inconvenience that often befalls police and citizen witnesses in the scheduling of court appearances."⁹⁰

Among procedures recommended and implemented (on a small scale) by the New York project were:

- (1) excusing witnesses from appearing on a first adjourned date where their testimony was practically never required and then using the date for plea bargaining and schedule setting;

⁸⁸ See J. LACEY, *THE APPEARANCE CONTROL PROJECT IN THE NEW YORK CITY CRIMINAL COURT: A PROGRESS REPORT AND PROPOSAL* (Unpublished Report, February 19, 1971). A final report on this very promising report is expected in June 1972. Mr. Lacey himself is now associated with the Center for Prosecution Management, Washington, D.C.

⁸⁹ *Id.* at 1.

⁹⁰ *Id.* at 1-2.

- (2) the use of "witness forms" containing complete and accurate information about residence addresses and phone numbers, occupational addresses and phone numbers, working hours, vacation dates, "unavailable" dates, names and telephone numbers of close relatives and friends, and other data facilitating notification and scheduling;
- (3) coding witnesses as early as possible according to the ease with which they could be notified by telephone, the probability of their continuing to appear, the likelihood of their appearing promptly, and the time it would take them to travel to court once notified, so as to determine which witness might be summoned by "telephone";
- (4) putting selected "reliable" witnesses on telephone alert and then calling them when their presence is required;
- (5) giving all civilian witnesses wallet-sized cards containing space for filling in the places and times of scheduled court appearances and a telephone number to be called in the event of questions and directing them to keep the card on their persons at all times; and
- (6) using notifications written in two languages.⁹¹

These specific procedures appear to have produced promising results in the New York context.⁹² Similar projects in other jurisdictions could do just as well in developing useful innovations geared to local problems and requirements. Even a modest number of these projects would afford perspective and, hence, a greater likelihood of identifying undesirable practices. They would also provide a vehicle for institutionalizing concern for witnesses and act as an agency for causing procedural alterations. Secondarily, they may provide a much-needed means for airing the complaints of witnesses and voicing their legitimate demands for reform.

The projects should be headed by management-minded lawyers or legally oriented management experts. When so many able private consultants are hungry for new fields into which to expand it would appear that qualified persons would not be too hard to locate. A more difficult problem is getting court administrators, independent-minded judges, prosecutors and court clerks to experiment with new procedures. But this problem will be present until the Millennium, and nothing better can be recommended than to continually apply constructive pressure against those who do not welcome needed reform, especially where a change in their own consciousness is required.

2. WITNESS LIAISON AND SUPPORT SQUADS

The second suggestion is the establishment of Witness Liaison and Support

⁹¹ *Id.* at 18-33.

⁹² *Id.* at 34-49.

Squads. In general, these squads would represent the interests of the court system to the witnesses and, more importantly, the interests of the witnesses to the court system. Its members would keep witnesses informed about changes in court dates, court procedures, reasons for postponements and delay, and, in general, about what is going on in the courtroom and courthouse. They would also keep judges, court clerks, and lawyers informed about witness availability, alert them to especially disgruntled witnesses, act as advocates for legitimately aggrieved witnesses who themselves may be too timid or inarticulate to complain and generally just yell "bloody murder" at instances of witness abuse. They might also assist in arranging police protection for witnesses in appropriate cases. The squads might try to pin down attorneys as to their intentions on a scheduled date as far in advance as possible so as to prevent "waste" appearances by witnesses.

They would spend large amounts of time on the telephone trying to locate witnesses, explaining things to them, telling them where to go, conveying reminders, announcing last-minute calendar changes, placating ruffled feelings, and the like. They would often have to work nighttime hours to reach witnesses who could not be reached days. They might frequently provide automobile rides to and from the court, especially for the elderly and handicapped persons. Occasionally, they might even baby-sit or arrange for baby-sitters. They might also meet and greet witnesses at the courthouse, assure their comfort, and provide directions, answers to questions, a smile, and a helping hand.⁹³

Squads similar to these already exist in embryonic form in many jurisdictions in the person of "the girl in the subpoena room" or "the girl in the clerk's office." To this extent, what I am suggesting is a massive expansion in the size, importance, and functions of her job.

The members of witness liaison and support squads would have to be mature, responsible, and intelligent individuals, but they would not necessarily have to meet any stringent educational requirements, and they probably would not have to be paid exorbitant sums of money. Indeed, such squads might be made up partly of volunteers, perhaps drawn from the ranks of the retired. In many instances, the perfect person to head such a program at a modest salary, might be found among the ranks of early retirees, notably police officers and military personnel.

This article will not attempt to state which agency or combination of agencies should have administrative responsibility for the squads because court systems, generally, and witness notification responsibility, particularly, vary widely. Conceivably, the witness liaison and support squad could be a police unit, a prosecutor's unit, a judge's unit, a clerk's unit, a unit operated by a board consisting of representatives from several of the above-mentioned agencies, or a unit operated by some independent outside agency. Possibly, they should be completely independent and responsible only to the public.

Both witness appearance-control projects and witness liaison and support

93 This idea owes a great deal to the police "community relations units" suggested in Penegar, *Appraising the System of Criminal Law: Its Processes and Administration*, 47 N.C.L. REV. 59, 140-41 (1968).

squads would also help to reduce court delay. In many jurisdictions, the inability to produce required witnesses at the right time is a substantial cause of adjournments and, thus, of wasted court time and crowded calendars. The two above-mentioned proposals aim at improved two-way communication and notification, and increased attention to witness convenience. To the extent that these aims are realized, witnesses are more likely to appear when needed and therefore adjournments are likely to be fewer, and delay is likely to be less.

3. EARLY SCREENING AND DIVERSIONARY DEVICES

Although the situation varies from jurisdiction to jurisdiction it is clear that many cases that cannot be won come into the criminal courts and wend their way through the court system for a time until they terminate by dismissal. It is also clear that many offenders hauled before criminal courts could better be turned over the rehabilitative or supervisory agencies at the outset of proceedings. The disposition of these cases takes up considerable quantities of court and witness time to little or no benefit. In order to lessen the burden thus created, the third suggestion is "early screening" and increased use of "diversionary devices."

"Early screening" means that an experienced prosecutor should carefully and critically examine each case at the outset of proceedings, determine whether it is likely to be "successful," and not permit "bad" cases to enter the system at all; they should, in other words, "screen out" bad cases early in their history, before they have wasted much court and witness time.

In general, the earlier and more thorough the screening, the better the result. The District Attorney's Office in Philadelphia has experimented with placing prosecutors in police stations at night to screen out "bad" arrests as soon as they are brought in. The District Attorney's Office in Milwaukee seldom lets a felony or a nontraffic misdemeanor get to initial appearance in court without an assistant having interviewed all crucial police and civilian witnesses, including any the defendant can produce. However, the screening practices of these two offices are exceptional. In general, screening either occurs only after several court and witness appearances or consists of a quick look at a police officer's written summary of the evidence, a summary that is likely to be incomplete, self-serving, biased in favor of prosecution, and less than completely candid. My experience in Wisconsin is that the candor and completeness of police reports have tended to diminish with the likelihood of their being discovered and utilized by defense attorneys.

In a few localities, the implementation of thorough early screening might involve statutory changes or massive changes in the thinking of judges, prosecutors, and policemen. In most places, it will require only increases in prosecutorial manpower and the firm belief that the job is worth doing.

Early screening can work smoothly in tandem with the kind of diversionary devices that have been tried in some places, although either can also operate independently to good effect. "Diversionary devices" are methods to "divert" certain types of offenders, especially first offenders, from the criminal courts to more appropriate agencies. Often, the offender is given an option of being

prosecuted for a certain crime or submitting to supervision or treatment by some other person or agency, say, a psychiatrist, a clergyman, a community mental health facility, an alcoholic or narcotics rehabilitation unit, a probation department, and so forth.

Tentative reports on the success of such programs in terms of their impact on offenders tend to be encouraging. Less well recognized is the extent to which they may unclutter our courts and save witnesses time and grief.

4. FORMALIZED MANDATORY PRETRIAL CONFERENCES AND "ONE SHOT" "FISH OR CUT BAIT" PLEA BARGAINING.

Fourth, it is suggested that within a few weeks of initial appearance, conferences between a prosecutor and the defendant's attorney be scheduled, that appearance be made mandatory for attorneys on both sides, that stipulations be discussed and, if possible, be reached, and that future scheduling be arranged where appropriate.

Further, plea bargaining should be strongly encouraged at these conferences, but prosecutors' offices should make it an iron rule to engage *only* in "one shot" "fish or cut bait" plea bargaining. By "one shot" plea bargaining, it is meant that only one assistant prosecutor per defendant has the authority to extend concessions. Defense attorneys are thereby precluded from shopping for a better deal from another assistant. "Fish or cut bait" plea bargaining means that the *first* concession offered is the *only* one offered. Obviously, this contemplates that the one concession offered be the product of informed and deliberate decision by an experienced and sensitive prosecutor and that it represent the "best deal" the prosecutor can offer. It means also that the accused and his attorney must "fish or cut bait," *i.e.*, take the deal and plead guilty or go to trial in what is often an exercise in futility.

The theory of the above proposal is sound. Mandatory conferences between prosecutors and defense attorneys can do much to iron out difficulties that often consume absurd quantities of court time, cause unnecessary witness appearances, and contribute to court delay. Where quick plea bargains are struck, the savings are all the greater. If the defendant and his counsel know that only one assistant will offer only one deal, and if the deal involves considerable concessions, the likelihood is that they will accept it rather than the comparatively dismal alternatives. When the hope of a "better deal" is eliminated or greatly reduced, it becomes far less advantageous to spend the time and effort required to "bounce the case around." The beneficiaries are the witnesses, the courts, and the public.

In some jurisdictions under certain conditions, notably where the dockets are less crowded, "time bomb" plea bargaining may be combined with the above suggestions to achieve beneficial results. "Time bomb" plea bargaining contains three elements: First, the bargain proposed by the prosecutor must be accepted within some specified length of time, or the offer will terminate and not be renewed; second, the offer is timed to expire several days in advance of the scheduled trial date; and third, it has been made certain as far as possible that on the scheduled trial date, a judge, a prosecutor, a courtroom, jurors, and witnesses

will be available for hearing the case. If the offer terminates, the defendant is required on the trial date either to go to trial or to plead guilty to the original, unreduced charge without the comfort of any concessions relating to sentence. Over the long run, the consistent enforcement of "time bomb" plea bargaining will increase the number of guilty pleas, substantially reduce the number of waste appearances, save "court time," and result in speedier trials.

5. JUSTLY COMPENSATORY WITNESS FEES

A fifth suggestion is that witness fees be drastically increased and that they provide witnesses with just compensation. Additionally it is suggested that a start be made toward measuring the cost to the individual witness of his appearances and then providing him with fair reimbursement for those costs. Fees, in other words, would vary, not only with number of appearances and mileage traveled, but also with the amount of wages lost, the amount of time spent waiting around at each appearance, necessary expenditures for meals, transportation, lodgings, and baby-sitters, and perhaps certain more subtle factors. Possibly the victim of a protracted beating by a gang, who might be compelled to relive hours of torture on the witness stand, should be compensated at a higher rate than the passerby. Conversely, the witness using the courts to obtain vengeance for a private grievance should arguably be entitled to less than the bystander who is just doing his duty as a citizen. Merchants pressing bad-check claims as substitutes for more expensive civil collection devices might be entitled to nothing at all.

Simple fairness requires movement in this direction. If the framers of the fifth amendment to the United States Constitution in 1789 could say that "private property"—including time and fruits of labor—should not "be taken for public use, without just compensation"; how can we say otherwise in the Age of Aquarius? In addition, the payment of justly compensatory fees, which will be much higher fees, will prompt painstaking consideration for the witness's time and comfort.

Computation of witness fees could become excessively complicated and could be more trouble than the results are worth. Indeed, the system could wind up paying many witnesses more than they are worth. If that point is ever reached, it will be long after there are sweeping changes in our present crude methods and unjust levels of compensation.

6. COMFORT AND CONVENIENCE

A sixth suggestion is that judges and judicial administrators examine their consciences to find out if they are doing everything possible for the comfort and convenience of witnesses and take any steps necessary to remedy deficiencies in this regard.

Where space is not at too high a premium, courts should provide parking spaces for witnesses. Notifications should include directions to courtrooms in localities where courtrooms are many and hard to find. It does not seem unrea-

sonable that waiting witnesses be provided with reading material, free coffee, access to television, soft chairs, clean rest rooms, and a place to relax. Hearings requiring witnesses should never be postponed in advance of the scheduled time without there being vigorous, thorough, systematic efforts extending beyond normal court working hours to notify witnesses that they need not appear. Witnesses should *always* be kept informed about the status of their case, the reasons for adjournments and the eventual outcome.

Finally, it does not seem unreasonable to think that short courthouse tours might be arranged for groups of witnesses, that outdoor waiting areas might be set up in good weather, and that access to nearby recreational facilities (*e.g.*, the rarely used police gymnasium in a Milwaukee County court facility) be afforded to those few witnesses who might thus find the wait less burdensome.

The point is not that any of the ideas mentioned above is necessarily a good one for any given locality. The point is that things could be done and should be done for witnesses that are not being done. What is needed is not a national blueprint but conscientious self-criticism, imagination and, above all, action on the local level.

7. EVALUATION AND TESTING

Finally, it is suggested that innovations, if at all possible, be systematically tested and evaluated, preferably in connection with the research program outlined earlier. It is best to pinpoint the precise impact of changes on witness appearances, waiting times, attitudes, and absences, conviction rates, speedy trials and the like in order to lay a foundation for exportation of those showing positive results and elimination of those showing little or no promise. Most of these proposals will prove to have merit, but some will undoubtedly have unforeseen undesirable consequences.

C. *Court Management Studies*

Throughout the country, court management studies are proliferating. All of them aim at making courts "better." Most are geared to making the operations of trial court clusters in metropolitan areas more "efficient."

It is suggested that henceforth every such study should sharply focus on the ways in which court operations affect witnesses, and further, that every study should expressly adopt and employ "witness interest" as one yardstick of success. In other words, court operations will have to be pronounced "good" or "efficient" according, in part, to the extent to which they protect the interests of witnesses and the extent to which they treat them well.

The author is *not* suggesting that "witness' interest" become the exclusive or even the primary criterion of evaluation. Certainly, fairness to the accused must remain the central concern of our criminal court system; and a judge's time *is* valuable, should be expended wisely, and valued appropriately. The author is only suggesting that the witness' time is also valuable, though perhaps less so than the judge's, and that fairness to witnesses, as well as to defendants,

should be assured. In other words, that the time of witnesses, the comfort of witnesses, and the feelings of witnesses ought to be taken into account. These things must be thrown into the hopper with traditional ingredients. To achieve the right blend may take some mixing and testing. But the soup tastes foul until everything has been put in the pot.

*D. Rethinking of the Approach to Constitutional Questions Involving
Criminal Procedure*

Traditionally, and up to the present, appellate courts, notably the United States Supreme Court, have taken a distinctive, fairly well-understood, but never articulated approach to constitutional questions involving criminal procedure. As suggested earlier in this article:

- (1) they focus too heavily on the claims and interests of litigants to the virtual exclusion of those of interested non-litigant parties, as witnesses, and thus tend to give the former undue relative importance;
- (2) they focus too heavily on those interests previously defined as "rights" to the virtual exclusion of those not so defined and tend, therefore, to give the former too high a priority.

Because of this distinctive approach, they have missed the forest for the trees. In "interpreting" and thereby changing the law, they have ignored overall, systemic, administrative consequences. They have not adequately considered the indirect, collateral effects of their decisions. They have shortchanged peripheral parties like witnesses and victims of crime.

One result has been the multiplication of required hearings and "decision points." The concept of "decision points" may be stated as follows:

A lawsuit is a unit of court time. That unit in turn is made up of a whole series of subunits, each of which is a decision point. Perhaps, for ease of conception, these subunits or decision points may be regarded as cells within any physical structure. The total time of the case is the time devoted to all of the decision points.⁹⁴

Thus, each time the Supreme Court created a new legal requirement, for example, a new prerequisite for the use of a confession, it "created a decision point and with it the attendant costs in time and dollars."⁹⁵ With each new requirement, new types of decisions have to be made and, "because the decisions have to be made, time must be spent in gathering the facts—*i.e.*, presenting the evidence—necessary for their determination."⁹⁶ New kinds of hearings, often requiring the presence and testimony of witnesses, must be held. "The case, then," says John P. Frank,

⁹⁴ J. FRANK, *AMERICAN LAW: THE CASE FOR RADICAL REFORM* 65 (1969).

⁹⁵ *Id.* at 66.

⁹⁶ *Id.* at 67.

is a unit of time, which in turn is a collection of subunits of decision points [E]very element of the substantive law and every element of procedure creates decision points that affect costs and affect time

What is happening in the course of the law is an almost endless increase in the number of decision points, usually without much regard to the consequences the increase will have on the legal system. If I may use a fanciful illustration, think of the elephant in a circus, standing with feet close together upon a small supporting pedestal. Let the elephant be the collection of decision points, and the pedestal be the legal system that has to make the decisions. What happens is that the elephant grows and grows and grows as he absorbs more and more decision points The enlargement comes in two primary ways. First, the law itself grows. Second, there are more people presenting matters that need to be decided. The combined effect is that at some point, the weight of the elephant collapses the pedestal.⁹⁷

“The practical effect of all of this structure,” according to Frank, in another context, but with words fully applicable to criminal procedure, “is that so many decision points have been created, and so cumbersome a procedure is necessarily involved in determining them, that for practical purposes we have put a lawsuit in front of a lawsuit. . . .”⁹⁸ In terms of judge and court time, in terms of witness time and witness exhaustion, in terms of delay in bringing an accused to trial, “it is *not* two for the price of one.”⁹⁹ The result, as we have seen, is “future shock” and a criminal justice system which *sounds* good in theory and in the rhetoric of Supreme Court opinions, but which functions with dazzling deficiency in practice.

A second undesirable and unforeseen result has been an increase of great magnitude in the complexity of criminal procedure. In virtually every criminal case, a very large number of plausible legal claims can now be made on behalf of the defendant and, in support of each of these claims, an almost infinite number of arguments and precedents can be cited. Virtually every case, if imaginatively handled by an artful, well-informed defense attorney determined to pull out all the stops, could easily consume scores of hours of court time.

So great is the law’s complexity that it may be literally becoming too complex for its practitioners. As a prosecutor it was the author’s experience that few defense attorneys were aware of all their clients’ rights and all the plausible legal arguments that could be raised in their defense. Frequently, possible attacks on the legality of proceedings were bypassed under circumstances in which the failure was clearly neither deliberate nor ethical. It is simply impossible for most practitioners, many of whom do not specialize, to know “everything” that may be done for an accused criminal.

To a striking degree, the expeditiousness of our court processes, and perhaps their very functioning, may depend on the extent to which defense counsel are ignorant of or unconcerned with their clients’ rights and on the extent to which each trial court system has evolved unspoken understandings, rarely visible to appellate courts, about “punishing” lawyers and clients who assert “too many”

97 *Id.* at 68-69.

98 *Id.* at 87.

99 *See id.* at 86-92.

claims. Few are the court systems, where the "troublesome" defendant is not sentenced to more years than his "cooperative" counterpart.

Increasing complexity has another byproduct. It requires increasing expertise among both judges and lawyers. Increased expertise requires more specialization. Specialization tends to reduce the size of the trial bar and to a lesser extent the size of the trial bench. With fewer judges and fewer lawyers to handle more defendants, the problems of scheduling and moving criminal cases on their way become immensely compounded. "Court delay" becomes of increasing concern.

Still another result is great uncertainty about the dictates of the law relating to criminal procedure. It is now quite often impossible to tell in advance of a ruling whether, for example, a search was or would be "reasonable," and the evidence thereby obtained admissible.

The point is that consequences such as uncertainty, complexity, delay, the multiplicity of decision points, increases in hearings, impacts on witnesses and victims were not and are not being given adequate consideration by the Supreme Court and by appellate courts generally.¹⁰⁰ Opinions of these courts in the criminal procedure area illustrate perfectly what has been described as "the lack of consideration by the lawmaking portion of the legal system for the law-administering portion, with the result that the law grows, heedless of its administrative consequences."¹⁰¹

Appellate courts must adopt a new approach, a fresh perspective, a different framework of analysis in resolving constitutional questions of criminal procedure. They must deliberately look beyond their traditional concerns, beyond the litigants, beyond the "rights" claimed violated. The appellate courts must consciously focus on projected impacts on those only collaterally involved in the case before the court—on policemen, on attorneys, on victims, and on witnesses. They must always consider and explicitly express themselves on the overall systemic consequences of their decisions. "[T]he administrative consequences of [every] law change," must be "where they belong, in the bright center of our vision."¹⁰²

E. Rethinking Recent Supreme Court Decisions Affecting Criminal Procedure in Light of Systemic Consequences

In using this new approach, we must commence the reevaluation and reappraisal of major Supreme Court decisions of the past decade and a half affecting criminal procedure. For the sake of witnesses, we should begin with those that require extra-evidentiary hearings at which witnesses appear. Each decision, each rule, each type of hearing should be seriously and scrupulously evaluated, not only in terms of the purposes the Court thought they would serve, but in terms of their greater consequences for the administration of justice and in terms of their effect on classes of persons, like witnesses, not represented in the original lawsuit. Where complexities prove to be of marginal necessity, they should be eliminated

100 See note 85 *supra*.

101 J. Frank, *supra* note 94, at 85.

102 *Id.* at 86.

and the law simplified.¹⁰³ With respect to each decision, each rule, each type of hearing, we must ask the question posed by Professor Ben Kaplan in another context: "[A]re we in this country simply paying too much in time, effort, and money to pursue the finer lineaments of truth which must in any event elude us?"¹⁰⁴

F. *Rethinking of Laws and Practices Affecting Witnesses*

Common law systems evolve, not so much by deliberate goal-oriented alteration, as "by piecemeal and expedient tinkering."¹⁰⁵ Both the tinkering and the tinkerers have been witness-blind. Thus, it is not surprising that our entire system of law and practice imposes heavy liabilities on witnesses along with substantially no countervailing rights. Being "invisible," witnesses have been "forgotten." The result is a legal fabric that pervasively disadvantages them in numerous important respects. Therefore the offending system and its legal fabric must be rethought in light of an appropriate concern for the interests of witnesses and subjected to massive reevaluation in terms of the extent to which they are treated with fairness and justice. I do not say that all laws adversely affecting witnesses, once reconsidered, will have to be discarded or modified. Many will prove to have been justified by their service to other important interests. However, nearly every aspect of our present law and practice is eminently challengeable and should be challenged. I am, in other words, recommending the asking of some hard questions, but not necessarily suggesting the answers.

Nationwide, most continuances in state criminal cases are probably granted routinely or automatically upon request without judicial inquiry into the justification for the continuance or its impact on witnesses.¹⁰⁶ Rarely is any but the most perfunctory record made of the decision to continue.¹⁰⁷ Frequently, continuances imposing serious burdens on witnesses are prompted by nothing more substantial than the informal personal relationship between bench and bar.¹⁰⁸ This relationship has resulted in widespread winking at the despicable practice of granting repeated continuances, often with witnesses in the wings, because "my witness, Mr. Green, has not yet appeared," that is, because a lawyer has not yet received his fee.¹⁰⁹ Frequent continuance seems to be the norm rather than the exception. Should not our continuance practices be carefully reappraised?

In some localities, witnesses are routinely required to remain in or near the courtroom, away from work and away from home, all through the many days of a lengthy trial. Should not his practice be reconsidered in light of the advent of the telephone and automobile?

In some jurisdictions it is the practice of police to retain possession of stolen

103 These recommendations parallel and paraphrase John P. Frank's with respect to other areas of the law. *Id.* at 108-110.

104 Kaplan, *Civil Procedure—Reflection on a Comparison of Systems*, 9 *BUFF. L. REV.* 409, 421 (1960), quoted in Frank, *supra* note 91, at 85.

105 Penegar, *Appraising the System of Criminal Law: Its Processes and Administration*, 46 *N.C.L. REV.* 69, 72 (1968).

106 *See, e.g.,* Banfield & Anderson, *Continuances in the Cook County Criminal Courts*, 35 *U. CHI. L. REV.* 259 (1968) *passim*.

107 *See id.*

property recovered from an accused person until the termination of all related criminal court proceedings. This means that the already shaken victim is without his television set, record player, stamp collection, wallet, credit cards, power tools, or whatever, for the two-month, six-month, or twelve-month pendency of a criminal prosecution. In some jurisdictions, this practice may be necessitated by existing evidentiary rules. Where this is so, these rules should be reconsidered and probably discarded as unnecessary and hypertechnical. In other jurisdictions the practice is totally unnecessary from the legal standpoint. It provides marginal additional convenience to the prosecutor at the expense of great inconvenience to the victim. Of course, it also provides a club to hold over the victim in the event of his noncooperation. But should such a club be necessary? And should this practice be tolerated?

In many jurisdictions, witnesses, including victims, are routinely excluded from the courtroom at the request of either counsel. Consequently, they are afforded no look at a process which often deeply and intimately concerns them and which they take to reflect upon their veracity and honor. Often, they have no place to go except uncomfortable corridors adjacent to the courtroom. Unlike other practices affecting witnesses, exclusion can have beneficial effects. It may prevent witnesses from coloring their testimony in light of other testimony. But in practice, are the advantages always explicitly measured against the interest of the witness in observing the proceedings of which he is part? If they were, would we not have fewer orders of exclusion? And would not they be applied to fewer witnesses under more limited circumstances? Would not they be limited to parts of the proceedings rather than all the proceedings, *e.g.*, might not a witness be excluded only during the testimony of some witnesses, but not for others?

Should not the devices that keep fees from getting into the hands of witnesses be reconsidered? Should not the prevailing casual attitude toward notifying witnesses of last-minute changes in schedule be revalued? Perhaps the laws having to do with securing the appearance of out-of-state witnesses from distant locations are due for reappraisal? Perhaps also the laws relating to the confinement of material witnesses, which have enormous impact on relatively few lives and which already have been extensively criticized, are now due for immediate change.

In every courtroom of the nation, witnesses are sworn, examined, and cross-examined individually. But does this make sense? As one judge has argued:

Why hear witnesses only one at a time? If three people saw the accident, why not swear them together and hear their testimony as a group, as precisely the way the investigating officer originally heard it. That is what the state's attorney, defendant's attorney, and probation officer do when they report the "facts" for a presentence report. That is what a husband and wife do, standing before the court, each asking to be given the child. . .

108 Of this relationship (discussing its impact on court delay), one judge has said: "One would hesitate to call it a corrupt bargain, but it is certainly far too often a cozy arrangement." Monroe, *The Urgent Case for American Law Reform: A Judge's Response to a Lawyer's Plea*, 19 DE PAUL L. REV. 466, 479-480 (1970).

109 See Banfield & Anderson, *supra* note 106, at 265-266.

If [jurors] can be examined in groups, why not witnesses? . . . Put otherwise: if three lawyers can talk at once, why not three witnesses?¹¹⁰

In every criminal court, a witness may be required to testify on several occasions about much the same or similar facts.¹¹¹ For example, he is often required to testify both at a preliminary examination and before a grand jury, not to mention the trial. Is this necessary?¹¹² For example, does the requirement for indictment by grand jury (where it exists) carry with it appreciable benefits or should it be eliminated as an unnecessary source of repetitive questionings and appearances? Similarly, should not jurisdictions forbidding the use of hearsay testimony at preliminary examinations consider whether the repetitive testimony thus required serves any purposes that could not better be served by devices that burden witnesses less, say, by expanded rights of discovery? Should duplicate testimony be the routine? Once a witness testifies at some length on a certain subject and is once subjected to cross-examination, should he be required to give essentially the same testimony a second time, absent some special showing of need? In the ordinary situation (with either party free to show that the situation was not ordinary), wouldn't it suffice for the witness's earlier testimony simply to be read into the record?

To what extent should complex proofs and the testimony of hard-to-get witnesses be required at preliminary stages of prosecution? In Milwaukee, for example, it is thought that to establish probable cause for crucial elements of crime at *preliminary examinations*, (1) a county medical examiner's testimony is necessary to establish "cause of death" in homicide cases, (2) a physician's testimony is necessary to establish "great bodily harm" in aggravated battery and certain other similar types of cases, (3) a chemist's testimony is necessary to establish the identity of "narcotic drugs," "dangerous drugs," and marijuana, and (4) often, some expert's testimony is necessary to establish "value in excess of \$100" in felony theft or stolen goods cases. Are these proofs really necessary? Wouldn't it be better overall to tolerate either less rigorous proof or the admission of letters or other hearsay reports at preliminary stages of inquiry?

Woven into the fabric of criminal law are requirements that the prosecution prove "elements" of crimes to varying degrees of satisfaction at preliminary stages and, of course, "beyond a reasonable doubt" at trial. Among such elements are "nonconsent" elements and "no authority" elements. In burglary cases, for instance, the prosecution must establish that the burglar entered the building "without the consent of the owner." Similarly, in forgery cases the prosecution may be required to show that the forger endorsed another person's name on the check "without authority to do so." These requirements may necessitate testimony, respectively, by the "owner" and by the purported endorser. Often, these "nonconsent" or "no-authority" witnesses know nothing about the crime apart from their nonconsent or nonauthorization. Often, even their nonconsent or nonauthorization will be fairly obvious from the circumstances. Nevertheless,

110 Monroe, *supra* note 108, at 473.

111 See Section III *supra*.

112 For the same question in a civil contest, see Joiner, *Fog in the Courts and at the Bar: Archaic Procedures and a Breakdown of Justice*, 47 *Tex. L. Rev.* 968, 975 (1969).

prevailing law and practice in many jurisdictions dictate that their testimony will be required at least once, at trial, and perhaps more often.

Is it necessary that crimes be so defined as to make "nonconsent" and "nonauthorization" elements of crime and therefore part of the state's burden of proof? Should not the definition of burglary, theft, arson, forgery and other crimes involving nonconsent elements be rethought and perhaps changed in light of the burdens they impose on witnesses? In the alternative, could not less rigorous methods of proof suffice to establish such elements at trial? Or could not "presumptions of nonconsent" be applied once certain factual circumstances indicative of nonconsent had been shown? Or could not the prosecution be required to present "allegations of nonconsent" to which the defendant, if he seriously wished to litigate the issue, would have to issue a challenge, perhaps supported by an affidavit alleging facts sufficient to show that the issue was non-frivolous?

Should not "testimonial privileges" be thought of as extending to witnesses as well as to parties? Perhaps a wife should not be required to disclose private communications between herself and her husband even if her husband, the defendant, expressly waives his privilege and permits her to do so? Perhaps a priest should not be required to break the seal of the confessional even if a party-penitent permits him to do so?

Should not a witness be afforded some right not to have to answer some types of questions either because they excessively impinge on his rights or privacy or because they are insulting or abusive or because answering them would damage his reputation and indeed perhaps ruin his life? And ought not this right exist independently of the demands of the parties and the fancied requirements of lawsuits?

And should not our law afford witnesses some practical method of redress for having been frivolously subpoenaed to court, for having been maliciously castigated by judges or lawyers in or out of court, and for having been insufficiently compensated for their time and labor?

But perhaps more important than reevaluating any specific facets of our procedure is reappraising the general statuslessness of witnesses in the eyes of the law.

In a real sense, being a witness means that one's liberty is restricted and that one's property (time and earning capacity) is taken away "for public use." It also means "servitude" to the court that may be "involuntary." When some witnesses are afforded privileges denied to others—as when a doctor awaits a phone call, while a scrubwoman stands by in the corridor—it may raise questions about "the equal protection of the laws." Under extreme circumstances, it may amount to cruel and unusual punishment. It may entail substantial restriction on the right to interstate travel or massive invasion of privacy. It may involve a person's "being a witness against himself" in ways other than those falling within the "privilege against self-incrimination" as traditionally defined. When the witness' time, a form of property, is taken "for public use," the taking almost always seems to be "without just compensation." Restrictions on his liberty can usually be seen as having been imposed "without due process of law," especially when one considers that "due process is at best a vague concept, one which consists not of

a body of precise rules, but rather of the application of general principles of fundamental fairness or ordered liberty to the particular facts of each case."¹¹³

As most readers will readily observe, the above paragraph applies the language of "the Constitution," notably the Bill of Rights and the 13th and 14th amendments to witnesses in a manner which is neither unreasonable nor outlandish. In this respect it does something that no court has yet done. Is it not perhaps time to apply our fundamental law to persons of that abused class known as witnesses? Is it not time for us to come to regard witnesses, like accused persons, as having "rights"? Is it not time for us to begin to evolve a concept heretofore lacking in our legal tradition, one of "*rights* of witnesses"? If we come to see witnesses as having human dimensions, as being persons worthy of dignity and respect, should we not extend to those persons the kinds of protections we describe as "rights"?

This suggestion, of course, does not mean that witnesses' rights should assume overriding significance with respect to other values. Obviously, the "rights" of witnesses must always be considered along with other values, for example, fairness to an accused, and fairness to a public anxious to secure the neutralization of dangerous persons. When the balance is struck, a witness's rights may have to be sacrificed to other compelling societal or individual interests. Nevertheless, is it not better for legal and administrative decisions to be made with the interests of witnesses explicitly considered? Given the human dimension of witnesses, the extent to which their interests have been ignored in the past, and the substantial respects in which the criminal process can affect their lives, is it not more fair and more likely to produce just results to characterize their interests as "rights"?

It is perhaps unfortunate that our legal system affords so little real opportunity for interests as "trivial" as those of the ordinary witness to be asserted and vindicated by explicit decisions of courts of law. If there had been a history of courtroom confrontations between the interests of witnesses and those of others, perhaps the rights of witnesses would ultimately have become formally enshrined in the American pantheon of values. Even now, perhaps what is needed is a Ralph Nader who would take up the cudgel for witnesses in courts of law, perhaps by making imaginative use of class action provisions, and would compel by litigation the development, definition and elaboration of rights of witnesses.

However, formalization of the rights of witnesses is not the heart of my suggestion. The heart of my suggestion is the need for a massive shift in thinking about witnesses and the need for a vocabulary and framework of analysis attuned to the new thinking. I am suggesting the need for Socrates' and Solomons rather than Naders and Gilberts. I am hoping that our philosophy of witnesses will come to reflect appreciation of their importance and their humanity. I am hoping that our terminology will come to reflect a sounder philosophy. I am suggesting as a first step that a more apt terminology may mold a sounder philosophy. The result, I hope, for witnesses as well as others, will be justice.

With good heart, great faith, and hope for the future, I shall bypass the hemlock and await the fury of the mob.

¹¹³ Comment, *Right of Criminal Defendant to the Compelled Testimony of Witnesses*, 67 COLUM. L. REV. 953, 957 (1967).