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## Why Civil and Criminal Procedure Are So Different: A Forgotten History

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## WHY CIVIL AND CRIMINAL PROCEDURE ARE SO DIFFERENT: A FORGOTTEN HISTORY

*Ion Meyn\**

*Much has been written about the origins of civil procedure. Yet little is known about the origins of criminal procedure, even though it governs how millions of cases in federal and state courts are litigated each year. This Article's examination of criminal procedure's origin story questions the prevailing notion that civil and criminal procedure require different treatment. The Article's starting point is the first draft of the Federal Rules of Criminal Procedure—confidential in 1941 and since forgotten. The draft reveals that reformers of criminal procedure turned to the new rules of civil procedure for guidance. The contents of this draft shed light on an extraordinary moment: reformers initially proposed that all litigation in the United States, civil and criminal, be governed by a unified procedural code. The implementation of this original vision of a unified code would have had dramatic implications for how criminal law is practiced and perceived today. The advisory committee's final product in 1944, however, set criminal litigation on a very different course. Transcripts of the committee's initial meetings reveal that the final code of criminal procedure emerged from the clash of ideas presented by two committee members, James Robinson and Alexander Holtzoff. Holtzoff's traditional views would ultimately persuade other members, cleaving criminal procedure from civil procedure.*

*Since then, differences in civil and criminal litigation have become entrenched and normalized. Yet, at the time the Federal Rules of Criminal Procedure were drafted, a unified code was not just a plausible alternative but the only proposal. The draft's challenge to the prevailing notion that civil and criminal wrongs inherently require different procedural treatment is a critical contribution to the growing debate over whether the absence of discovery in criminal procedure is justified in light of discovery tools afforded by civil procedure. The first draft of criminal procedure, which called for uniform rules to govern proceedings in all civil and criminal courtrooms, suggests the possibility that current resistance to unification is, to a significant degree, historically contingent.*

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#### INTRODUCTION

Spurred by the reform of federal civil procedure that transformed litigation in 1938, the U.S. Supreme Court appointed an advisory committee to draft the first Federal Rules of Criminal Procedure in February 1941. Over the next six months, committee Reporter James J. Robinson and his staff sifted through public commentary and existing law to create a new set of rules governing criminal disputes. Confidential and never publicly circulated, this first draft was ultimately forgotten.<sup>1</sup> What it reveals, however, is extraordinary: the original conception of the Federal Code of Criminal Procedure integrated the rules of *civil* procedure. The advisory committee had drafted a unified code of procedure that would have governed all litigation in federal courts, civil and criminal, and which would have influenced reform in the majority of states.

The committee's final product in 1944, however, fundamentally differed from its original draft. As a result, criminal litigation was placed on a vastly different course than civil litigation. A transcript of the first meetings provides a window into what led to this divergence—a clash between the views of Robinson and Alexander Holtzoff, the committee's secretary.<sup>2</sup>

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1. The draft was found with the expert assistance of reference librarian Kris Turner at the University of Wisconsin Law School and his counterpart at Harvard Law School. The copy was discovered in the collection left by Sheldon Glueck, an influential law professor at Harvard. Glueck served on the advisory committee appointed by the U.S. Supreme Court in 1941 to draft the Federal Rules of Criminal Procedure. Appointment of Advisory Comm. on Rules in Criminal Cases, 312 U.S. 717 (1941).

2. These transcripts are retained by the Administrative Office of the U.S. Courts.

Robinson's proposal would have retained the parallelism between civil and criminal procedure that had persisted for centuries at common law. Because recent reform to the Federal Rules of Civil Procedure had transformed litigation, Robinson's approach would have been equally transformative. Holtzoff, in contrast, sought to preserve existing practices and resisted, in large degree, any course correction. Because Holtzoff persuaded others on the committee of his view, the resulting reform effort of criminal procedure did not embrace change, but resisted it. The repercussions were enormous, as many states adopted the federal template as their own.<sup>3</sup>

Given the committee's ultimate decision to reject a unified code, litigating civil and criminal matters is now different, and starkly so. To compare modern criminal and civil procedure is not to compare apples to oranges, but, as David A. Sklansky and Stephen C. Yeazell observed, to compare "tangerines [to] socket wrenches."<sup>4</sup> Where civil procedure gives parties agency by affording them formal power to investigate facts, criminal procedure deems a criminal defendant a passive participant who makes choices based on information managed by the prosecutor. And where civil litigation can generate significant pretrial disputes, criminal procedure permits less friction and is protective of state leverage. The design of criminal procedure facilitates prosecution—from charging to sentencing. The efficiency of the criminal process, however, threatens the quality of information that supports prosecutions and facilitates the high-volume processing associated with mass incarceration.

Despite the significant consequences of its procedural design, there is surprisingly little understanding of criminal procedure's origin. Yet the practice of criminal procedure is now entrenched. As a consequence, scholars bold enough to question the differences between civil and criminal procedure do so tentatively. For example, when Sklansky and Yeazell recently asked whether the two codes might benefit from some degree of cross-pollination, they framed their inquiry cautiously. They stated, "[w]e certainly do not contend that civil and criminal cases have no important differences and should be treated the same," adding that any careless comparison could be "dangerously misleading" and ignore "large differences."<sup>5</sup> The original design of federal criminal procedure, however, demonstrates that these "large differences" were not inevitable or even the most likely outcome.<sup>6</sup> The current iteration of criminal procedure was in fact the alternate, later-considered option. The initial draft envisioned a unified code that would shape and govern all litigation in the United States. Legal scholars continue to question the procedural boundary between civil and

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3. See Jerold H. Israel, *On Recognizing Variations in State Criminal Procedure*, 15 U. MICH. J.L. REFORM 465, 485 (1982) (observing that more than half of state criminal procedure codes are influenced by federal reform).

4. David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683, 684 (2006).

5. *Id.* at 685.

6. *Id.*

criminal disputes,<sup>7</sup> and some jurisdictions begin to permit the infiltration of civil procedure into criminal disputes.<sup>8</sup> This Article's historical findings further destabilize the prevailing notion that civil and criminal wrongs inherently require different procedural treatment.

Part I of this Article describes the procedural path shared by civil and criminal disputes at common law and surveys various criticisms of common law. This background reveals that civil and criminal disputes were more alike than different. Part II then charts the path of how *civil* procedure reformers turned to equitable principles to reimagine dispute resolution and, in turn, how these changes led reformers to consider similar changes to *criminal* procedure. Part III is the heart of this Article: source material that was confidential at the time of drafting reveals both that the first draft of the Federal Rules of Criminal Procedure contemplated the integration of civil

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7. See generally Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585 (2005) (favoring reforms that integrate civil discovery tools into criminal adjudication); Russell M. Gold et al., *Civilizing Criminal Settlements*, 97 B.U. L. REV. (forthcoming 2017) (proposing integration of civil discovery rules to inform plea bargaining); Russell M. Gold, "Clientless" Lawyers, 92 WASH. L. REV. 87 (2017) (challenging presumptions over the demarcation between civil and criminal disputes); Ion Meyn, *Discovery and Darkness: The Information Deficit in Criminal Disputes*, 79 BROOK. L. REV. 1091 (2014) [hereinafter Meyn, *Discovery and Darkness*] (analyzing discovery procedures available to civil and criminal law litigants); Ion Meyn, *The Unbearable Lightness of Criminal Procedure*, 42 AM. J. CRIM. L. 39 (2014) [hereinafter Meyn, *Unbearable Lightness*] (comparing each pretrial moment, through a procedural lens, in civil and criminal disputes); Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541 (proposing depositions for criminal cases); Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097 (2004) (observing that the low community standard that defines adequacy of counsel in criminal cases is linked to the lack of discovery available in criminal cases); Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79 (2008) (challenging justifications for a civil and criminal procedural divide). This recent scholarship follows earlier efforts to provide a critical lens as to differences between civil and criminal procedure, beginning with Jerome Hall's foundational piece. See Jerome Hall, *Objectives of Federal Criminal Procedural Revision*, 51 YALE L.J. 723, 723 (1942); see also Robert L. Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 316 (1960) (questioning the lack of discovery in criminal disputes); Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1192 (1960) (advocating for the creation of "a free deposition and discovery procedure").

8. See Darryl K. Brown, *Discovery in State Criminal Justice*, in ACADEMY FOR JUSTICE: A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM (Erik Luna ed., forthcoming 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2951166](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2951166) [<https://perma.cc/7A2J-ZWE7>] (surveying jurisdictions that have integrated civil discovery rules into criminal codes); Daniel S. McConkie, *The Local Rules Revolution in Criminal Discovery*, 39 CARDOZO L. REV. (forthcoming 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2982512](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2982512) [<https://perma.cc/K3WU-9GAG>]; Meyn, *Discovery and Darkness*, *supra* note 7, at 1110 (identifying the minority of state jurisdictions that permit depositions in criminal cases); Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 285, 288 & n.5, 302–06 (2016) (finding that though ten states have "closed-file" policies, twenty-three states are experimenting with broadening the disclosure obligations of prosecutors, while seventeen other states have adopted "open-file" policies with liberal disclosure obligations); *id.* at 289 ("While discovery rules continue to vary significantly from state to state, a recent trend has been in the direction of earlier and broader discovery.").

rules and that reformers saw a unified code of procedure as the path forward. Based on the original draft and transcripts of the first committee meetings, Part III traces how the committee uncoupled civil from criminal procedure. Finally, Part IV suggests that certain factors may have contributed to this outcome, including institutional bias, gravitation toward existing practices, and a lack of any explicit objectives to lead reform. The Article concludes that this origin story destabilizes the prevailing conception that criminal disputes require different procedural treatment than civil disputes.

#### I. THE COMMON LAW: CREATING COMMON CAUSE FOR REFORM

For centuries, criminal and civil disputes shared a similar procedural pathway.<sup>9</sup> Governed by the common law, civil and criminal disputes occurred in two stages: pleading and trial.<sup>10</sup> Criminal and civil litigants were required to present a single issue against a single defendant in accordance with precise, unyielding language.<sup>11</sup> This deep structure of common law was exported to the United States, preserving a procedural parallelism.<sup>12</sup> “[T]he rules and principles of pleading with respect to . . . a civil action are applicable to [a criminal] indictment,” wrote William L. Clark in 1918;

9. Emerging from the Magna Carta, common law procedures replaced trials by ordeal and the arbitrary pronouncements of local elders, establishing a consistency in rights and remedies that bound peasants, clergy, and the king alike. See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 916 (1987). There was virtue in the common law’s conservatism: the principle that only “specific facts would trigger specific legal consequences” resisted the arbitrary application of law and the justice-distorting pressures of social networks, class, and political power. *Id.*

10. See JOSEPH H. KOFFLER & ALISON REPPY, *HANDBOOK OF COMMON LAW PLEADING* 13–14 (1969); BENJAMIN J. SHIPMAN, *HANDBOOK OF COMMON-LAW PLEADING* 8–9 (3d ed. 1923); Ellen E. Sward, *A History of the Civil Trial in the United States*, 51 U. KAN. L. REV. 347, 350–52 (2003). The pleadings stage determined whether a plaintiff had a cognizable claim and, if so, endeavored to identify precisely the dispute’s legal and factual topography. See Charles E. Clark, *History, Systems, and Functions of Pleading*, 5 AM. L. SCH. REV. 716, 717 (1926).

11. See *Stubblefield v. Commonwealth*, 246 S.W. 444, 445 (Ky. 1923) (noting that the particularities of pleading in criminal law “emanated from the extreme technical exactness of the common law with reference to pleading in both civil and criminal causes”); 1 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 508 (MacMillan & Co. ed. 1883); Franklin G. Fessenden, *Improvement in Criminal Pleading*, 10 HARV. L. REV. 98, 99 (1896) (“As in ancient days the test was whether the case could be brought to fit the writ, so now the inquiry many times is whether the case fits the form of indictment.”); see also *Tomlinson v. Territory*, 33 P. 950, 952 (N.M. 1893) (“There being but one count in the indictment, not more than one offense could properly be proved. It is a principle of common-law pleading, applicable to both civil and criminal cases, that all pleadings must be single.”); Ronald Hamowy, *F.A. Hayek and the Common Law*, 23 CATO J. 241, 248 (2003) (describing pleading requirements as to civil disputes); Subrin, *supra* note 9, at 915. As to the reference to “litigants,” until the professionalization of police and the rise of public prosecutors in the late 1800s, it was most common for a private citizen to serve as a plaintiff in criminal law actions. THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 424 (5th ed. 1956).

12. See WILLIAM L. CLARK, *HANDBOOK OF CRIMINAL PROCEDURE* viii–x (William E. Mikkell ed., 2d ed. 1918) (indicating there are two stages, pleading and trial); Subrin, *supra* note 9, at 926–27.

“where the criminal law is silent as to the form of an indictment in a particular case,” a litigant could look to “pleading in civil actions” for guidance.<sup>13</sup>

The desire to reform civil and criminal procedure responded to a shared criticism. A state court commented in 1923 that criticism “emanated from the extreme technical exactness of the common law with reference to pleading in both civil and criminal causes.”<sup>14</sup> Individual efforts of any attorney to improve the clarity of pleadings presented great risks: “[t]he pleader is fearful lest, in departing from time-honored forms, he may put the [case] in peril of failure.”<sup>15</sup> To the plaintiff or the prosecutor, the pleading phase might have felt like a sword fight in a minefield; one’s own step could be as fatal as the opponent’s attack.<sup>16</sup> Examples abound. For a Massachusetts prosecutor, alleging that a crime took place “on the fifteenth day of July, 1855” was deemed insufficient for lacking guidance as to the era—was it “B.C.” or “A.D.?”<sup>17</sup> A North Carolina prosecutor’s description of killing an animal in the “field of another” deviated too much from “in an enclosure not surrounded by a lawful fence,” the required language.<sup>18</sup> In a civil action alleging the defendant broke two gates and three hedges, the plaintiff fatally failed to specify later in the complaint that the defendant had broken the “aforesaid” gates and hedges.<sup>19</sup> The advance to trial was thus vulnerable to a judge using a technical defect to stall or dismiss the case.

These technicalities seemed intractable. Subject to a slow trajectory of growth, the common law also resisted change. A treatise in 1918 observed that “[n]o inconsiderable portion of the difficulties in the way of the criminal pleader, at common law, have been removed . . . in most of the states in the American Union.”<sup>20</sup> Criticism of common law procedure, however, only gained momentum. “[L]egal procedure,” wrote Professor Hugh E. Willis in

13. CLARK, *supra* note 12, at 158.

14. *Stubblefield*, 246 S.W. at 445.

15. Fessenden, *supra* note 11, at 99. Indicative of the treacherous waters faced by prosecutors, Francis Wharton’s 1918 treatise warned that if a statute criminalizing escape used the words “[f]eloniously and unlawfully,” a prosecutor’s failure to state these exact words would be fatal to the indictment. 1 FRANCIS WHARTON, A TREATISE ON CRIMINAL PROCEDURE 793 (James M. Kerr ed., 10th ed. 1918).

16. CLARK, *supra* note 12, at 157–217. Expressing a similar sentiment, Frederick Pollock, a correspondent of Oliver Wendell Holmes, wrote in 1912,

Perverse ingenuity, once let loose on the art of pleading, went . . . from bad to worse . . . . [A] strictly logical adherence to consequences would have brought the business of the Courts to a dead-lock . . . . In many cases there were alternative forms of procedure having different incidents wholly unconnected with the substance of the case . . . [and] it was often difficult to be sure what the proper form of action was.

Frederick Pollock, *The Genius of the Common Law*, 12 COLUM. L. REV. 387, 387 (1912).

17. 1 JOEL PRENTISS BISHOP, NEW CRIMINAL PROCEDURE OR NEW COMMENTARIES ON THE LAW OF PLEADING AND EVIDENCE AND THE PRACTICE IN CRIMINAL CASES 220 (4th ed. 1895).

18. *Id.* at 228 & n.5 (discussing *State v. Staton*, 66 N.C. 640 (1872)). Bishop provided another example: merely alleging that a person broke and entered into a house would disqualify an indictment that required the language “dwelling-house of another.” *Id.* at 346.

19. HENRY JOHN STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS 333–34 (1871).

20. WHARTON, *supra* note 15, at 183.

1922, “has [become] an end.”<sup>21</sup> Capturing the sense that common law could not attend to the sweeping changes of the industrial age, one commentator wrote, “We have made wonderful improvements in discoveries and inventions to save time . . . but in the courts we still move as slowly as the travelers that in olden times crept along in oxcarts and canal-boats.”<sup>22</sup>

Common law’s rigidity and its prohibitions on joinder could not attend to the growth of complex legal relationships between government, individuals, and enterprise—or to the growth of organized crime.<sup>23</sup> If a litigant survived the pleading gauntlet, parties faced a pretrial lacuna, as there was no formal period of discovery and investigation. Parties instead looked toward the trial horizon in darkness. At trial, parties presented surprise documents and witnesses that had not been subjected to any meaningful pretrial evaluation. Add to this frustration the procedural variances between neighboring jurisdictions, and the drumbeat for reform quickened. As one writer stated, “No petty tinkering, here and there, with existing law will suffice. Our codes and statutes as to procedure should not be minute. They should give the courts more latitude in making flexible rules and in exercising a reasonable discretion.”<sup>24</sup> By the mid-nineteenth century, notable statewide efforts began to present viable alternatives to the common law’s cabined approach as reformers proposed the integration of equitable principles “to escape procedural restraints in order to do substantive justice.”<sup>25</sup>

## II. CIVIL PROCEDURE REFORM

In response to criticism of common law, civil reformers looked to equity for innovation. Courts of equity had developed in tandem with common law disputes, relieving civil litigants from “an alleged injustice that would result from rigorous application of the common law” by providing alternative procedures and remedies.<sup>26</sup> By disposing of the jury, equity courts could exercise significant discretion in determining substantive and factual issues

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21. Hugh E. Willis, *Proposed Procedural Reform*, 5 ILL. L.Q. 17, 20 (1922).

22. E.J. McDermott, *Delays and Reversals on Technical Grounds in Civil and Criminal Trials*, 45 AM. L. REV. 356, 356 (1911).

23. See Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 387, 390–91 (1935).

24. McDermott, *supra* note 22, at 369.

25. Subrin, *supra* note 9, at 926.

26. *Id.* at 918. Courts of equity did not resolve criminal cases—rather, the state brought a criminal case, and the state was limited to bringing actions and pursuing remedies that were provided for by statute. See, e.g., *Taylor v. Woods*, 52 Ala. 474, 478 (1875) (“All causes, whether in equity or at law, had but two grand classifications, civil and criminal. The latter comprehends only violations of the criminal law—causes at the common law, in which the crown, or with us the State, complains of violated law and broken peace, in which all individual right and interest are lost, and merged in the greater right and interest of the sovereign.”); *Johnson v. State*, 171 S.W. 1128, 1132 (Tex. Crim. App. 1914) (Davidson, J., dissenting) (“I have been taught from the time I studied equity jurisprudence that there is a rule of equity, not criminal law, the substance of which is that he who seeks equity must come into court with clean hands or do equity. In that instance the plaintiff or complaining party is seeking equity in a civil matter. It cannot be a criminal prosecution. The rules of equity are resorted to in civil matters when the law has failed of remedies. It is fundamental that a criminal prosecution is not an equity case.”).

at any point of the litigation, blurring boundaries between pleading and trial. Courts sitting in equity compelled parties to appear and answer questions before trial, presaging the deposition.<sup>27</sup> Equity courts invited parties to furnish the backstory to disagreements to inform decision-making. Set free from the common law's "search for a single issue,"<sup>28</sup> disputes could absorb "as many [i]ssues of [l]aw or of [f]act as the [p]leaders desired."<sup>29</sup>

These innovations inspired efforts to reform civil procedure. In 1879, Connecticut ambitiously merged equity and law, initiated a lawsuit through a "simple statement of pleading," and permitted joinder of parties and claims that arose from the same transaction.<sup>30</sup> More modest in scope but influencing reform in thirty states, David Dudley Field spearheaded an effort to replace common law's issue pleading with "code pleading" in 1848.<sup>31</sup> The Field Code discarded pleading requirements as it erected new ones; it abandoned forms of action and technical terms of art, and a plaintiff now pleaded "ultimate facts," leading to disputes over whether a fact was ultimate, evidentiary, or conclusory.<sup>32</sup> Complicating the picture, legislative attempts to modify the Field Code drew criticism for undermining cohesion between rules.<sup>33</sup> These unpopular incursions led some commentators to conclude that the legislature had "neither the time nor the facilities to inquire into detailed problems of judicial procedure or to formulate complete codes."<sup>34</sup>

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27. Subrin, *supra* note 9, at 919.

28. *Id.*

29. KOFFLER & REPPY, *supra* note 10, at 519.

30. William C. Bruce, *Joinder of Claims, Parties, and Counterclaims: A Proposal for Revision of the Connecticut Provisions*, 51 CONN. B.J. 354, 365 (1977); *see also Report of Committee on Uniformity of Procedure and Comparative Law*, 19 ANN. REP. A.B.A. 411, 425 (1896).

31. RICHARD L. MARCUS ET AL., *CIVIL PROCEDURE: A MODERN APPROACH* 118 (5th ed. 2009). Code pleading jurisdictions required plaintiffs to plead the "ultimate facts" that were essential to the underlying legal claim, as opposed to "mere evidence," a distinction that resulted in much litigation and disagreement over the specificity of facts required to make a valid claim. *Id.* at 123.

32. Charles E. Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 450 (1958) ("The intent and effect of the rules [of civil procedure] is to permit the claim to be stated in general terms; the rules are designed to discourage battles over mere form of statement and to sweep away the needless controversies which the codes permitted that served either to delay trial on the merits or to prevent a party from having a trial because of mistakes in statement." (quoting FED. R. CIV. P. 8 advisory committee's note to 1955 proposed amendment)); Kenneth J. Vandeveld, *A History of Prima Facie Tort: The Origins of a General Theory of Intentional Tort*, 19 HOFSTRA L. REV. 447, 454–55 (1990) (discussing the significance of the Field Code's reforms).

33. *See* Homer Cummings, *The New Criminal Rules—Another Triumph of the Democratic Process*, 31 A.B.A. J. 236, 236 (1945) ("As a result of amendments passed by the legislature from year to year, the original [Field] Code became so burdened with detailed requirements that it practically broke down of its own weight.").

34. George H. Dession, *The New Federal Rules of Criminal Procedure: 1*, 55 YALE L.J. 694, 702 (1946); *see also* Clark, *supra* note 32, at 443 (stating that, prior to reform in 1938, "constant amendments of procedure by the legislature were all too well known; they were perhaps the most prominent argument for reform"). Those practicing criminal law shared similar feelings. *See Rules of Criminal Procedure for the District Courts of the United States: Hearings Before Subcomm. No. 2 of the Comm. on the Judiciary H.R., 76th Cong. 8–9* (1939) [hereinafter *Hearings Before Subcomm. No. 2*].

As statewide reforms responded to the criticisms of common law procedure,<sup>35</sup> the New Deal ethos of centralized social reform and reliance on expertise to shape policy provided additional impetus to turn over reform to the judiciary.<sup>36</sup> In 1934, Congress enabled the Supreme Court to achieve uniformity through the Federal Rules of Civil Procedure.<sup>37</sup> The Court had discretion in how to proceed. It could have codified existing practices or drafted an entirely new set of rules, and it could have done so through broad consensus or in relative secrecy. Yale Law School Dean Charles E. Clark viewed an insular drafting process as critical to reimagining a code that would “meet the needs of an increasingly complex social organization for efficient and workable court machinery.”<sup>38</sup> Clark sought to avoid the repackaging of existing practices, believing an insular approach would facilitate intellectual freedom in the absence of a constant reminder of perceived constraints.<sup>39</sup>

Clark’s predictions seemed to bear out: the Court appointed a committee that produced innovative rules through a series of confidential meetings. Clark, who served as the committee’s reporter, took cues from statewide efforts as the committee merged law and equity.<sup>40</sup> Stephen N. Subrin succinctly identified significant features of the new rules of civil procedure: “ease of pleading,” “broad joinder,” “expansive [pretrial] discovery,” “greater judicial power and discretion,” “control over juries,” “reliance on professional experts,” “reliance on documentation,” and “disengagement of substance, procedure, and remedy.”<sup>41</sup>

The new code resisted tradition and instead favored resolution on the merits.<sup>42</sup> The procedural gulf between pleading and trial was replaced by a robust discovery phase; this new stage became the heart of litigation, as it

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35. See Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 272 (1989).

36. See David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 438 n.2 (2011); Laurens Walker, *The End of the New Deal and the Federal Rules of Civil Procedure*, 82 IOWA L. REV. 1269, 1271 (1997).

37. See 28 U.S.C. § 723(b)–(c) (1934) (current version at 28 U.S.C. § 2072 (2012)); Clark, *supra* note 32, at 436.

38. Clark & Moore, *supra* note 23, at 387.

39. See Clark, *supra* note 32, at 445–46. Clark thought criticism should come after, not during, the moment of creation. *Id.*

40. FED. R. CIV. P. 2 (1938) (amended 2007) (“There shall be one form of action to be known as ‘civil action.’”).

41. Subrin, *supra* note 9, at 923–24; see, e.g., FED. R. CIV. P. 20(a) (1938) (amended 2007) (“All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any questions of law or fact common to all of them will arise in the action.”).

42. See FED. R. CIV. P. 3 (1938) (amended 2007) (“A civil action is commenced by filing a complaint with the court.”); *id.* 8(a) (“A pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . .”); *id.* 8(e)(1) (“Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.”); *id.* 12(b) (amended 1946, 1963, 2007) (“Every defense, in law or fact, to a claim for a relief in any pleading . . . shall be asserted in the responsive pleading . . . .”).

permitted parties to scrutinize factual and legal assertions.<sup>43</sup> The rules challenged assumptions about judicial neutrality, permitting courts to shape pretrial proceedings.<sup>44</sup> A summary judgment motion allowed scrutiny of factual allegations and afforded judges the authority to dismiss claims.<sup>45</sup> Such a demanding process potentially facilitated informed settlement talks. Trial by surprise gave way to a new regime that promoted factual transparency and more searching trials.<sup>46</sup> By 1938, the Supreme Court sent this version to Congress, leading to the adoption of the new Federal Rules of Civil Procedure that would transform litigation.

### III. CRIMINAL PROCEDURE REFORM

Civil procedure reform created the necessary impetus, and the potential architecture, for the reform of criminal procedure. As with civil procedure, states had made efforts to confront criticisms of the common law.<sup>47</sup> But after the transformation of civil litigation in 1938, House Representative Frances Walter observed that congressional reform of criminal procedure was virtually inevitable.<sup>48</sup> He found allies in the U.S. Department of Justice. Assistant Attorney General Brian McMahon testified that in some jurisdictions, pleading technicalities might require a forty-page indictment.<sup>49</sup> Former Attorney General Homer Cummings observed that a lack of statutory

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43. *See id.* 26–31, 33–36, 45 (amended 2007). Clark’s views on civil procedure were shaped by legal realism: his preference for data-driven judicial decisions led to his embrace of, and advocacy for, a robust pretrial discovery period. *See* Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 80–89 (1989); Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 711 (1998); Subrin, *supra* note 9, at 967–68.

44. *See* FED. R. CIV. P. 16 (1938) (amended 2007).

45. *See id.* 56.

46. *See id.* 26, 30–36.

47. *See, e.g.*, *State v. Hliboka*, 78 P. 965, 967 (Mont. 1904) (noting legislative efforts to change civil and criminal pleading “to do away with the mere forms and technicalities of the common law”); *State v. Womack*, 29 P. 939, 941 (Wash. 1892) (observing that recent legislative efforts had sought to facilitate the use of a “plain statement” in pleading so as to address the distortions to justice that resulted from “the technicalities and cobwebs and mysticisms of the common law”). Initial reform efforts did not escape strict pleading formulas but merely mitigated them. For example, as to indictments that required “an averment as to money, or bullion or gold dust[,] . . . treasury notes or certificates, banknotes or other securities[,] . . . checks, drafts[,] or bills of exchange,” the American Law Institute proposed in 1931 that it should be sufficient to describe such things as “money, without specifying the particular character, number, denomination, kind, species, or nature thereof.” *State v. Peke*, 371 P.2d 226, 232 (N.M. 1962).

48. *See Hearings Before Subcomm. No. 2, supra* note 34, at 35.

Rep. Walter: With the rules adopted in civil practice in the way they have been we cannot, very well not enact this resolution.

Rep. Robinson: That is because the civil rules have been so well received?

Rep. Walter: Yes.

Rep. Robinson: That this would follow along, yes; I think so.

*Id.*

49. *Id.* at 10.

guidance on criminal procedure led to inconsistencies.<sup>50</sup> Assistant Attorney General Alexander Holtzoff emphasized the lack of uniformity.<sup>51</sup> And New York University Law Professor Arthur T. Vanderbilt told Congress that “the system of criminal procedure is even more backward and primitive than has been the case with civil procedure.”<sup>52</sup> Consistent with the conclusions of civil reformers, proponents of criminal procedure reform thought the judiciary best suited to create rules of procedure.<sup>53</sup> In 1940, President Franklin D. Roosevelt wrote to the American Law Institute, “I am hopeful that the Congress will make provision for the regulation and simplification of Federal criminal procedure by means of judicial rule making, similar to that made by it several years ago in respect to Federal procedure.”<sup>54</sup> That year, Congress passed legislation that gave the Supreme Court authority to draft rules of criminal procedure.<sup>55</sup>

The influence of civil procedure reform continued to be evident. The Supreme Court delegated its drafting authority to a new advisory committee to follow a course “so successfully employed by the earlier advisory committee on Rules of Civil Procedure.”<sup>56</sup> The Supreme Court appointed Professor Vanderbilt as chairman,<sup>57</sup> Professor James J. Robinson as reporter

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50. *Id.* at 8.

51. *Id.* at 9 (citing *Tennessee v. Davis*, 100 U.S. 257 (1879)). During the hearing, Holtzoff read a passage penned by Supreme Court Justice Nathan Clifford:

Examined in the most favorable light, [criminal procedure] is a mere jumble of Federal law, common law, and State law, consisting of incongruous and irreconcilable regulations which, in legal effect, amount to no more than a direction to the judge sitting in such a criminal trial to conduct the same as well as he can, in view of the three systems of criminal jurisprudence.

*Id.* The rules of criminal procedure governing federal disputes in 1930 varied by jurisdiction. See James J. Robinson, *The Proposed Federal Rules of Criminal Procedure*, 27 J. AM. JUDICATURE SOC’Y 38, 42 (1943). And the Conformity Act required federal courts to follow common law rules unique to the state in which the federal court presided. See *Hearings Before Subcomm. No. 2, supra* note 34, at 4, 8. Federal courts were also subject to constitutional constraints and a few federal statutes that affected “joinder of counts in an indictment; the effect of a judgment on demurrer; procedure in removal hearings; the issuance of search warrants and similar narrow procedural provisions.” *Id.* at 8.

52. *Hearings Before Subcomm. No. 2, supra* note 34, at 2.

53. See *id.* at 8–9, 16, 23. Foreshadowing disagreements unique to criminal reform, some commentators raised concerns that shifting rulemaking authority to courts risked disrupting prosecutorial power. *Id.* at 16, 23.

54. Homer Cummings, *The New Criminal Rules—Another Triumph of the Democratic Process*, 31 A.B.A. J. 236, 238 (1945).

55. See 18 U.S.C. § 687 (1940) (current version at 28 U.S.C. § 2072 (2012)).

56. Dession, *supra* note 34, at 695.

57. *Register of the Arthur T. Vanderbilt Political, Professional, and Judicial Papers, 1902–1957*. WESLEYAN U., <https://www.wesleyan.edu/libr/schome/FAs/VA1000-186.xml> [<https://perma.cc/T8GF-JM6U>] (last visited Oct. 16, 2017); see also Jim H. Smith, *Arthur T. Vanderbilt II ‘72: The Legacy of His Grandfather—and of Professor Clement Vose*, WESLEYAN MAG. (Dec. 10, 2014), <http://magazine.wesleyan.edu/2014/12/10/arthur-t-vanderbilt-ii-72-the-legacy-of-his-grandfather-and-of-professor-clement-vose> [<https://perma.cc/AV5P-TED9>]. Vanderbilt was a descendent of magnate Cornelius, “The Commodore.” See Anne Chisholm, *More Money Than Anyone Else*, N.Y. TIMES (Sept. 24, 1989), <http://www.nytimes.com/1989/09/24/books/more-money-than-anyone-else.html> [<https://perma.cc/HR72-52EV>].

and special assistant to the U.S. Attorney General's Office, and Alexander Holtzoff as secretary.<sup>58</sup>

*A. The First Draft: A Unified Code of Procedure*

In February of 1941, Reporter James Robinson and his staff began working up the first draft of criminal procedure.<sup>59</sup> Robinson served as a prosecutor and was on active duty with the U.S. Navy before joining academia.<sup>60</sup> The year before he was appointed to be reporter, Robinson served as chairman of the American Bar Association's section of criminal law. In this role, he advocated for the A.B.A. to "exert a serious leadership against crime and for common sense and efficiency in criminal law administration."<sup>61</sup> Robinson's staff was filled with members of the U.S. Department of Justice, the Offices of the Assistant U.S. Attorney, and the National Association of U.S. Attorneys.<sup>62</sup> Over the course of six months, Robinson and his team made a crucial decision: the organization and content of the draft would be anchored in the newly reformed civil rules.

In moving toward a unified code, Robinson's team acknowledged the diversity of possible approaches. To each proposed rule, the team considered laws, standards, and commentary. The first draft, for example, proposed a rule that required civil and criminal rules to be interpreted in the same way; to this rule, the committee appended Federal Judge W. Calvin Chestnut's comments in opposition, as well as comments in support from the Judicial

58. See Judge Matthew F. McGuire, *Judge Alexander Holtzoff—A Vignette*, D.C. B.J., Mar.–Sept. 1973, at 17. Serving the committee in nonleadership positions were former New York Court of Appeals Judge Frederick E. Crane and Federal District Judge Hugh D. McClellan; attorneys George Z. Medalie, Leland Tolman, Gordon E. Dean, G. Aaron Youngquist, George J. Burke, George F. Longsdorf, Murray Seasongood, and J.O. Seth; and law professors Sheldon Glueck (Harvard), George H. Dession (Yale), Herbert Wechsler (Columbia), John Barker Waite (University of Michigan), and Lester B. Orfield (University of Nebraska). Dession, *supra* note 34, at 695 n.9.

59. Arthur T. Vanderbilt, *The New Federal Criminal Rules*, 51 YALE L.J. 719, 720 (1942) ("[T]he Advisory Committee on Rules of Criminal Procedure commenced its work in February, 1941 . . .").

60. *Hearings Before Subcomm. No. 2, supra* note 34, at 35; Leon H. Wallace, *Dedication: James J. Robinson*, 50 IND. L.J. 648, 648 (1974); *Indiana Governor Is After Vigilantes*, N.Y. TIMES, June 14, 1921, at 2; *James J. Robinson Dies, Libyan High Court Judge*, WASH. POST (May 25, 1980), <https://www.washingtonpost.com/archive/local/1980/05/25/james-j-robinson-dies-libyan-high-court-judge/3d005f12-b648-4b46-8c25-3d621a7c481d/> [<https://perma.cc/7XA7-872V>]. Robinson would later serve as a prosecutor in the Tokyo war crimes trials after World War II. *The People of the IMTFE*, U. VA. L. LIBR., <http://imtfe.law.virginia.edu/people#2326> [<https://perma.cc/X3M7-JNGC>] (last visited Oct. 16, 2017).

61. James J. Robinson, *Report of the Chairman*, A.B.A. SEC. CRIM. L. PROGRAM & COMM. REP., July 1939, at 10, 14.

62. Robinson, *supra* note 51, at 44. In fact, the majority of Supreme Court Justices at that time had previously served the in Department of Justice, including Justices Felix Frankfurter, Charles Hughes, James McReynolds, Stanley Reed, Owen Roberts, and Harlan Stone. See TOM W. CAMPBELL, *FOUR SCORE FORGOTTEN MEN: SKETCHES OF JUSTICES OF THE U.S. SUPREME COURT* 333, 364–65, 381 (1950); *PROCEEDINGS OF THE BAR AND OFFICERS OF THE SUPREME COURT OF THE UNITED STATES*, NOVEMBER 4, 1949, at 95 (1950); Charles C. Burlingham, *Harlan Fiske Stone*, 32 A.B.A. J. 322, 323 (1946); Note, *Mr. Justice Reed—Swing Man or Not?*, 1 STAN L. REV. 714, 715 (1949).

Conference of the Fifth Circuit and the Committee for the Southern District of Florida, which had no objection to the “Uniformity of Criminal Procedure with Civil Procedure.”<sup>63</sup> As to proposed rules that provided for pretrial conferences and discovery, the draft included an assistant U.S. attorney’s comment that a prosecutor should not be required to “disclose information that might be harmful to the trial of the government case”<sup>64</sup> and also included comments in support of permitting a judge to hold pretrial conferences<sup>65</sup> and providing depositions to defendants.<sup>66</sup>

The legal and political environment appeared amenable to integrating the substantive innovations of civil procedure reform.<sup>67</sup> President Roosevelt thought reform of criminal procedure should look to civil reform, as it had been “met with general acclaim.”<sup>68</sup> Professor Jerome Hall, a preeminent scholar of criminal procedure, provided a comprehensive justification for a unified code in his 1942 article in the *Yale Law Journal*.<sup>69</sup> For Hall, civil reform had been responsive to procedure’s *universal* purpose: to discover relevant information, fulfill the promise of substantive law, assess whether a defendant was liable under that law and, if so, to what degree.<sup>70</sup> Hall viewed the civil code as a compendium of neutral rules and saw no reason that criminal litigation should not be subject to such treatment.<sup>71</sup> “In general, as regards the purely technical rules, those that are neutral as to advantage, the new civil rules are always suggestive and sometimes can be applied almost literally to criminal procedure.”<sup>72</sup> Hall highlighted the major innovations of civil rules—notice pleading, judicial management, and discovery—but found existing features of criminal procedure “primitive” by comparison.<sup>73</sup> For Hall, civil and criminal disputes shared similar challenges and were accordingly susceptible to a similar solution.

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63. Advisory Committee on Rules of Criminal Procedure, Rules of Criminal Procedure for the District Courts of the United States r. 2 note (Sept. 8, 1941) [hereinafter 1941 Draft Rules of Criminal Procedure] (tentative draft) (on file with author).

64. *Id.* r. 16 note (comments of Alexander Campbell, U.S. attorney for the Northern District of Indiana).

65. *Id.* (comments of the Committee for the District of Kansas) (suggesting that “the principle of pre-trial should be applied in criminal cases if that can be done without violating the Constitution”); *see also id.* (comments of the Judicial Conference of the Second Circuit).

66. *Id.* r. 26.

67. Meanwhile, other commentators were alarmed by the widespread debate, arguing, for instance, that “the task of reforming civil procedure should be sharply distinguished from the task of improving criminal procedure” and that “[t]his distinction is not usually recognized.” Comment, *Reform in Criminal Procedure*, 50 *YALE L.J.* 107, 108 n.8 (1940).

68. *Id.* (“It is hoped this grant of power will result in introducing uniformity and simplicity in the administration of criminal justice in the federal courts and eliminating some of the archaic technicalities which at times hamper or delay the progress of cases through the courts. . . . The Rules of Civil Procedure have met with general acclaim and have made an important contribution to reducing law’s delays and diminishing the cost of litigation. It is reasonable to expect a similar result in criminal cases from the legislation just enacted.” (alteration in original) (quoting 9 *U.S.L.W.* 2032 (1940)).

69. *See* Hall, *supra* note 7, at 739.

70. *See id.*

71. *See id.*

72. *Id.*

73. *Id.*

Consistent with Hall's views, Robinson's team, apparently with Chairman Vanderbilt's support, integrated civil rules into its first draft.<sup>74</sup> Robinson wrote that in this draft the "criminal rules follow as closely as possible in organization, in numbering and in substance the Federal Rules of Civil Procedure."<sup>75</sup> Indeed, the draft tracks the civil code's organization, with sections including scope, commencement, pleadings and motions, parties, discovery, and so forth.<sup>76</sup> Similar to civil litigants entering unfamiliar territory with the introduction of the new civil procedure code, criminal law practitioners would view this new ordering as a radical departure from existing conceptions.<sup>77</sup>

Though Robinson's team integrated the majority of civil rules, they excepted those deemed incompatible with criminal disputes.<sup>78</sup> The staff did not include civil rules like interpleader, class actions, and summary judgment.<sup>79</sup> Any correspondence from Robinson explaining the basis for these omissions was not found. He may have concluded that interpleader or class action rules were inapplicable where the pleading party is always a single entity (such as the state),<sup>80</sup> and he may have determined summary

74. On the first day of the full committee, Chairman Vanderbilt said,

I think the notion of keeping the parallel numbering of the two sets of rules, civil and criminal, is a splendid one. I have a doubt in my own mind as to how it is going to work out, whether it may not mean too much warping and twisting of our rule, but I think we can start with it tentatively and see how it materializes.

Hearing Before the Advisory Committee on Rules of Criminal Procedure, United States Supreme Court at 17 (Sept. 8–10, 1941) [hereinafter Advisory Committee Hearing] (on file with author).

75. *Id.* at 5.

76. *See generally* 1941 Draft Rules of Criminal Procedure, *supra* note 63.

77. Charles Clark, in his approach to the civil rules, wrote "[e]xperience teaches us, that . . . the general professional reaction is, quite naturally, against change . . ." Clark & Moore, *supra* note 23, at 390. Indicative of this resistance to change, during the first day of the full committee's meeting, member Sheldon Glueck continually expressed his discomfort with the first draft's departure from the structure of the common law. *See* Advisory Committee Hearing, *supra* note 74, at 17, 257. For example, Mr. Glueck suggested, "I think that most of us visualize this whole business as an orderly process, having certain traditional steps, and I think it might help if . . . some stress were placed on a chronological order of the subjects." *Id.* at 257. Committee member Crane responded that he agreed, but Holtzoff disagreed, saying, "I do not think, when we have the final draft, we need follow the numbering of the civil rules." *Id.*

78. *See* Advisory Committee Hearing, *supra* note 74, at 4; *see also* 1941 Draft Rules of Criminal Procedure, *supra* note 63 (letter from James J. Robinson to members of the advisory committee).

79. For example, the civil rule for interpleader (in which an interested third party may join as a plaintiff in the litigation) was not included, as only the government has the power to bring a criminal case. *See* Advisory Committee Hearing, *supra* note 74, at 457. Class actions permit a plaintiff to bring a lawsuit and represent similarly harmed but unnamed plaintiffs against a single defendant. *See* FED. R. CIV. P. 23(a).

80. The author was unable to locate correspondence or transcripts of meetings that might reveal the particular reasons why Robinson and his staff rejected certain rules. There could be many other reasons to exclude class actions: they usually are brought against the government for the violation of civil rights, or, otherwise, are brought against companies in mass tort cases. In a criminal case against a corporation, there is little to stop a prosecutor from bringing multiple counts against a single corporate defendant for harming multiple victims. Those victims might elect to bring a class action in a civil lawsuit for monetary damages and any injunctive relief. In any case, subsequent Supreme Court decisions requiring

judgment was precluded by a defendant's right to a jury trial.<sup>81</sup> Robinson also made adjustments to some civil rules. For example, Robinson resisted a full embrace of notice pleading; instead, he thought that a prosecutor should provide a defendant a minimum threshold of notice of the charges.<sup>82</sup> Robinson also preserved common law constraints on joinder, as opposed to civil procedure's more permissive stance.<sup>83</sup>

With these notable caveats, the first draft moved toward a unified code: there was a "fundamental principle" that guided the first draft, "that is, to follow as closely as possible the organization and so far as possible the content of the civil rule in preparing [each] criminal rule."<sup>84</sup> Given the receptivity to civil reform, Robinson thought tethering criminal and civil rules would confer legitimacy to criminal process:

In the first place, the civil rules, as we know, have won a deserved prestige. There is no reason why the criminal rules might not well follow as closely as possible the plan and content of the civil rules and in that way gain some of the same confidence which has been afforded the civil rules.<sup>85</sup>

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individualization of criminal lawsuits would be in agreement with the committee's exclusion of the class action from the criminal code. *See, e.g.,* Brandon L. Garrett, *Aggregation in Criminal Cases*, 95 CALIF. L. REV. 383, 393 (2007) ("Aggregation remains a largely unused method of criminal adjudication in the United States. Where core individual rights are at stake in criminal trials, the Supreme Court has repeatedly ruled that every criminal defendant deserves an individual 'day in court.' The Court has accordingly developed a rigid set of rights that appear to preclude any significant aggregation of criminal cases."). This does not mean that aggregation in criminal law cases might always be inappropriate; as Garrett observes, it might be appropriate for defendants in a postconviction context to bring a class action against the state. *See id.* Garrett's observations also highlight the porous nature of criminal and civil procedure—in Wisconsin, for example, a postconviction criminal claim is considered a civil remedy. *See, e.g.,* State v. Russo, No. 2009AP187, 2010 WL 1542426, at \*2 (Wis. Ct. App. Apr. 20, 2010). To certify a prosecutor as a class representative would provide an end-run around the requirement that every element of every allegation be proven beyond a reasonable doubt, *see In re Winship*, 397 U.S. 358, 362–63 (1970), and would violate a defendant's right to confront witnesses, *see Crawford v. Washington*, 541 U.S. 36, 50–51 (2004).

81. A civil litigant is also entitled to a jury trial through the Seventh (as opposed to the Sixth) Amendment. Recent scholarship calls into question the constitutionality of the summary judgment's use in civil litigation because it derogates a civil party's jury right. *See, e.g.,* Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 140 (2007); *cf.* Luke Meier, *Probability, Confidence, and the Constitutionality of Summary Judgment*, 42 HASTINGS CONST. L.Q. 1, 1 (2014). Taking a different approach, Carrie Leonetti has proposed why a "defensive summary judgment" motion might be appropriate in criminal litigation. Carrie Leonetti, *When the Emperor Has No Clothes: A Proposal for Defensive Summary Judgment in Criminal Cases*, 84 S. CAL. L. REV. 661, 670 (2011).

82. *See* 1941 Draft Rules of Criminal Procedure, *supra* note 63, r. 8. For a full discussion of this rule, see *infra* Part III.B.

83. *See* 1941 Draft Rules of Criminal Procedure, *supra* note 63, r. 20. Common law rules governing joinder in criminal disputes had gradually become less strict. For instance, by 1918, joinder permitted several criminal defendants to be joined in the same indictment so long as they "join in the commission of an offense, whether it be a felony or a misdemeanor, . . . and one or all may be convicted." CLARK, *supra* note 12, at 347.

84. Advisory Committee Hearing, *supra* note 74, at 4; *see also* 1941 Draft Rules of Criminal Procedure, *supra* note 63 (letter from James J. Robinson to members of the advisory committee).

85. Advisory Committee Hearing, *supra* note 74, at 4.

Robinson also recognized that legal assistance available to criminal defendants was suboptimal. He envisioned a unified code providing a bridge between poor criminal defendants and better-resourced firms in civil litigation. A unified code would erode perceived barriers to entry and expose criminal disputes to a larger market of litigators:

I think it is the object of all of us to attract into the practice in criminal cases as many as possible of the lawyers whose practice frequently is exclusively on the civil side. It would seem that it would be some contribution toward that end if the criminal rules can be made as closely as possible like the civil rules.<sup>86</sup>

Robinson was aware that civil procedure reform, in encouraging factual development and transparency, would disrupt the existing balance of power between the prosecutor and the defendant and would alter the existing roles of litigants in a criminal dispute. Yet Robinson was also aware that maintaining parallelism between civil and criminal procedure was a historically rooted approach, that the civil rules had been well received, and that Congress and the executive had instructed the committee to look to civil rules for guidance. In his correspondence to the full committee, Robinson emphasized, “I want you to understand that this draft has been prepared with the idea of carrying that parallelism [to civil rules] as far as possible . . . .”<sup>87</sup> He encouraged members to offer “full and free criticism.”<sup>88</sup> He was likely surprised at how fully and freely it came from one member, Alexander Holtzoff, who would prove to be the tip of the spear, if not the spear itself, in vanquishing Robinson’s vision.<sup>89</sup>

### *B. The Full Committee Considers a Unified Code*

The full committee met on September 8, 1941.<sup>90</sup> The work of Robinson and his staff, which took six months to construct, was undone in four days. The transcripts of these first few meetings reveal how criminal procedure was severed from civil procedure, but they also indicate that the outcome was not inevitable. James Robinson did not face a committee inherently opposed to his vision, but rather faced a powerful spokesperson who was wedded to existing practices and institutional norms: Alexander Holtzoff. Holtzoff dominated meetings, voicing his opinion on the first page and most of the 800 pages that follow.<sup>91</sup> He frequently attempted to frame the issue and guide the discussion on each rule, ready to offer a counterproposal that altered and often discarded the proposed civil rule.

Though Holtzoff’s justifications for his positions were highly variable and sometimes self-contradictory, a pattern emerged: he preferred existing common law practices over civil rules, unless the civil rule better facilitated

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86. *Id.*

87. *Id.* at 6.

88. *Id.*

89. *Id.*

90. *Id.* at 1.

91. *See id.*

prosecution. Robinson soon identified this pattern, even as Holtzoff raised other reasons to reject a civil rule. For example, when Holtzoff objected to the imposition of written pleas because doing so would undermine a defendant's right to make an oral plea, Robinson suspected that a different motive—prosecutorial efficiency—was at play: “We want, of course, these rules to be fair to the Government. At the same time they must be fair to the defendant. We must have a balance between the two. I think we all agree we do not want just speedy and quick convictions.”<sup>92</sup>

As the first day of the full committee meeting progressed and Holtzoff resolutely engaged with each proposed rule, Robinson voiced his concerns that the effort to achieve parallelism was being frustrated. “If we begin to leave a thing out as dealt with in the civil rules at one point and proceed to make our own rearrangement, we are going to get pretty far away from our plan of holding the two systems of rules pretty closely together.”<sup>93</sup> In fact, Robinson's edifice had sustained significant damage within the first hour, given that the committee rejected the proposed rule that would have anchored the criminal rules to the civil rules: the conformity rule. Once this rule was defeated, the parallelism envisioned by the first draft began to unravel.

#### 1. The Conformity Rule (Proposed Rule 2)

The first draft opened with a conformity rule, the heart of a unified code:

Each of these Rules of Criminal Procedure which duplicates or which corresponds to a Federal Rule of Civil Procedure bears the same rule number as the civil rule which it duplicates or to which it corresponds in title or in function. The procedure under these rules is designed to conform as closely as possible to the procedure under the Federal Rules of Civil Procedure, and these rules shall be construed with that purpose in view.<sup>94</sup>

Robinson attempted not only to duplicate the civil code's content but also to tie the interpretation of the criminal code to the civil code. Under this rule, civil and criminal litigators would look across a more transsubstantive plane.<sup>95</sup> This rule would constrain courts from distinguishing criminal from

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92. *Id.* at 90–91.

93. *Id.* at 99. The author has not yet determined to what plan Robinson referred—such as, for example, any discussions he had with principal committee members before he and his staff drafted the first set of rules.

94. See 1941 Draft Rules of Criminal Procedure, *supra* note 63, r. 2.

95. David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 BYU L. REV. 1191, 1207–08 (“For some species of process law, trans-substantivity has long served as a central principle of doctrinal design. This is so for evidence law. Trans-substantivity's persistence reflects the long-held belief, voiced prominently by John Henry Wigmore, that ‘there is no occasion’ in evidence law ‘for a distinction’ among various types of cases.” (footnotes omitted) (quoting 1 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 4 (1904))); Scott M. Matheson, Jr., *Procedure in Public Person Defamation Cases: The Impact of the First Amendment*, 66 TEX. L. REV. 215, 228 (1987) (“To fulfill its role in our legal system, procedure strives for fairness and efficiency. In a fair and efficient procedural system, the principal and valued features are accuracy in fact-finding and rule application, minimum cost in both time and expense to the parties and the court system, and predictability for the participants. These goals in turn support the

civil disputes and would prohibit courts from looking to other sources of law in interpreting the meaning of criminal rules. The first civil discovery rules, for example, permitted parties to request documents “material” to the case—the conformity rule would hitch the criminal code’s use of “material” to its meaning in the civil code.<sup>96</sup>

Because Chairman Vanderbilt instructed the committee to address each rule in *seriatim*, the committee had addressed the most sweeping, controversial rule first—the conformity rule. Holtzoff announced it “would be dangerous to tie” the two codes together, as other members raised more measured concerns.<sup>97</sup> Professor Sheldon Glueck worried about adopting the civil code’s structure itself; he thought doing so would entail “too great [a] warping” of a criminal case’s existing chronology.<sup>98</sup> Professor Herbert Wechsler wondered whether policies animating criminal and civil law were too different to share the same procedural backbone.<sup>99</sup> Attorney George Z. Medalie observed that criminal courts had permitted some informality to persist and worried that tying criminal rules to civil rules might end this implicit agreement.<sup>100</sup> With these unanswered questions hanging in the balance, Holtzoff nevertheless moved to strike the conformity rule, contending that civil rules constituted a thicket of technicalities that would undermine efficiency.<sup>101</sup> His motion to cleave criminal from civil procedure and send civil and criminal litigation on different paths for generations carried without further discussion.<sup>102</sup> This single, unexamined decision permitted a wedge to be driven between the two codes.

In the absence of a conformity rule, courts interpreting criminal rules have looked to other sources of law for guidance in interpreting rules of criminal procedure, like postconviction standards, which typically impose quite limited obligations on the state.<sup>103</sup> In contrast, terms like “relevant” and “material” that are used in civil procedure impute broad obligations.<sup>104</sup> In the conformity rule’s absence, courts have explicitly adopted prudential principles that widen the procedural divide: “As a matter of general

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development of trans-substantive procedure, for the substance-procedure dialectic involves much more than simple considerations of substance over form.”)

96. FED. R. CIV. P. 34 (1938) (amended 2007) (“Upon motion of any party showing good cause therefor and upon notice to all other parties . . . the court may order any party to permit the inspection and copying of [documents] . . . not privileged, which constitute or contain evidence *material* to any matter involved in the action and which are in [the party’s] possession, custody, or control.” (emphasis added)).

97. Advisory Committee Hearing, *supra* note 74, at 22.

98. *Id.* at 17. Chairman Vanderbilt thought it easy to integrate any procedures unique to criminal cases within the civil code’s organization, satisfying Glueck. *Id.* at 17–18.

99. *Id.* at 18.

100. *Id.* at 22–23.

101. *Id.* at 23.

102. *Id.*

103. *See, e.g.*, United States v. Bulger, 928 F. Supp. 2d 305, 324 (D. Mass. 2013); United States v. Felt, 491 F. Supp. 179, 186 (D.D.C. 1979) (stating that materiality “has at times been interpreted to track closely with the constitutional standard”).

104. *See* Jordan Gross, *An Ounce of Pretrial Prevention Is Worth More Than a Pound of Post-Conviction Cure: Untethering Federal Pretrial Criminal Procedure from Due Process Standards of Review*, 18 BERKELEY J. CRIM. L. 317, 323 (2013).

construction “[t]he measure of discovery permitted by the Rules of Criminal Procedure is not intended to be as broad as in a civil case.”<sup>105</sup>

Dissolving the conformity rule that would have bound the two codes left Holtzoff free to pick and choose which civil rules to incorporate and how to interpret them. Wechsler’s astute question regarding what policy objectives should inform the construction of the code was left unanswered. In the absence of an overarching set of objectives, the rule creation exercise risked creating a code that favored one party over another. The committee nevertheless moved on to the next set of proposed rules—the pleading rules.

## 2. Pleading

Under civil rules, once a plaintiff files a complaint, the clerk issues a summons to be served on the defendant so as to provide notice of the dispute.<sup>106</sup> This simple arrangement was met with Holtzoff’s approval, as a prosecutor might prefer the service of a complaint to the hassle of arrest.<sup>107</sup> When others suggested inserting language into the summons that would heighten notice, Holtzoff, having just portrayed the civil rules as a thicket of technicalities, turned to them for cover, saying: “You do not have anything like that in civil summons. I would like to see our criminal forms just as simple, if possible,”<sup>108</sup> and “I think the clarity with which the civil rules were drawn is something to be admired.”<sup>109</sup> Holtzoff did object to a provision permitting a court to “direct the clerk to issue a summons” on the grounds that such discretion should remain only with the prosecutor.<sup>110</sup> Medalie thought judicial temperance might control the worst urges of junior prosecutors who were apt to “regard very petty offenses as being almost capital offenses.”<sup>111</sup> “Some person with experience,” he noted, “should be with them to give them a word of caution.”<sup>112</sup> However, Holtzoff thought any concerns of overreaching were best dealt with internally by the Department of Justice.<sup>113</sup>

A keystone of civil procedure reform was to replace technical pleading requirements with “notice pleading.” Notice pleading resisted any particular form and gave legs to potentially embryonic and murky allegations.<sup>114</sup> Contrary to its label, notice pleading promised defendants significantly less notice. Robinson attempted to find a middle ground, rejecting the formalized and unyielding language of the common law but also building in a minimum

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105. See *United States v. Ross*, 511 F.2d 757, 762 (5th Cir. 1975) (alteration in original) (quoting *Clay v. United States*, 397 F.2d 901, 915 (5th Cir. 1968)).

106. See 1941 Draft Rules of Criminal Procedure, *supra* note 63, r. 4.

107. Advisory Committee Hearing, *supra* note 74, at 45–46.

108. *Id.* at 48.

109. *Id.* at 50.

110. *Id.* at 52.

111. *Id.* at 53.

112. *Id.*

113. *Id.* at 52.

114. See, e.g., *Dioguardi v. Durning*, 139 F.2d 774, 774 (2d Cir. 1944).

baseline of notice.<sup>115</sup> Robinson defended his decision to deviate by a degree from the civil standard: “You are stating the grounds for putting a man in the penitentiary. There is nothing comparable to that in the civil rules.”<sup>116</sup> Holtzoff disagreed and advocated for the full embrace of notice pleading, again praising the civil code’s simplicity.<sup>117</sup> Holtzoff thought that to “allege that the defendant murdered John Smith by a fatal gunshot wound” would be sufficient to advance to trial.<sup>118</sup> With some concessions to Medalie and Frederick E. Crane, who thought a prosecutor should at least provide a “concise statement of facts,”<sup>119</sup> Holtzoff persuaded others to adopt the civil rule in this instance.<sup>120</sup> Importing notice pleading into criminal procedure had a significant consequence: it dramatically lowered the entrance fee for the prosecutor.

The question then would be whether, in exchange for easing the prosecutor’s burden to initiate litigation (and allowing less notice of the facts of the dispute), Holtzoff would consider a discovery phase to permit a defendant to review and test the factual basis for the state’s allegations. Holtzoff would not. But before taking on the issue of discovery, the committee turned to civil reform’s construction of a pretrial motion practice that required written responses and deliberation, as opposed to existing practices that had permitted oral and spontaneous motions to flourish.

### 3. Pretrial Motion Practice

The civil rules required written motions and notice of hearings, informing parties of the content of any motion and granting an opportunity to respond in writing and be heard.<sup>121</sup> To Holtzoff, these requirements threatened to delay proceedings and impede prosecution.<sup>122</sup> Holtzoff observed that rural courts ran through a docket in three days (day one, indictments; day two,

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115. See 1941 Draft Rules of Criminal Procedure, *supra* note 63, r. 8. Proposed Rule 8 called for a “plain and concise statement” of (1) the court’s jurisdiction, (2) the source of the accusation (i.e., grand jury), (3) the defendant’s name, (4) the time of the offense, (5) the place of offense, (6) the act or omission that constitutes the offense, (7) any criminal intent, (8) the name of victim, (9) any other essential facts that provide important notice to defendant, and (10) the statute violated. *Id.* The proposed rule further stated that “[n]o formal or additional allegations are required.” *Id.*

116. Advisory Committee Hearing, *supra* note 74, at 218.

117. *Id.* at 207.

118. *Id.* at 201.

119. *Id.* at 202, 205. At the hearing, Medalie concurred that using the language “a concise statement of facts constituting the offense” was sufficient. *Id.* at 206. Crane and Medalie’s suggestion was aimed at preventing an automatic filing of a bill of particulars that would require a concise set of facts anyway. *Id.*

120. Holtzoff stated, “We could adopt that language and require a short and plain statement of facts constituting the offense with which the defendant is charged.” *Id.* at 207. Holtzoff may have added the last part—a short and plain statement of facts—to placate a member who advocated for such a rule. In addition, Medalie thought a defendant should have some notice of the actual statute he allegedly violated; his wishes would be reflected in the resulting code. *Id.* at 211–12. The chairman by fiat ultimately adopted Holtzoff’s version. *Id.* at 219.

121. See 1941 Draft Rules of Criminal Procedure, *supra* note 63, r. 6(d)–(e).

122. See Advisory Committee Hearing, *supra* note 74, at 110. This suggestion seemed to undermine one of the only explicit goals of the committee—to achieve a set of uniform rules.

pleas; day three, any trials) and did not reconvene for three months.<sup>123</sup> He proposed leaving it to individual jurisdictions to impose or waive these requirements. Here, Holtzoff sacrificed uniformity for efficiency. When J.O. Seth wondered why a person indicted on a Monday should be convicted on Tuesday, Holtzoff maintained that accelerated dispositions protected defendants; otherwise, a defendant “might have to languish in jail for two or three months until the next term of court.”<sup>124</sup> Seth found this feature of the system unacceptable, but Holtzoff assured him that Congress was “perfectly satisfied with” these circumstances.<sup>125</sup>

Holtzoff also objected to a rule that all parties should be notified of any written motion.<sup>126</sup> Though asserting a prosecutor should always receive notice, Holtzoff thought it the responsibility of codefendants to stay updated by reading local law journals. Robinson worried that the failure to be informed of a hearing could harm a codefendant’s case and argued that all civil litigants were entitled to notice. Holtzoff responded, “The civil rules are so different from criminal prosecutions . . . . A civil case is a controversy between two private individuals, which is different from criminal procedure.”<sup>127</sup> This observation seemed to support Robinson’s view that a criminal defendant who faced a loss of liberty should receive at least the same notice as a civil defendant. But perhaps Holtzoff meant that a prosecutor, as minister of justice, would ensure that a hearing would be fair to all, rendering notice to codefendants unnecessary. Holtzoff’s motion to strike the “notice of hearing” provision was met with a sea of ayes.<sup>128</sup>

Holtzoff also objected to a provision giving the *court* the power to require that notice be sent to all parties.<sup>129</sup> Holtzoff presumably viewed this arrangement as an unnecessary erosion of prosecutorial power. Vanderbilt agreed with Holtzoff for other reasons. He thought that a judge serving a short term should not make procedural decisions that would outlast his tenure.<sup>130</sup> Robinson pushed back: “When a man’s life or liberty is at stake, I do not think we ought to take [matters of judicial administration] into consideration.”<sup>131</sup> Holtzoff responded, “We have to take the courts as we find them.”<sup>132</sup> Robinson fired back, “We have to take the rights of defendants

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123. *Id.* at 109.

124. *Id.* at 110.

125. *Id.* at 111.

126. *Id.* at 90–92; *see also* 1941 Draft Rules of Criminal Procedure, *supra* note 63, r. 5(a).

127. Advisory Committee Hearing, *supra* note 74, at 93.

128. *Id.* at 96.

129. Holtzoff was frequently on the alert for any language that indicated that a matter would proceed “by leave of court.” For example, in proposed Rule 7(a)(1), if a defendant waived his right to an indictment, then “the attorney for the government may by leave of court proceed against the accused by information, or complaint.” 1941 Draft Rules of Criminal Procedure, *supra* note 63, r. 7(a)(1). Holtzoff sought to leave this matter purely in the hands of the prosecutor. Advisory Committee Hearing, *supra* note 74, at 147.

130. *See* Advisory Committee Hearing, *supra* note 74, at 97–98.

131. *Id.* at 97.

132. *Id.*

as we find them.”<sup>133</sup> Holtzoff’s view, however, resonated with the majority of members.

As to the civil rule’s requirement that motions actually be in writing, Holtzoff thought doing so put oral motions under a cloud of illegitimacy.<sup>134</sup> Said Holtzoff, “I think that criminal practice is much more informal than civil procedure, and I do not think we want to make it any more formal or any more difficult. I think our aim should be to simplify it rather than to complicate it.”<sup>135</sup> Medalie agreed, asking, “What is the harm in granting motions without papers?” to which Holtzoff answered, “None at all.”<sup>136</sup> To Holtzoff, even a rule that required a uniform caption page was objectionable—it signaled approval of a written tradition. Holtzoff stated, “You do not need all that formality with papers in a criminal case. . . . [W]e do not want to inject technicalities and formalities that do not now exist.”<sup>137</sup> Robinson bristled, “Do not let us use epithets like ‘technicalities and formalities.’”<sup>138</sup> Where Robinson saw these civil rules provide notice and deliberation, Holtzoff saw new fronts open up for judicial incursion, distraction, and delay.<sup>139</sup>

#### 4. Judicial Management of Pretrial Disputes

Reform to civil procedure challenged assumptions about judicial neutrality by inviting a judge to put a thumb on a pretrial scale.<sup>140</sup> By emboldening the judge, the civil rules built in a control rod to its new creation: a party-driven system that afforded litigants with discovery powers, which could be misused

133. *Id.*

134. See 1941 Draft Rules of Criminal Procedure, *supra* note 63, r. 7. Under proposed Rule 7(b)(1), “[a]n application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing” and “shall state with particularity the grounds therefor.” *Id.*

135. Advisory Committee Hearing, *supra* note 74, at 179–80. Holtzoff would later write that common law pleading practice in the criminal law was formal and technical, as it required “useless and laborious learning” and “an incalculable amount of midnight oil” to solve the “futile problem of how an indictment should be drawn and what it should contain.” Alexander Holtzoff, *Reform of Federal Criminal Procedure*, 12 GEO. WASH. L. REV. 119, 124 (1944).

136. Advisory Committee Hearing, *supra* note 74, at 180.

137. *Id.* at 181–82.

138. *Id.* at 182.

139. See *id.*; see also 1941 Draft Rules of Criminal Procedure, *supra* note 63, r. 16.

140. See Charles E. Clark, *Objectives of Pre-Trial Procedure*, 17 OHIO ST. L.J. 163, 163–64 (1956) (noting that, following the adoption of the Federal Rules of Civil Procedure and Rule 16 in particular, “[p]re-trial procedure in this country came into its own,” giving the rules “wide appeal” and animating the “objectives of pre-trial”). Presently, Rule 16(a) provides that the court “may order the attorneys” to appear for the purposes of “(1) expediting disposition of the action; (2) establishing early and continuing control so that the case will not be protracted because of lack of management; (3) discouraging wasteful pretrial activities; (4) improving the quality of the trial through more thorough preparation; and (5) facilitating settlement.” FED. R. CIV. P. 16(a). Furthermore, Rule 16(b)(3) requires a court to issue a scheduling order that controls the litigation and investigation, and Rule 16(c)(2) permits the court to simplify issues, eliminate claims or defenses, amend pleadings, obtain stipulations as to facts and admissibility, avoid unnecessary proof, determine the appropriateness of summary judgment, manage discovery and disclosures, identify witnesses and important documents, and set dates for discovery. *Id.* 16(b)–(c).

to harass opponents and delay proceedings. An empowered judge could play referee and intervene.<sup>141</sup> Charles Clark viewed judicial management as critical to individualizing a case, “so that [the case] may be separated for its own particular treatment from the vast grist of cases passing through our courts in daily routine toward negotiation and settlement and, occasionally, trial.”<sup>142</sup> In attending to the need for efficiency, civil reformers considered what was lost by the mass processing of cases and sought to insert mitigation measures. Clark’s observation exemplified a deep concern to achieve balance between competing aims of reform.

The first draft of criminal procedure also envisioned judges climbing down into the pretrial trenches.<sup>143</sup> Holtzoff viewed this as a threat to prosecutorial discretion, and he was not alone. Medalie said, “I wonder how United States attorneys feel about this,” underscoring a sense of prosecutorial entitlement to pretrial territory.<sup>144</sup> Committee members doubted that a judge would demand a pretrial conference in the absence of prosecutorial consent, and one member could not believe that a judge would tell a U.S. attorney to appear just so the judge could exert influence.<sup>145</sup> The few civil litigators in the room disagreed—a judge could do exactly that.<sup>146</sup> To this, even Robinson was skeptical: “I doubt if the judge would do much of that in a criminal case.”<sup>147</sup> Medalie agreed, responding “No; [the judges would] not do it.”<sup>148</sup> Still, Holtzoff thought ceding control to the court was ill-advised; a prosecutor should not “lose control of the calendar.”<sup>149</sup>

Medalie also concluded that conferring power to a judge would be “a large profit . . . to the defendant.”<sup>150</sup> Endemic of the committee’s failure to view each rule in isolation, the committee’s discussion of judicial incursion in pretrial proceedings was not anchored to any discussion of discovery. Yet, in the absence of discovery, any concern about judicial overreaching would be rendered moot. The committee amended the rule to permit a judge to invite parties for a pretrial consultation, to which a party could decline; later, the provision would be excised altogether.<sup>151</sup> As a result, where civil rules establish a court’s “early and continuing control” of a case, criminal rules today provide for no pretrial judicial management.<sup>152</sup> Consistent with

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141. See Clark, *supra* note 140, at 164.

142. *Id.*

143. See 1941 Draft Rules of Criminal Procedure, *supra* note 63, r. 16.

144. Advisory Committee Hearing, *supra* note 74, at 374.

145. See *id.* at 375.

146. See *id.* at 375–76.

147. *Id.* at 375.

148. *Id.*

149. *Id.* at 376.

150. *Id.* at 391.

151. The Supreme Court, in its final review of the proposed rules, would jettison the rule altogether.

152. FED. R. CIV. P. 16(a)(2); *cf.* FED. R. CRIM. P. 17.1 (providing the closest analogue to present-day Rule 16(a)(2)). Rule 17.1 limits the court’s discretion to discussing a pretrial hearing only to “promote a fair and expeditious trial.” FED. R. CRIM. P. 17.1. Thus, it is rarely relevant and narrow in scope.

Holtzoff's stated objectives, prosecutors now fill that vacuum and maintain control over the course of criminal cases.

### 5. Discovery

Under common law, the pretrial exchange of information was exceptional. Civil reform turned this exception into the rule. Civil reform introduced a new phase and changed the deep structure of litigation to pleading, discovery, and trial.<sup>153</sup> To civil reformers, the rules created a system of checks and balances, with the discovery phase as the constant point of reference.<sup>154</sup> Without this phase, notice pleading provided too much leniency, and the objectives of individualizing lawsuits, exploring the merits, and preventing surprise at trial remained unfulfilled.

The first draft of criminal procedure adopted the civil discovery phase almost whole cloth, integrating depositions, document requests, physical and mental examinations, and requests for admission.<sup>155</sup> The draft included a rule giving a defendant the power to depose witnesses and permitted the defendant to ask questions "relevant to the subject matter."<sup>156</sup> Meanwhile, the rule conditioned the government's right to take a deposition on a defendant deposing a "prospective witness for the government."<sup>157</sup> Suggestions from the legal community revealed support for affording deposition power to criminal defendants. For instance, representatives from the State Bar Association of Kansas thought that a defendant should be "permitted to take depositions on notice to the United States attorney 'in the same manner as provided in the rules of civil procedure.'"<sup>158</sup>

The committee's discussion of this rule revealed fears that a defendant would use the deposition power to leave for China at the government's expense and refuse to return, forcing extradition.<sup>159</sup> In addition to worries about jailbreaks and witnesses relocating to Shanghai, some thought a defendant would misuse depositions to cause delay, while others worried that the government would misuse depositions to circumvent the Confrontation Clause.<sup>160</sup> Some members thought that a deposition was only a vehicle to secure trial testimony, not a tool to investigate or test the credibility of an

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153. *See supra* notes 41, 43 and accompanying text.

154. *See supra* note 46 and accompanying text.

155. 1941 Draft Rules of Criminal Procedure, *supra* note 63, r. 26–32 (depositions); *id.* r. 34 (document requests); *id.* r. 35 (physical and mental examinations); *id.* r. 36 (requests for admissions). Without explanation, interrogatories were excluded on the ground that such a tool could not be used in criminal proceedings. *Id.* r. 33 ("No criminal rule is proposed which is comparable to Civil Rule 33.").

156. *Id.* r. 26.

157. *Id.*

158. 1941 Draft Rules of Criminal Procedure, *supra* note 63, r. 26 note.

159. Advisory Committee Hearing, *supra* note 74, at 418–19. Crane, after discussing his concern about the defendant attempting to stay wherever he travelled to participate in the deposition, stated, "I should think he would be delighted to go [to China], as he gets out of jail and has a joy-ride and takes his lawyer along at the expense of his Government." *Id.* at 419.

160. *Id.* at 419–20. Some worried that the government would overuse depositions, though as Medalie pointed out, "Practically . . . the Government can examine anybody it wants to after indictment and before trial on whatever pretext it has." *Id.* at 452.

opponent's witnesses. "Why should the defendant take the deposition of a witness who is likely to be a witness for the Government?" asked Holtzoff. He thought instead that "[t]he defendant would take the deposition of a witness who is likely to be a witness for himself."<sup>161</sup> Robinson pushed back, arguing that a defendant "wants to know what he is going to have to meet in court."<sup>162</sup> Medalie thought that if a witness is going to be available for trial, "there is no case made, under any principle of justice, for the taking of the deposition in advance of the trial, unless you want to try the whole case by deposition."<sup>163</sup> Robinson explained that in civil cases, "You want to find out what the other side is going to do on the trial."<sup>164</sup> But Crane retorted, "[T]hat is the trouble. I think you have the idea of civil practice injected into the criminal procedure."<sup>165</sup> "To . . . go into the other side's case to examine anybody . . . before trial," he noted, "is a thing you would never think of in a criminal case."<sup>166</sup>

This exchange revealed that members, though seemingly aligned with Holtzoff, might have accepted the proposed rule. When Wechsler expressed that the deposition rule as drafted was too disjointed,<sup>167</sup> Medalie proposed the committee adopt the civil rule by reference.<sup>168</sup> Robinson, rather than embrace an ally, took a self-defeating approach to express his brewing frustration and reminded Medalie that the committee had decided against referencing civil rules when it rejected the conformity rule.<sup>169</sup> Medalie turned to Robinson:

You talk very earnestly about having lawyers who do civil work do work in criminal cases. I think that is a futile hope of yours, because of the mystery connected with criminal cases. Still, I think it is a mighty good thing to have procedure the same in both branches of trial and litigated practice wherever possible; and here for the first time we have a definite opportunity to make the things about the same.<sup>170</sup>

This was the first time that Medalie explicitly supported the integration of key civil rules. The moment demonstrated Medalie's political skills: he expressed skepticism at the enterprise of a unified code while he advocated for the implementation of a paradigm-shifting civil rule. Crane also seemed willing to import this centerpiece of civil reform, urging the committee to simplify the rules or just "[r]efer to the civil rules."<sup>171</sup> The issue, however, was tabled, and Holtzoff would volunteer himself to assist with the next draft of the rules. The committee ultimately considered, after Holtzoff's redrafting, a diluted deposition right; the revised rule limited the use of

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161. *Id.* at 447.

162. *Id.*

163. *Id.* at 450–51.

164. *Id.* at 452.

165. *Id.*

166. *Id.* at 453.

167. *See id.* at 456–57.

168. *Id.* at 459.

169. *Id.* at 460.

170. *Id.* at 462.

171. *Id.*

depositions to prevent “a failure or delay of justice.”<sup>172</sup> In subsequent drafts, erosion of the rule continued and, when the committee’s final draft was submitted to Congress in 1944, depositions were limited to those rare instances in which a witness would not be available for trial, a standard that effectively removed from criminal disputes the most powerful tool of pretrial investigation.<sup>173</sup>

The first draft of criminal procedure also permitted document requests; specifically, upon a showing of good cause, the court could “order any party to produce and permit the inspection and copying” of documents or things “not privileged” that were “material” to the case.<sup>174</sup> In introducing the rule, Robinson’s fatigue in swimming against the current was apparent:

Here again you see an effort has been made to present to you a rule which would be adapted to criminal cases so far as possible in a comparative way with the civil rule 34 applying to civil cases. Whether or not that is possible or practicable is for your consideration. If you feel that discovery cannot be used in criminal cases, you may indicate that.<sup>175</sup>

Holtzoff immediately moved to strike the rule, contending that this was “a one-sided proposition” and asking, “Am I right that this could operate only in favor of the defendant as against the Government and never in favor of the Government as against the defendant, because the defendant could always plead the privilege against self-incrimination?”<sup>176</sup> Holtzoff instead proposed a rule that would condition a defendant’s access to government documents on a waiver of the self-incrimination privilege. G. Aaron Youngquist was also opposed to the exchange of documents, as he suspected a defendant would use such information to fabricate a defense: “If you disclose your evidence to the defendant, it gives him, if he be that kind of person, an opportunity to frame up a defense to meet it.”<sup>177</sup>

Here, Medalie again aligned himself with Robinson’s cause and, this time, he dug in his heels. The resulting discussion was rich. To Holtzoff and Youngquist, Medalie said, “the truth ought to have no favorites.”<sup>178</sup> Holtzoff responded:

This is not only a question of producing the truth at the trial. This is a way of getting a discovery before the trial and preparing evidence to meet it with, which means that unscrupulous defendants may fabricate evidence with which to meet the evidence that the Government is going to introduce at the trial.<sup>179</sup>

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172. Advisory Committee on Rules of Criminal Procedure, Rules of Criminal Procedure for the District Courts of the United States r. 57(a) (Jan. 12, 1942) [hereinafter 1942 Draft Rules of Criminal Procedure] (tentative draft) (on file with author).

173. FED. R. CRIM. P. 15 (1944) (amended 1975, 1987, 2002, 2011).

174. 1941 Draft Rules of Criminal Procedure, *supra* note 63, r. 34.

175. Advisory Committee Hearing, *supra* note 74, at 465.

176. *Id.* at 465–66.

177. *Id.* at 466.

178. *Id.*

179. *Id.*

Medalie was skeptical that a defendant could use government documents to fabricate evidence and thought any such attempt would backfire and aid in the conviction.<sup>180</sup> Medalie indicated his comfort with constitutional protections, and, while conceding that they had some cost to the government, he thought that prosecutors would retain an advantage: “you are practicing law now in criminal cases with that handicap for the Government.”<sup>181</sup>

Holtzoff replied, “This is not a question of concealing the truth. This is a question as to whether or not the [prosecutor’s] evidence should be revealed . . . before trial.”<sup>182</sup> Medalie did not back down: “What harm is there in knowing what the prosecutor knows? It is the truth.”<sup>183</sup>

Fellow committee member Gordon Dean agreed with Medalie, wondering why a defendant should not have a chance, in advance of trial, to consider the State’s evidence.<sup>184</sup> Dean did not see a similar obligation on a defendant, who did not have a burden at trial.<sup>185</sup> Medalie asserted that a prosecutor could, by any ready excuse, convene a grand jury to subpoena witnesses in preparation for trial.<sup>186</sup> But Holtzoff continued to protest that there could be no discovery right afforded to a defendant in the absence of a reciprocal obligation.<sup>187</sup> Medalie observed that Holtzoff was battling “something that is inherent in our whole system, and that is the privilege against self-incrimination.”<sup>188</sup> Medalie also pointed out that Holtzoff drew all his examples of perceived unfairness from corporate cases, where defendants hold most of the evidence and which were not representative of the ordinary cases in which the government has “far more than the defendant could get.”<sup>189</sup>

Holtzoff moved to make a defendant’s request for documents conditional on waiving the right to self-incrimination. This motion lost, though Youngquist stated, “I vote ‘no’ because I think we should not [permit a defendant access] at all,” to which Holtzoff stated, “I am willing to go along with that.”<sup>190</sup> A chorus of nays followed a chorus of ayes, so that motion lost as well.<sup>191</sup> This standoff indicated that, with the leadership of a figure like Medalie, the committee could be persuaded to accept a regime that had concordance with the civil regime. The standoff also revealed Holtzoff’s tenacity and singular purpose. The committee’s second draft would retain the substance of Robinson’s proposal, but a “poison-pill” was added (likely by Holtzoff, who after the first meeting was authorized to participate in drafting), which read:

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180. *Id.* at 471.

181. *Id.* at 467.

182. *Id.*

183. *Id.*

184. *Id.* at 467–68.

185. *Id.*

186. *Id.* at 468.

187. *See id.* at 468–70.

188. *Id.* at 470.

189. *Id.*

190. *Id.* at 472.

191. *Id.* at 473.

This rule is based on Civil Rule 34, but it is made considerably narrower than the latter. The principal difference between the two is that in order to meet the constitutional privilege against self-incrimination it contains an express provision exempting the defendant from being required to produce any document or object if he alleges that the contents may tend to incriminate him. . . .

It appears to the draftsman that the rule is somewhat futile in criminal cases, but is presented so that it may receive further consideration.<sup>192</sup>

To Holtzoff, losing an argument was a momentary loss in a greater war.

The final draft submitted to Congress more closely tracked Holtzoff's preference that a defendant receive nothing from the State. It only permitted a defendant access to documents that had belonged to the defendant but had been seized by the State—or, in other words, information of which the defendant was already aware.<sup>193</sup> Overall, the robust discovery regime created in the first draft was severely curtailed.<sup>194</sup> And due to this four-day meeting in September 1941, a criminal defendant, initially given agency to investigate and test the government's case, was procedurally deemed a passive recipient of information that would be managed by the prosecutor.<sup>195</sup>

### C. A New Code Based on the Old Code

With Holtzoff's influence, the second draft of criminal procedure hewed closely to common law procedure as it integrated a few civil rules—borrowed from rules of equity—that facilitated prosecution.<sup>196</sup> In the introduction to the second draft considered by the advisory committee, Robinson noted that Holtzoff had “assisted in the revision of numerous rules,” attempting to keep

192. 1942 Draft Rules of Criminal Procedure, *supra* note 172, r. 56 note.

193. FED. R. CRIM. P. 16 (1944) (amended 1966, 1974, 1983, 1987, 1991, 1993, 1994, 1997, 2002, 2013).

194. Meyn, *Discovery and Darkness*, *supra* note 7, at 1101 (observing that discovery under the Federal Rules of Criminal Procedure provides only for limited disclosures).

195. *See id.*; *see also* 1941 Draft Rules of Criminal Procedure, *supra* note 63, r. 16.

196. This direction was consistent with the suggestions of Crane, Glueck, Holtzoff, and Chairman Vanderbilt. Advisory Committee Hearing, *supra* note 74, at 257.

Mr. Glueck: I think that most of us visualize this whole business as an orderly process, having certain traditional steps, and I think it might help if . . . some stress were placed on a chronological order of the subjects.

Mr. Crane: I agree with that.

Mr. Holtzoff: I do not think, when we have the final draft, we need follow the numbering of the civil rules.

*Id.* Vanderbilt expressed that the committee could rearrange the structure and, if need be, reference any integration of the civil code to “accomplish what the reporter had in mind.” *Id.* at 258. Compare CODE OF CRIMINAL PROCEDURE (AM. LAW. INST. 1931) (structuring the Table of Contents as: Arrest, Preliminary Examination, Bail, Grand Jury, Indictment and Information, Arraignment, Pleas, Jurisdiction and Venue, Trial), with 1942 Draft Rules of Criminal Procedure, *supra* note 172 (structuring the Table of Contents as: General Provisions; Preliminary Warrant or Summons, Hearing, and Bail; Indictment and Information; Arraignment, Pleas, Motions, and Notices; Trial).

the rules brief and simple and “to facilitate the functioning of the trial as a method for determining the truth about an issue which is in controversy.”<sup>197</sup>

This sixth draft was the first to be publicly distributed, and it bore little relationship to civil procedure.<sup>198</sup> Articles authored by committee members that praised the reform were published contemporaneous with the draft’s public debut.<sup>199</sup> Robinson acknowledged that the committee had considered civil procedure as a template, but as a team player, he portrayed civil reform as incompatible. He wrote that the committee had determined that “the possibilities of adapting the civil rules . . . as the basis or model of organization or of content for the criminal rules were limited and unpromising, except in isolated instances.”<sup>200</sup> Meanwhile, Holtzoff’s analysis was triumphant:

The principal significance of the new federal criminal rules is found in the attempt to reform procedure and to make far-reaching improvements as they appeared necessary. Existing procedure has been simplified and numerous outmoded technicalities that originated several centuries ago have been eliminated. Many of these technicalities were the culmination of humanitarian efforts to ameliorate the rigors of the criminal law at a time when it was almost savage in its ferocity. Today they are meaningless and arouse risibility. The simplification of procedure has been accomplished, however, without sacrifice of any safeguards that properly surround a defendant in a criminal case. In fact, in some respects the new rules have cemented and strengthened the protection accorded to the defendant.<sup>201</sup>

In December 1944, the rules of criminal procedure were sent to Congress for authorization.<sup>202</sup> The final draft retained common law’s deep structure of pleading and trial. Yet the new code dramatically eased the prosecutor’s journey from pleading to trial. The prosecutor now faced a forgiving pleading standard, which only required a “plain, concise and definite written statement of the essential facts constituting the offense charged.”<sup>203</sup> The new code adopted other equitable rules, including the liberal joinder of claims and parties, which eased the prosecutor’s ability to consolidate felonies and misdemeanors that were based on “transactions connected together or constituting parts of a common scheme or plan.”<sup>204</sup> Rejecting a discovery

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197. 1942 Draft Rules of Criminal Procedure, *supra* note 172 (letter from James J. Robinson to members of the advisory committee).

198. See Holtzoff, *supra* note 135, at 123.

199. See generally *id.*; George F. Longsdorf, *The New Federal Rules of Criminal Procedure*, 18 J. ST. B. CAL. 263 (1943); Lester B. Orfield, *The Preliminary Draft of the Federal Rules of Criminal Procedure*, 22 TEX. L. REV. 37 (1943); Robinson, *supra* note 51, at 39, 44; Arthur T. Vanderbilt, *New Rules of Federal Criminal Procedure*, 6 TEX. B.J. 300 (1943).

200. Robinson, *supra* note 51, at 43.

201. Holtzoff, *supra* note 135, at 123.

202. Letter from Harlan F. Stone, Chief Justice of the Supreme Court of the U.S., to the Honorable Francis Biddle, Attorney Gen. of the U.S. (Dec. 26, 1944), *in* 327 U.S. 823 (1945).

203. FED. R. CRIM. P. 7(c) (1944) (amended 1966, 1972, 1979, 1987, 2000, 2002, 2009).

204. *Id.* 3 (amended 1972, 1993, 2002, 2011) (drafting the complaint); *id.* 4 (amended 1966, 1974, 1987, 1993, 2002, 2011) (serving the complaint); *id.* 8(a) (amended 2002) (“Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the

phase, the final draft of criminal procedure preserved the pretrial lacuna between pleading and trial that characterized common law disputes. Depositions were limited to those rare instances in which trial testimony would otherwise be lost.<sup>205</sup>

This absence of a discovery phase provided prosecutors with both front-end gains (given that the complaint required little, and a defendant had no power to factually challenge the allegations) and back-end gains (given that the prosecutor could motivate a plea through the strategic release of information and an inflated trial threat, as the prosecutor remained fairly insulated from motions in limine due to the defendant's denial of access to the state's witnesses).<sup>206</sup> Though Robinson's first draft contemplated the judge mediating pretrial disputes (an intervention that would anyway be minimized by the eradication of a discovery phase),<sup>207</sup> the Supreme Court, before sending the final iteration to Congress, struck the provision altogether.<sup>208</sup> Throwing a bone to the traditionalists, the final draft integrated the constitutional standards commonly included in treatises on common law procedure, providing guidance as to grand jury proceedings, arraignment, and the preliminary hearing.<sup>209</sup> The new template had become the old template, but it had been modified to further facilitate prosecutorial intentions. As Charles Clark had warned, a reform effort that favored existing rules risked being retrogressive.<sup>210</sup> Whereas reform to civil procedure set in motion a new way of resolving disputes, criminal procedure froze in time and protected existing hierarchies. The differences between civil and criminal practice, once small, became a yawning gap.

#### IV. POSTMORTEM ANALYSIS

Was the adoption of Holtzoff's view inevitable? Could the committee have adopted Robinson's draft? A dissection of the committee's meetings helps to illuminate what happened. But *why* the committee did what it did remains unknown. Some preliminary observations, set forth in this Part,

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same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."); *id.* 12 (amended 1974, 1983, 1987, 1993, 2002, 2014) (raising defenses); *id.* 14 (amended 1966, 2002) (addressing joinder issues).

205. *Id.* 15(a) (amended 1974, 1987, 2002, 2011).

206. A preliminary hearing provides a check, though a weak one, designed to ensure that the defendant committed a felony so that detaining the defendant pending trial comports with due process. See Meyn, *Unbearable Lightness*, *supra* note 7, at 61–62.

207. See Advisory Committee on Rules of Criminal Procedure, Preliminary Draft of Rules of Criminal Procedure for the District Courts of the United States r. 15 (May 1942), in 1 MADELEINE J. WILKEN & NICHOLAS TRIFFIN, *DRAFTING HISTORY OF THE FEDERAL RULES OF CRIMINAL PROCEDURE* 60–61 (1991).

208. See FED. R. CRIM. P. 15 (1944).

209. Advisory Committee on Rules of Criminal Procedure, Preliminary Draft of Rules of Criminal Procedure for the District Courts of the United States r. 5, in 1 WILKEN & TRIFFIN, *supra* note 207, at 46 (arrest); *id.* r. 6, in 1 WILKEN & TRIFFIN, *supra* note 207, at 48 (preliminary hearing); *id.* r. 7, in 1 WILKEN & TRIFFIN, *supra* note 207, at 50 (grand jury proceedings); *id.* r. 11, in 1 WILKEN & TRIFFIN, *supra* note 207, at 56 (warrant or summons and bail upon indictment or information).

210. See *supra* notes 39–40 and accompanying text.

provide insight into the dynamics that influenced the committee's decision to reject Robinson's vision and adopt rules rooted in the past.

*A. Holtzoff at the Helm and an Amenable Crew*

One wonders whether, in Holtzoff's absence, Robinson would have accomplished a result that bore a closer resemblance to civil procedure. Holtzoff dominated meetings to exert a singular influence, pronouncing opinions that had the quality of well-wrought judicial decrees.<sup>211</sup> Holtzoff was intimately involved in legislative affairs in his supervisory role within the Department of Justice and, during the pendency of committee meetings, worked with congressional leaders to secure an amendment that would broaden the committee's influence and, consequently, his.<sup>212</sup> His position held sway with others, and even today, reading from a flat transcript, Holtzoff flies off the page as relentless. If Holtzoff's portrayal of the civil rules was in constant flux, he was consistent in constructing rules that preserved prosecutorial discretion and facilitated the quick resolution of criminal disputes. Members like Youngquist, Crane, and Glueck appeared predisposed to such an endeavor. Yet when Medalie took on Holtzoff, Medalie could expect to persuade other members. These interventions, however infrequent, reveal that committee members held diverse views. At the same time, it was equally true that members often seemed amenable to Holtzoff's positions.

A deep bench of current and former prosecutors provides one explanation for the committee's bias toward rules that facilitated prosecution. The committee did not seem to be aware of this overrepresentation. In a postgame talk at the Catholic University School of Law on October 16, 1945, Chairman Vanderbilt informed his audience that the committee had been composed of "judges and former judges, prosecutors, district attorneys, . . . defense counsel, [and] representatives of the Department of Justice."<sup>213</sup> Robinson likewise touted the committee's diversity, observing that the members came from numerous states and included professors, judges, "federal and state district attorneys, . . . assistant attorneys general, . . . defense counsel, [and]

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211. In a few instances, fellow committee members revealed irritation with Holtzoff's recall of facts and law. For example, where Medalie thought he was correcting Holtzoff by saying that federal banks were closed on state holidays, Holtzoff stated:

I know. The rule as to banks is this—a bank can close on any day on which you cannot present negotiable paper under the laws of the state; that is, where you cannot present negotiable paper on a state holiday; and that is why even federal banks close on state holidays.

Advisory Committee Hearing, *supra* note 74, at 106–07. Medalie responded, "We have solved the mystery." *Id.* at 107. Holtzoff would find his rightful place at the bench when President Harry S. Truman named him to a seat on the U.S. District Court for the District of Columbia in 1945. See *Holtzoff, Alexander*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/holtzoff-alexander> [<https://perma.cc/YF6N-F4FV>] (last visited Oct. 16, 2017).

212. See Advisory Committee Hearing, *supra* note 74, at 40–41.

213. Arthur T. Vanderbilt, *Preparation of the Rules, Their Adoption by the Supreme Court and Submission to Congress*, 5 F.R.D. 90, 92 (1945).

lawyers in the general practice of law.”<sup>214</sup> Former Attorney General Homer Cummings was even more generous, contending that the committee had acted as a mere conduit for ideas, apparently free of any bias.<sup>215</sup>

Yet, of the members who had criminal law experience, it was mostly prosecutorial in nature. Holtzoff served in the Department of Justice’s leadership as special assistant to the U.S. attorney general.<sup>216</sup> Robinson served as a prosecutor in Indiana.<sup>217</sup> Medalie served twenty years as a prosecutor—as a district attorney, a deputy state attorney general, and as the U.S. attorney for the Southern District of New York.<sup>218</sup> Tolman was a special attorney at the Department of Justice.<sup>219</sup> Gordon Dean was the Department of Justice’s criminal division chief.<sup>220</sup> Judge Crane had served as assistant district attorney in New York and was later considered by the Coolidge administration for the position of U.S. attorney general.<sup>221</sup> Youngquist served as attorney general of Minnesota and an assistant U.S. attorney—his journal entries revealed an impulse to join raids on dens of gangsters.<sup>222</sup> Burke served as the prosecuting attorney in Michigan, was a member of the Michigan Crime Commission, and ran for state attorney general.<sup>223</sup> Dession had a short stint at the state’s attorney’s office in Middlesex County, Connecticut.<sup>224</sup> Wechsler had served as an assistant attorney general.<sup>225</sup>

214. Robinson, *supra* note 51, at 44.

215. Cummings stated that the committee was a “conduit through which judges, prosecutors, attorneys, government officials and others interested in the functioning of criminal justice . . . could present their problems and make known their needs.” Dession, *supra* note 34, at 697. Dession, however unintentionally, contradicted Cummings’s claim and observed that the rules were created during the committee’s internal effort. *Id.* (stating that the committee authored the initial draft of the rules, taking on “the brunt of the research, [and] the initial policy decisions”). A review of the committee’s first meetings further contradicts Cummings’s view; despite having at the committee’s disposal commentary from the legal community catalogued in briefing materials, members rarely, if ever, referenced it. In fact, the committee created five confidential drafts before distributing a draft to the public for comment. Robinson, *supra* note 51, at 39. The committee was not a conduit, but it was an author.

216. McGuire, *supra* note 58, at 18; Holtzoff, *Alexander*, *supra* note 211.

217. See *supra* note 60 and accompanying text.

218. George Z. Medalie, *Big-Game Prosecutor, Goes Back to Private Practice Tuesday*, JEWISH TELEGRAPHIC AGENCY (Nov. 19, 1933), <http://www.jta.org/1933/11/19/archive/george-z-medalie-big-game-prosecutor-goes-back-to-private-practice-tuesday> [<https://perma.cc/4CHH-WEBD>]; *Judge G.Z. Medalie Dies in Albany* at 62, N.Y. TIMES, Mar. 6, 1946, at 27.

219. Leland L. Tolman, 82, *Ex-Court Administrator*, N.Y. TIMES (Jan. 15, 1991), <http://www.nytimes.com/1991/01/15/obituaries/leland-l-tolman-82-ex-court-administrator.html> [<https://perma.cc/7F48-ZEQT>].

220. Gordon Dean, 52, *Was Truman Aide*, N.Y. TIMES, Aug. 17, 1958, at 78.

221. Barbara B. Mistishen, *Frederick Evan Crane*, HIST. SOC’Y N.Y. CTS., <http://www.nycourts.gov/history/legal-history-new-york/luminaries-court-appeals/crane-frederick.html> [<https://perma.cc/7KYZ-PZXU>] (last visited Oct. 16, 2017).

222. *Postscripts*, 52 MINN. HIST. 195, 195–96 (1991).

223. William B. Treml, *Burke Family Law Legacy to Continue*, ANN ARBOR NEWS (Aug. 30, 1986), [http://oldnews.aadl.org/aa\\_news\\_19860830-burke\\_family\\_law](http://oldnews.aadl.org/aa_news_19860830-burke_family_law) [<https://perma.cc/37FV-CFSK>].

224. Charles E. Clark, *George H. Dession*, 64 YALE L.J. 1103, 1103 (1955).

225. Vanderbilt, *supra* note 213, at 92–93.

Seth appears to have had some experience as a prosecutor.<sup>226</sup> As to the remaining members, Glueck<sup>227</sup> and Wechsler<sup>228</sup> had not strayed from the academy, and Vanderbilt,<sup>229</sup> McClellan,<sup>230</sup> Longsdorf,<sup>231</sup> and Seasongood<sup>232</sup> were immersed in civil practice.

Missing from this list was a criminal defense attorney. Some members, during periods of private practice, may have represented criminal defendants. But, with the exception of Medalie and Youngquist, no member indicated any such experience during committee deliberations.<sup>233</sup> Moreover, no one noted the absence of a defense attorney on the committee.<sup>234</sup> And Judge Crane felt quite at ease in expressing his dim view of the criminal defense bar.<sup>235</sup>

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226. Seth, however, seemed mostly engaged in civil matters, as he was at the center of transactions that ran the gamut from negotiating water disputes with Colorado and Texas as New Mexico's representative to assisting Georgia O'Keeffe with securing tax benefits. See Advisory Committee Hearing, *supra* note 74, at 114 (noting Seth's work as a prosecutor); NANCY HOPKINS REILY, *GEORGIA O'KEEFFE, A PRIVATE FRIENDSHIP* 366 (2007); *Water Law*, MONTGOMERY & ANDREWS L. FIRM <http://montand.com/practice-area/water-law/> [<https://perma.cc/8U7S-8M54>] (last visited Oct. 16, 2017).

227. See J.Y. Smith, *Delinquency Authority Sheldon Glueck Dies*, WASH. POST (Mar. 12, 1980), <https://www.washingtonpost.com/archive/local/1980/03/12/delinquency-authority-sheldon-glueck-dies/e4cd9e2b-aba0-49db-a264-af60a5aff5d1/> [<https://perma.cc/8G7Q-HLNS>]. Glueck authored prediction tables that purportedly could identify a person's propensity to engage in criminal behavior by the age of six; his determinism sat within a set of rules that would ultimately assist a prosecutor to achieve a result that was, in Glueck's mind, already written. See *Sheldon Glueck of Harvard Dies; Studied the Roots of Delinquency*, N.Y. TIMES, Mar. 13, 1980, at 86.

228. See Tamar Lewin, *Herbert Wechsler, Legal Giant, Is Dead at 90*, N.Y. TIMES (Apr. 28, 2000), <http://www.nytimes.com/2000/04/28/us/herbert-wechsler-legal-giant-is-dead-at-90.html> [<https://perma.cc/846X-K6ZR>].

229. See *supra* note 57 and accompanying text.

230. See *Boston Judge Rules Out Wire Tapping Evidence*, LEWISTON DAILY SUN, May 12, 1938; *McClellan, Hugh Dean*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/mccllellan-hugh-dean> [<https://perma.cc/LJ5R-G8YU>] (last visited Oct. 16, 2017).

231. See GEORGE FOSTER LONGSDORF, *CYCLOPEDIA OF FEDERAL PROCEDURE: CIVIL AND CRIMINAL* (1929).

232. See *Murray Seasongood, Lawyer; Ex-Cincinnati Mayor Was 104*, N.Y. TIMES (Feb. 23, 1983), <http://www.nytimes.com/1983/02/23/obituaries/murray-seasongood-lawyer-ex-cincinnati-mayor-was-104.html> [<https://perma.cc/AF5G-9ZXF>].

233. For example, Youngquist stated, "About six years ago I with a group of other attorneys were defending one of the few cases in which I have been on the defense . . ." Advisory Committee Hearing, *supra* note 74, at 545. In addition, Medalie stated, "I have tried criminal cases where the district attorney and I stipulated facts." *Id.* at 464.

234. Yet, as committee members were well aware, major cities had established public defender offices by 1941. Los Angeles's public defender office had existed for twenty-five years, Chicago's had existed for a decade, and New York City's Legal Aid Society had existed for more than thirty years. See Advisory Committee Hearing, *supra* note 74, at 253. There was also no federal defender at this point in time. See Julian A. Cook III, *Federal Guilty Pleas Under Rule 11: The Unfulfilled Promise of the Post-Boykin Era*, 77 NOTRE DAME L. REV. 597, 627 n.157 (2002) (noting that federal Defender Services was established by the Criminal Justice Act of 1964).

235. Judge Crane opined that thirty percent of criminal defense attorneys should never have been admitted to the bar and that if a defendant had money, defense attorneys would "all scrap over it." Advisory Committee Hearing, *supra* note 74, at 250. Judge Crane added that criminal law "is not like the civil end of it. It is rough business, much of it, in these great big cities. You get a lot of lawyers who are as bad as the defendants." *Id.*

The institutional alignment with prosecutorial agencies in fact went deeper. Robinson created his support staff with the cooperation of the U.S. Department of Justice, Offices of the Assistant U.S. Attorney, and the National Association of U.S. Attorneys, all of which loaned attorneys to the effort.<sup>236</sup> In addition, a key staff member who sat in on meetings was Fred E. Strine, who served in the criminal division of the Department of Justice.<sup>237</sup> Drafts passed through two committees: one was composed of federal judges, and the other, called the Department of Justice Committee, was led by Assistant Attorney General Wendell Berge.<sup>238</sup> Robinson noted that the approval of these committees conferred legitimacy to the effort.<sup>239</sup> The committee's final draft relied on

recommendations of Attorneys General of the United States with respect to criminal procedure, as contained in annual reports of the Attorneys General during the past fifty years . . . [as well as] recommendations with respect to criminal procedure which have been made by the crime surveys, namely, the National Commission on Law Observance and Enforcement.<sup>240</sup>

The institutional alignment among the committee members and support staff did not make the result inevitable. Robinson and his staff, however oriented toward law and order, proposed a code that hewed closely to the civil rules. Medalie, with deep ties to state and federal prosecutorial offices, at times opposed Holtzoff. The debate among committee members was at times robust.

Indeed, Medalie and Holtzoff engaged in a rich discussion over whether defendants should have access to the government's documents, which momentarily persuaded others to block Holtzoff's effort to do away with the rule.<sup>241</sup> One wonders, had members of the defense bar been represented, whether compromises would have been made that otherwise were not. It is one thing to be amenable to a point of view, but it is another thing to have had an experience that engenders a visceral sense of what is at stake. The fact that there was at times robust debate despite institutional homogeneity highlights the reasonableness of the initial draft's approach. With Holtzoff at the opposition's helm, the committee may have required the input of those with a fundamentally different experience to represent and draw out competing views.

### *B. The Gravitational Pull of Existing Practices*

Robinson estimated that 95 percent of the rules in the draft released to the public represented existing practices, whereas "not over 5 percent . . . can be

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236. See *supra* note 62 and accompanying text.

237. See Lester B. Orfield, *Amending the Federal Rules of Criminal Procedure*, 24 NOTRE DAME LAW. 315, 318 n.18 (1949).

238. See Robinson, *supra* note 51, at 44.

239. See *id.* (indicating that, due to the input of these committees, the proposed code "will be in general acceptable to those who value practical experience as a guide in the preparation of rules of criminal procedure for the federal courts").

240. *Id.* at 42.

241. See *supra* notes 177–80 and accompanying text.

considered to be substantially new provisions.”<sup>242</sup> The rules, observed Robinson, were not characterized by any “zeal to reform present procedure.”<sup>243</sup> Holtzoff agreed:

[T]he approach of the Committee has been of a conservative nature. The existing practice on each point was ascertained and modifications were made in it only in those instances in which it affirmatively appeared that an improvement was needed. The attitude of the Committee was not iconoclastic but, on the contrary, its mode of operation was to build on existing foundations.<sup>244</sup>

This was in stark contrast to the views of Charles Clark, who led the civil reform effort and warned: “Experience teaches us, that . . . the general professional reaction is, quite naturally, against change. . . . [A] reform of procedure which merely adjusts itself to the majority view of the bar at best can be only a minor readjustment, perhaps even harmful.”<sup>245</sup> Clark was not the only commentator to express these concerns. Said E.J. McDermott, “[I]t is not only necessary to make the need of reform clear, but the need of it must be incessantly dinned into the ears of the lawyers . . . until public opinion becomes so distinct and strong that dull, conceited or stubbornly conservative lawyers can not resist it.”<sup>246</sup>

But the committee ultimately took the path Clark sought to avoid. The gang of four—Holtzoff, Youngquist, Crane, and Glueck—all sought to repackage existing rules. Glueck believed a unified code would entail “too great [a] warping” of the existing chronology.<sup>247</sup> Glueck did not question whether the existing chronology of criminal procedure was necessary, nor did he articulate how the civil rules would actually disrupt the existing chronology (which arguably could coexist).<sup>248</sup> And, as to any disruption, Glueck did not articulate why Robinson’s proposed path was not an improvement.<sup>249</sup>

In embracing existing practices, the committee vaunted the code’s simplicity. Dession noted that the entire code, from complaint through appeal, was “sixty small pages of large print” and that, reduced to a pocket edition, “would take up no more space than a box of matches.”<sup>250</sup> But this simplicity reflected the omission of a discovery phase. Members reasoned that a discovery phase was unnecessary, that trial would compensate for its

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242. *Id.* at 42–43 (explaining that the sources of criminal procedure reform included “federal and state constitutions and statutes, the common law at various periods in the legal history of the United States, of the states and of England, the decisions of federal, state and English courts, the rules of court promulgated by the Supreme Court and by other federal courts, and the traditional details of practice and of administrative procedure which are not to be found in written or printed form”).

243. *Id.* at 43.

244. Holtzoff, *supra* note 135, at 139.

245. Clark & Moore, *supra* note 23, at 390.

246. McDermott, *supra* note 22, at 358.

247. Advisory Committee Hearing, *supra* note 74, at 17.

248. *Id.*

249. *See id.*

250. Dession, *supra* note 34, at 694.

absence,<sup>251</sup> and that a “witness upon the stand is far superior to his deposition.”<sup>252</sup>

The committee’s embrace of existing practices was consistent with a historical resistance to considering the rights of a criminal defendant. Jerome Hall viewed the historical development of criminal procedure to ever so slowly recognize a role for defendants within a process that presumed guilt.<sup>253</sup> Procedure initially permitted guilt to be determined by ordeal where procedure and evidence were inextricable—where procedure itself, drowning or being burned by hot irons, revealed evidence of culpability. As the law of procedure became distinct from evidence, the defendant’s role continued to be minimal. Procedure permitted a trial and the presentation of evidence, but it did not provide a means for a defendant to question witnesses.<sup>254</sup> The defendant’s role slowly increased over centuries, as he eventually became entitled to a public trial and could confront witnesses.<sup>255</sup> The criminal defendant, relative to other litigants, however, continued playing a lesser role; as of Hall’s writing in 1942, states were still debating whether a criminal defendant was entitled to object to defects in an indictment.<sup>256</sup> To Hall, tradition—the “deep imprint of professional methods, and most of all, the existing range of thought and evaluation”—imposed “rigorous limitations on actual deliberate change.”<sup>257</sup> Hall and Robinson’s efforts to transform criminal procedure met a tradition of resistance. As Holtzoff had observed, ignoring the counterexample provided by civil procedure reform, “The only time we run any risk of rejection [of a proposed rule] is when we change the practice.”<sup>258</sup>

### C. *Missing Objectives, but Also Hidden Objectives*

Unlike Robinson, who provided a rationale for his first draft, Holtzoff never explicitly proposed a rationale to guide the committee’s review. Indicative of this failure, the Supreme Court denied the committee’s first request to distribute a draft to the public because the Court was unable to understand the rules’ “true purport and the nature of the problems which they

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251. See 1942 Draft Rules of Criminal Procedure, *supra* note 172 (letter from James J. Robinson to members of the advisory committee).

252. George Rossman, *Arraignment and Preparation for Trial*, 5 F.R.D. 63, 74 (1945). This assertion, however, assumes that taking a deposition precludes advancing to trial. And, in the context of a typical trial, one should wonder whether the cross-examination of a state’s witness in the absence of a deposition presents a significant risk of fortifying the state’s case.

253. See Hall, *supra* note 7, at 728–32.

254. See Penny J. White, *Rescuing the Confrontation Clause*, 54 S.C. L. REV. 537, 545–46 (2003).

255. See *Hopt v. Utah*, 110 U.S. 574, 579 (1884) (“[T]he legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony that he shall be personally present at the trial; that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the constitution.”).

256. Hall, *supra* note 7, at 723.

257. *Id.*

258. Advisory Committee Hearing, *supra* note 74, at 111.

are thought to solve.”<sup>259</sup> The absence of a clear rationale was evident when at the start of the first meeting of the full committee, Wechsler stated:

The object of [the conformity rule, Rule 2,] is to secure interpretation in accordance with the interpretation of the civil rules and presumably to incorporate into the interpretative job here the policies that achieve dominance in the work on the civil rules. Now, without expressing a judgment as to whether that is wise or unwise, because I do not know enough about the civil rules and the grim detail that they present, nevertheless *a priori* it seems to me to be questionable, because we are dealing with situations in criminal cases in which the dominant policies may well be different.<sup>260</sup>

Wechsler’s objection is well taken; a committee charged with drafting a procedural code should agree on, or at least discuss, its objectives. His observation revealed that the committee had not discussed its values. Vanderbilt had instructed the committee to start with Rule 1 and continue in *seriatim*.<sup>261</sup> No space was carved out to accommodate a broader discussion that would attend to Wechsler’s concerns.

In the absence of any explicit, guiding principles, various members announced that criminal law was just different. Vanderbilt stated “that the problems of criminal law . . . are quite different from some of the problems of civil law.”<sup>262</sup> Holtzoff added,

I am impressed very much with the fact that the problems of criminal procedure are so different, the work in criminal cases so different from trying a civil case, that it would be dangerous to tie the criminal rules too strongly to the civil rules, either textually or by rule of construction.<sup>263</sup>

Absent, however, was the rationale for this perceived difference. Holtzoff did later elaborate on the philosophy that had guided his approach. After the draft was distributed to the public, he asserted that the Rules of Criminal Procedure

[i]n a larger sense . . . must necessarily crystallize a philosophy of administration of criminal justice. . . . [I]t must be conducive to a simple, effective, and expeditious prosecution of crimes. Perpetrators of crimes must be detected, apprehended and punished. The conviction of the guilty must not be unduly delayed. Criminals should not go unwhipped of justice because of technicalities having no connection with the merits of the accusation. The protection of the law-abiding citizen from the ravages of the criminal is one of the principal functions of government. Any form of criminal procedure that unnecessarily hampers and unduly hinders the

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259. Letter from Harlan F. Stone, Chief Justice of the Supreme Court of the U.S., to Arthur T. Vanderbilt, Chairman, Advisory Comm. on Fed. Rules of Criminal Procedure (June 8, 1942), in 1 WILKEN & TRIFFIN, *supra* note 207, at 7 (“The Court’s study of the proposed Criminal Rules has been without the aid of annotations such as were submitted to us with the first draft of the Civil Rules, which would appear to be needful to enable us to understand adequately many features of the Rules both in point of form and substance.”).

260. Advisory Committee Hearing, *supra* note 74, at 18.

261. *See id.* at 43.

262. *Id.* at 21.

263. *Id.* at 22.

successful fulfillment of this duty must be discarded or radically changed.<sup>264</sup>

The full committee may not have agreed with this approach. Yet, *sub silentio*, this view of criminal procedure's purpose drove reform.

Given that the first draft incorporated the civil rules, it is not unreasonable to think that the committee might have submitted a unified code to the Supreme Court. The confluence of circumstances, a dogged effort by Holtzoff, an institutionally aligned committee, a gravitation toward existing practices, and an unexpressed, powerful set of objectives may have contributed to the formation of a code that stands in stark contrast to the neutrality achieved by the Federal Rules of Civil Procedure.

#### CONCLUSION

Reformers of federal civil procedure provided a new roadmap for litigation in the United States in 1938.<sup>265</sup> Merging law and equity, the code simplified pleading, permitted joinder of multiple claims and parties, empowered parties to investigate their cases, and invited courts to influence a lawsuit's development. The reform's sweeping changes received widespread acceptance and broadly influenced state codes.<sup>266</sup> It was in this atmosphere of reassessment and innovation that a newly appointed advisory committee charged with reforming the rules of criminal procedure considered whether all disputes, civil and criminal, might be governed by a unified code.

The potential impact of a unified code would have been far reaching. No longer a passive participant, a criminal defendant would be procedurally assigned a role to investigate the case, thereby vesting him with agency in a dispute. The integration of a robust discovery phase would permit opportunities to test the integrity of allegations in the absence of a trial. The invitation of judicial management would further disrupt prosecutorial control. Such a model would achieve some balance between the aims of efficiency and accuracy. At the same time, a unified code of procedure would presumably increase prosecutorial drag. In the context of mass incarceration, however, this eventuality might be viewed as a benefit rather than a cost.

Led by Holtzoff, the reform of criminal procedure integrated civil rules that increased efficiency, like notice pleading and liberalized joinder, but rejected countermeasures designed to ensure accuracy, like judicial intervention and discovery tools. In this way, the committee did not actually integrate aspects of the civil code but instead created an entirely different code with new dynamics. Holtzoff's gravitation toward a stripped-down criminal code stemmed from his belief that the criminal justice system had become fair and just. He believed that the common law technicalities had served their function, which was "to ameliorate the rigors of the criminal law

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264. Holtzoff, *supra* note 135, at 121.

265. See Clark & Moore, *supra* note 23, at 388.

266. See *Hearings Before Subcomm. No. 2, supra* note 34, at 4 (statement of Alexander Holtzoff).

at a time when it was almost savage in its ferocity.”<sup>267</sup> Holtzoff thought such cruelties of the criminal law had been cured by evolving standards and the professionalization of law enforcement.<sup>268</sup> A few years after Holtzoff’s assertion of faith in the criminal justice system, President Harry S. Truman convened a commission that issued a report on the state of civil rights that catalogued police terror and injustice in the courtroom:

[A defendant] sometimes finds that the judicial process itself does not give him full and equal justice. This may appear in unfair and perfunctory trials, or in fines and prison sentences that are heavier than those imposed on other members of the community guilty of the same offenses. In part, the inability of the Negro, Mexican, or Indian to obtain equal justice may be attributed to extrajudicial factors. The low income of a member of any one of these minorities may prevent him from securing competent counsel to defend his rights. It may prevent him from posting bail or bond to secure his release from jail during trial. It may predetermine his choice, upon conviction, of paying a fine or going to jail. But these facts should not obscure or condone the extent to which the judicial system itself is responsible for the less-than-equal justice meted out to members of certain minority groups.<sup>269</sup>

Holtzoff seemed insulated from a growing consciousness regarding police misconduct, a burgeoning list of new crimes that expanded prosecutorial discretion, and the salience of race and class to outcomes in the criminal justice system.<sup>270</sup> Despite writing at the height of Jim Crow, Holtzoff thought that “[c]riminals should not go unwhipped of justice because of technicalities” and believed procedures that slowed criminal law outcomes were “meaningless and arouse[d] risibility.”<sup>271</sup> Holtzoff’s belief in system-wide integrity helps explain why he took the positions he did in constructing the criminal procedural code. Today, his vision remains baked in.

Over the course of four days, the committee made decisions that directly contributed to the perceived differences between civil and criminal matters. Indicative of how Holtzoff began to hammer a wedge between criminal and civil practice, the few civil litigators appointed to the committee began to feel more and more excluded. By the second day, Longsdorf, a civil litigator who should have felt qualified to participate given the nature of Robinson’s first draft, stated, “I have not any experience in criminal practice, which raises a

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267. Holtzoff, *supra* note 135, at 123.

268. See Advisory Committee Hearing, *supra* note 74, at 89. Holtzoff seemed resistant, however, to seeing inequalities in structural terms; for example, Holtzoff stated, “I would dislike to see any requirement introduced which would require defendants to file written pleas, because some of them cannot write their names.” *Id.*

269. TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT’S COMMITTEE ON CIVIL RIGHTS 27–28 (1947).

270. *Id.*; cf. Lyda Gordon Shivers, *The Office of the Public Defender*, 2 MISS. L.J. 462, 464 (1930) (“The charge is often hurled at the legal system of the State that a member of the Negro race in the majority of cases does not secure justice in our courts. This we indignantly deny stating that if it be true that the Negro does not in many cases secure justice (and we deny that he does not receive it) still it is not because of racial discrimination, but that he faces the same situation as the poor white man.”).

271. Holtzoff, *supra* note 135, at 121, 123.

good deal of doubt as to whether I ought to be here.”<sup>272</sup> As Holtzoff cleaved the criminal rules from civil rules, Longsdorf felt less and less relevant, indicative of Robinson’s fear that segregating procedure would segregate litigators and create two different worlds.<sup>273</sup> It has.

But it did not have to, as the origin story of criminal procedure reveals. Rather, the current iteration of criminal procedure was the alternative. The first draft, and its full integration of civil rules, was created over a span of six months by Robinson and his team through intensive study and collaboration with members of the legal establishment. However, Holtzoff, by force of personality, altered the anticipated course of criminal procedure. This revelation invites a reexamination of the prevailing view that procedural differences in criminal and civil disputes are inevitable, or for that matter, appropriate.

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272. Advisory Committee Hearing, *supra* note 74, at 265.

273. *See id.* at 4.