the examiner will serve.[117] Hearing examiners should be appointed by the agencies subject to noncompetitive examination by the Commission,[118] and the examination conducted by the Commission should be limited to insuring that the persons nominated by the agencies possess the minimum qualities necessary for conducting a fair hearing.[119]

The career aspects of the present hearing examiner program should be continued under agency administration. Variations in the difficulty of cases within agencies and between agencies under existing standards provide a basis for promotion incentives.[120] These incentives offer an excellent opportunity for an agency to train personnel for the hearing examiner function and provide the necessary distinction through which relatively young men can hope to achieve positions of greater responsibility.[121] The subordination of the hearing examiner position to the effectiveness of administrative action does not diminish the importance of the examiner but, rather, returns the position to its proper perspective.

CRIMINAL LAW: STATUTORY REGULATION OF ALIBI DEFENSE THROUGH NOTICE REQUIREMENTS

Alibi legislation is an experiment of fairly recent origin in criminal procedure[1] seeking to regulate the use of alibi by discarding certain established rules of criminal pleading.[2] A number of states, including Indiana,

117. REP. ATT'Y GEN. COMM. AD. PROC. 47 (1941). ". . . [T]he agencies themselves should have an important share of the responsibility of selecting the persons who shall be hearing [examiners]." *Ibid.;* APA—LEGISLATIVE HISTORY, SEN. DOC. No. 248, 79th Cong., 2d Sess. 215, 280, 371 (1946).

118. 5 CODE FED. REGS. § 6.2 (Cum. Supp. 1954).

119. See note 82 *supra.*

120. See note 28 *supra.* Multiple grades of examiner positions existed prior to the adoption of the APA. Civil Service Commission, Report to the Committee on Hearing Officers 10-11 (1954). The fact that this situation existed prior to the pressures which gave rise to the present controversy tends to confirm the fact that most, if not all, the present examiner complaints arise out of the lack of supervision and promotion delays rather than from the multiple grade structure.

121. The mean age of all federal examiners as of January 7, 1954, was 54 years. KINTNER REPORT, Appendix B (1954).

1. The first alibi act was adopted in Michigan in 1927. This law served as model for ensuing state enactments. The majority of the statutes were created in the period between 1934 and 1942.

2. Ordinarily the defendant in a criminal case cannot be compelled to reveal the nature of his defense through advance pleading. The duty rests upon the prosecutor to prove all the material allegations of the charge without the aid of prior notice of the defendant's case.

have found sufficient need for their enactment.[3] The laws are intended to aid the prosecuting attorney who might otherwise be at a disadvantage in cases in which the accused relies upon an alibi.[4] The false alibi has been seen as an easy avenue of escape for criminals. There is evidence that organized crime has made ready use of them in metropolitan areas where criminal syndicates find it an easy matter to acquire witnesses who will testify in behalf of accused friends or members of the organization.[5] It is indicated by some authorities that the prosecutor in such cases might easily disclose the falsity of the testimony had he the time to investigate both the reliability of the witnesses and the factual details of the evidence, but he is often denied opportunity. The alibi is produced in the final stage of the trial,[6] the testimony of the witnesses for the defense showing that the accused was at some distant point, in another state or city, at the time when the crime was committed.[7] The prosecutor, taken by surprise, can, nevertheless, not ask for continuance. Alibi is not a special defense;[8] it merely supports the general issue of not guilty,[9] directly traversing the

3. Alibi laws were enacted in the following states: Arizona, Indiana, Iowa, Kansas, Michigan, Minnesota, New Jersey, New York, Ohio, Oklahoma, South Dakota, Utah, Vermont, and Wisconsin.

4. The need for alibi lelgislation was seen by Professor Millar of the Northwestern University School of Law as early as 1920. Mr. Millar stated: "That the manufactured alibi is one of the main avenues for escape of the guilty needs no demonstration. Moreover, the amount of perjury that is annually committed in this connection forms a most considerable item in the mass of unpunished crime. This would be checked, and the fabricated alibi rendered most difficult, if the accused were to be required to give the prosecution such notice of the intended defense as would enable it to confirm or refute the accused's assertation." Millar, *The Modernization of Criminal Procedure,* 11 J. CRIM. L. & CRIMINOLOGY 344, 350 (1920).

5. "Another serious feature of the trial of one of these organized criminals is the defense of the 'hip-pocket alibi,' an alibi that is always ready to be produced on short notice. Most criminal syndicates can quickly arrange a false alibi through friendly poolroom proprietors, barbers, men about town. This alibi is produced in the final hours of the trial without warning. In it a parade of wituesses will claim that the accused was in Omaha, or Peoria, or San Francisco, or some other distant point. Before the prosecution has an opportunity to investigate and demonstrate the falsity of the alibi, the trial is over, and a dangerous menace to society may have been set free." Stassen, *The Show Window of the Bar,* 20 MINN. L. REV. 577, 580-581 (1936).

6. "Time and again in the courtrooms of this State I have seen 'reasonable doubt' thrown on the testimony of state witnesses by the conflicting testimony of alibi wituesses for the defense, brought into the courtroom at almost the last minute and at a time that offered the state little or no opportunity to check either the credibility of the witnesses or the accuracy of their statements." Esch, *Ohio's New "Alibi Defense" Law,* 9 PANEL 42 (1931). See also Reid, *Wisconsin Adopts New Alibi Rule,* 13 PANEL 3, 10 (1935).

7. The testimony of the witnesses for the defense merely need raise a rcasonable doubt as to whether or not the accused was present when the crime was committed. 1 WHARTON, CRIMINAL EVIDENCE 246 (11th ed. 1935). See also Scherer v. State, 187 Ind. 15, 116 N.E. 52 (1917); Howard v. State, 50 Ind. 190 (1875); People v. Montlake, 184 App. Div. 578, 172 N.Y.S. 102 (1918).

8. 1 WHARTON, *op. cit. supra* note 7 at 244, 245.

9. In State v. Norman, 103 Ohio St. 541, 542, 134 N.E. 474, (1921), the court spells out the principle as follows: "An alibi is, strictly speaking, not a defense, though usually

evidence offered by the state in support of the charge.[10]

The purpose of the legislation is to prevent the wrongful use of alibi by offering the prosecutor reasonable opportunity to investigate the validity of supporting evidence.[11] To accomplish this the statutes require advance notice from the defendant in which he informs the prosecutor of his intention to rely on alibi.[12] This provision is intended to eliminate the surprise element, and enable the prosecutor to cope with the problem of false or delayed alibis on even terms.[13]

All the statutes embody in some form the provision of advance notice.[14] Notice requirements imposed upon the defendant vary from state to state. Some acts require the naming of the specific place where the

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called such in criminal procedure. A defense generally involves the duty that it be supported by some quantity of proof, casting the burden upon the party relying upon it. In that sense, an alibi is not a defense. It is a term used merely to meet the general issue of not guilty, and applies particularly to a claim that the defendant was elsewhere than where the crime was committed."

10. "The defense of an alibi not only goes to the essence of guilt, but it traverses one of the material averments of the indictment, namely, that the defendant did *then and there,* the particular act charged." 1 WHARTON, *op. cit. supra* note 7, at 244. (emphasis added).

11. The court in a case arising under the Utah alibi statute said, "Its [the alibi statute] purpose clearly is to erect safeguards against the wrongful use of the defense of alibi and give the prosecution time and information to investigate the merit of such defense." State v. Wade, 92 Utah 297, 301, 67 P.2d 647, 651 (1937). Similar statements are made in People v. Rakiec, 289 N.Y. 306, 308, 45 N.E.2d 812, 813 (1942); State v. Thayer, 124 Ohio St. 1, 176 N.E. 656, 657 (1931).

12. This provision has been in force in Scotland for some time, where alibi has been made a special defense. The defendaut must plead the defense in advance, specifying the place where he will attempt to show he had been at the time of the crime. See Millar, *The Modernization of Criminal Procedure,* 11 J. CRIM. L. & CRIMINOLOGY 344, 351 (1920).

13. Another method which may successfully curb the use of false alibis through encouraging prior disclosure is that of permitting the judge to comment upon the defendant's failure to make such disclosure. English courts seem to have made use of this method. In Rex v. Littleboy, [1934] 2 K.B. 408, the defendant, when formally charged in the police court, said: "I am not guilty, I reserve my defense." *Id.* at 409. At the trial he raised the defense of alibi. The trial judge commented to the jury upon the fact that the defendant's silence had deprived the prosecution of an opportunity to make adequate inquiry into the truth of the defense. The verdict was guilty and the defendant was convicted. On appeal it was held that the comment of the trial judge did not constitute misdirection.

See also Russel v. Rex, 67 Can. Cr. Cas. 28 (1936); Rex v. Parker, [1933] 1 K.B. 850; Rex v. Moran, 3 Cr. App. 25 (1909). For a discussion of this point see *Reserving Defence: Comments at Trial,* 78 L.J. NEWS 160 (1934); *The Defence of Alibi,* 179 L.T. 212 (1935); *Criminal Law: Reservation of the Defence,* 19 N.Z.L.J. 209 (1943).

14. ARIZ. CODE ANN. §44-1031 (1939); IND. ANN. STAT. §9-1631 (Burns 1942); IOWA CODE ANN. §777.18 (1946); KAN. GEN. STAT. §62-1341 (1949); MICH. STAT. ANN. §768.20 (1948); MINN. STAT. §630.14 (1945); N.J. STAT. ANN. §2:190-7 (1937); N.Y. CODE CRIM. PROC. §295-1; OHIO CODE ANN. §13444-20 (1939); OKLA. STAT. tit. 22, §585 (1941); S.D. CODE §34.2801 (1939); UTAH CODE ANN. §77-22-17 (1953); VT. REV. STAT. §2400 (1947); WIS. STAT. §355.07 (1953).

defendant claims to have been at the time the offense was committed.[15] Others are less stringent.[16] The Minnesota law, for example, imposes a minimum requirement; the accused has only to indicate the county or municipality where he claims to have been.[17] Six states impose the additional duty of naming witnesses who are to substantiate the defense,[18] and in so doing indicate the most radical departure in this area from accepted criminal procedure. Failure to comply with statutory requirement of notice[19] results in all but two states in exclusion at the trial of supporting evidence.[20] Evidence may be admitted in the exceptional case at the discretion of the court.[21]

Alibi legislation has a relatively short history in the United States, but in those jurisdictions where such acts have been adopted there have been some expressions of approval and support for their effectiveness.[22] Reports indicate substantial increase in the number of convictions obtained in cases where alibis were offered and successful prosecution has

15. ARIZ. CODE ANN. §44-1031 (1939); IND. ANN. STAT. 9-1631 (Burns 1942); N.J. STAT. ANN. §2:190-7 (1937); N.Y. CODE CRIM. PROC. §295-1; OHIO CODE ANN. §13444-20 (1939); OKLA. STAT. tit. 22, §585 (1941); S.D. CODE §34.2801 (1939); UTAH CODE ANN. §77-22-17 (1953); WIS. STAT. §355.07 (1953). These laws require the defendant to name the "specific place," or "particular place," or "place in detail."

16. IOWA CODE ANN. §777.18 (1946); KAN. GEN. STAT. §62-1341 (1949); MICH. STAT. ANN. §768.20 (1948); VT. REV. STAT. §2400 (1947). These statutes do not include language of specificity.

17. MINN. STAT. §630.14 (1945).

18. ARIZ. CODE ANN. §44-1031 (1939); IOWA CODE ANN. §777.18 (1946); MICH. STAT. ANN. §768.20 (1948); N.J. STAT. ANN. §2:190-7 (1937); N.Y. CODE CRIM. PROC. §295-1. The Iowa statute is perhaps the most burdensome for the defendant as it compels him not only to list the names of the witnesses with their address and occupation but also requires a statement of the substance of that which the defendant expects to prove by the testimony of each witness.

19. Under the acts of two states, New Jersey and New York, the requirement of notice is dependent upon a written demand by the prosecutor. If the prosecutor fails to demand it, the defendant is under no duty to serve a notice.

20. The Oklahoma and Iowa alibi statutes constitute the only exceptions. Under the Oklahoma act when the defendant offers evidence in court to establish an alibi, and no notice has been served upon the prosecuting attorney, upon motion of the prosecutor the court may grant a postponement "for such time as it may deem necessary to make an investigation of the facts in relation to such evidence." OKLA. STAT. tit. 22, § 585 (1951). The Iowa act provides for continuance on motion of the state's attorney should the defendant file his alibi notice less than four days before the case is set for trial. IOWA CODE ANN. §777.18 (1946). The provisions of these laws seem to embody the most sensible and adequate approach to the alibi problem. See *infra* pp. 117-118.

21. All alibi statutes make the exclusion of evidence dependent upon the discretion of the court. See note 14 *supra*.

22. A general survey conducted by students of the University of Texas Law School shows that in those states which have adopted alibi legislation an overwhelming majority of the lawyers questioned reported that the legislation was desirable. Stayton and Watkin, *Is Specific Notice of the Defense of Alibi Desirable?* 18 TEX. L. REV. 151, 155 (1939).

been attributed by some writers to the fact that the acts afforded the time needed for proper investigation of the defense.[23]

Despite whatever advantages such legislation may offer, it has not been widely accepted. At the present time only fourteen states have enacted the laws.[24] In some of these states the acts have had to overcome substantial opposition.[25] In many other states proposed statutes have been defeated.[26] One major factor in this opposition is the belief that, while alibi laws may facilitate the work of the prosecution, they have a prejudicial effect upon the defendant's case.[27] The constitutionality of alibi statutes has been upheld against the contention that they compel self incrimination,[28] but there are several objections to them which raise ques-

23. The following statement was made about the effectiveness of the Michigan alibi statute: "It has been noted in the courts of Detroit since the passage of this act that alibi defenses are becoming less. Those offered almost always prove faulty and convictions follow. The great increase in convictions where alibis have been offered since the passage of the act is attributed by police and prosecuting officials to the statutory notice given to them, which permits inquiry into the alleged facts of the alibi prior to trial and the refutation and destruction of a false alibi.

"Instances have arisen where an alibi has been offered as a defense after notice given under the Alibi act and the police and prosecuting officials have been able to prove that the alibi witness committed perjury. Several perjury convictions have resulted on that score in Detroit." Toy, *Michigan Law on Alibi and Insanity Defense Reduces Perjury,* 9 PANEL 52 (1931).

24. See note 3 *supra.*

25. The New York alibi statute was voted down three times by the legislature before its adoption. Dean, *Advance Specifications of Defense in Criminal Cases,* 20 A.B.A.J. 435, 437 (1934).

26. In 1926, the Section of Criminal Law and Procedure of the California Bar Association recommended the adoption of an alibi statute but the efforts of this committee, the district attorneys of the state, and the California Crime Commission were unavailing when the legislature met in 1931. *Ibid.*

An alibi bill was introduced in the House of Representatives of the Illinois State Legislature during the 1947 Session. It was referred to the House Judiciary Committee, and died there. Note, 39 J. CRIM. L. & CRIMINOLOGY 629, 630 (1949).

27. The desirability of alibi provisions in Illinois has been questioned on the ground that it would enable prosecuting officials to intimidate the defendant's witnesses in advance of trial. *Id.* at 632.

28. On several occasions alibi statutes have been attacked as unconstitutional, the major contention being that the acts compel the accused to give testimony in violation of his privilege against self-incrimination. The basic premise of this theory is that the advance information required by the statutes might lead to the discovery of incriminating evidence. This position has been held untenable by the courts on the ground that the defendant is at no time compelled to offer an alibi. If he chooses of his own free will to rely upon such a defense, the statute merely makes the evidence available to the prosecution at a date earlier than the trial. The alibi law merely sets up a reasonable rule of pleading. People v. Schade, 161 Misc. 212, 292 N.Y. Supp. 612 (1936); State v. Thayer, 124 Ohio St. 1, 176 N.E. 656 (1931).

Legal writers seem in agreement that no violation of the privilege against self-incrimination is involved in the operation of alibi statutes. See, Millar, *The Statutory Notice of Alibi,* 24 J. CRIM. L. & CRIMINOLOGY 849, 852-853 (1934); Notes, 39 J. CRIM. L. & CRIMINOLOGY 629, 631 (1949); 10 FORD L. REV. 305, 306 (1941); 50 HARV. L. REV. 523 (1936); Legis., 21 VA. L. REV. 940, 944-945 (1935).

tions as to their desirability.[29]

These objections center around the fact that alibi legislation must face a twofold problem: The law must be designed to accomplish the purpose of facilitating prosecution by reducing the possibility of successful use of false alibis, and at the same time it must not tend to upset the balance of procedural fairness in a criminal case.

The rules of criminal pleading ordinarily applicable do not require the defendant to reveal any parts of his defense in advance; the prosecutor is expected to prove his case without prior disclosure.[30] Under the alibi law the accused is deprived of the benefit of nondisclosure, and his position at the trial is weakened. The statute should not compel the defendant to reveal any more of his case than is absolutely necessary to secure for the prosecution the needed protection.

The disclosure of intention to rely upon an alibi is essential. Information as to the place where the defendant claims to have been when the crime was committed seems a reasonable requirement. Whether or not the names of witnesses for the defense should be included is questionable. It would seem that if the prosecutor was informed of the intention to use alibi and information as to place, he would be afforded sufficient insulation from surprise. While pre-trial examination of the defense witnesses would certainly make the prosecutor's task much easier, the danger that the witnesses may be intimidated is an argument against such procedure.[31] The six states which impose the duty of disclosure of the defendant's witnesses[32] seem to be unduly rigorous in this requirement. New Jersey's statute attempts to strike a balance of fairness by requiring the prosecutor to serve the defendant a bill of particulars which must indicate the names and addresses of witnesses who are to testify for the state in regard to the accused's presence at the scene of the crime.[33]

Even if the information required is restricted to bare essentials, several problems still remain. The element of surprise to the defendant

29. A nationwide investigation made by the students of the University of Texas Law School showed that while a majority of attorneys supported alibi legislation (55.1%), a substantial minority (44.9%) was of the opinion that the state should be able to disprove a false alibi if its case was properly prepared. The state, it was maintained by the group, should be bound to prove its case, including the presence of the defendant at the scene of the crime. Stayton and Watkin, *supra* note 22, at 153.

30. Only affirmative defenses need to be pleaded in advance, and alibi, in the absence of statute, is not an affirmative defense. See note 9 *supra*.

31. See note 27 *supra*.

32. See note 18 *supra*.

33. "Within 2 days after receipt of such bill [defendant's notice], the prosecutor shall, on written demand therefor, furnish the defendant with a written bill of particulars stating the names and addresses of the witnesses upon whom the state intends to rely to establish defendant's presence at the scene of the alleged offense." N.J. STAT. ANN. §2:190-7 (1937).

raises a question which deserves consideration. The prosecutor is protected from surprise by the advance notice; the accused is without this assurance. Generally recognized is the rule that the prosecutor may allege one time as that of the commission of the crime in the indictment, but that he need not adhere to it at the trial.[34] The only limitation is that the changed time must be within the statute of limitations and prior to the filing of the indictment.[35]

The courts allow the prosecutor to make the change on the assumption that in cases where time is not an essential ingredient of the crime its variation as between indictment and proof at the trial cannot possibly prejudice the accused.[36] This may be true as a general proposition but in situations where the defendant intends to rely upon an alibi, it may work hardship on him as he has necessarily prepared his defense for the time given in the indictment. Variation in time may be fatal to his case.

The defendant is not without some protection. Although alibi statutes on their face restrict the defendant to proof of the alibi offered in his notice to meet the time alleged in the indictment, there is indication that the courts will permit him to establish an alibi covering the time as presented by the prosecutor at the trial if he is in a position to do so.[37] The defendant may find it difficult to present an alibi immediately at the trial and the courts will handle this situation by declaring that he is en-

34. This rule has been applicable for centuries of Anglo-Saxon law, and apparently arose from the recognition of the fact that the prosecutor may not always be in a position before the trial to know with certainty the exact time of commission of the offense. 1 WHARTON, *op. cit. supra* note 7, at 1039; 1 BISHOP, NEW CRIMINAL PROCEDURE 400 (2d ed. 1913); CHITTY, CRIMINAL LAW 223 (2d ed. 1826).

35. "Where time is not of the essence, proof of time as charged is not necessary. It is sufficient to show that the crime was committed before the return of the indictment, and within the statute of limitations." Crickmore v. State, 213 Ind. 586, 591, 12 N.E.2d 266, 268 (1937).

See also Robbins v. State, 92 Ind. App. 155, 172 N.E. 504 (1930); Coger v. State, 196 Ind. 332, 147 N.E. 624 (1925); Hampton v. State, 8 Ind. 336 (1856).

Time is not of the essence of criminal offenses except where the offense is doing the thing charged on a certain date. See Dixon v. State, 223 Ind. 521, 62 N.E.2d 629 (1945); Crickmore v. State, 213 Ind. 586, 591, 12 N.E.2d 266, 268 (1937).

36. In Dixon v. State, 223 Ind. 521, 62 N.E.2d 629 (1945), the defendant was charged with receiving stolen goods. The state was permitted to amend the indictment, changing the date from February 10, 1943 to September 18, 1943. It was held that as time was not of the essence of the offense, the amendment did not alter the indictment in any material respect, and it was not a ground for reversal.

37. In State v. Petro, 148 Ohio 473, 76 N.E.2d 355 (1947), where there was a variance between the time alleged in the indictment and that proven at the trial, evidence to prove an alibi was admitted in the absence of previous notice by the defendant required by the statute, but only after the prosecutor withdrew his objection to the evidence.

In Reed v. State, 44 Ohio App. 318, 185 N.E. 558 (1933), defendant was charged with larceny of wheat. When the prosecutor attempted to prove that the defendant sold the wheat the next morning, evidence of an alibi concerning defendant's presence on the next morning was admitted in the absence of the statutory notice.

titled to a continuance on the ground of surprise if he can show sufficiently that he will be able to prepare and present an alibi to cover the new time introduced by the prosecutor.[38] The principal disadvantage which may result to the accused is that he will not always remember exactly where he has been at different times in the past and may not be able to show with certainty that he could prove an alibi for the time newly brought in issue by the prosecutor even if granted a continuance.

Another difficulty which the accused may encounter in those states which regulate alibi arises in cases where the indictment or affidavit presents an indefinite or broad allegation of time. It may be impossible to cover such period in its entirety, and the result could be failure of service of notice upon the prosecutor. Most jurisdictions hold that if the accused has difficulty in preparing his defense because of the uncertainty of allegations in the indictment, he may be entitled to a bill of particulars.[39] Upon demand, the court, in its own discretion, directs the prosecutor to serve such bill.[40] There is considerable trend of opinion to the effect that the defendant is not entitled to a bill of particulars giving the exact date of the commission of the crime where time is not of the essence of the

38. Where the indictment alleged February 20, as the date of the offense and the prosecutor at the trial proved that the crime was committed on February 18, continuance was denied, but the court said: "If on his motion for a new trial the defendant in this case had been able to make a showing that he could have produced witnesses whose testimony would tend to establish for him an alibi as to February 18, 1941, or that he, himself, could testify to such an alibi, and if the court were satisfied that the showing was substantial in nature, the court then doubtless would have concluded that actual prejudice resulted to the defendant from the change of date." People v. Fitzsimmons, 320 Mich. 116, 125, 30 N.W.2d 801, 805 (1948). The accused is entitled to a continuance only where he is prejudiced in his defense.

A non-alibi state handled the situation in a similar fashion. In People v. Kircher, 333 Ill. 200, 205, 164 N.E. 150, 152 (1928), the court said: ". . . [W]here the defense is an alibi and an incorrect date is alleged in the indictment and a sufficient showing of surprise and inability to meet the variance in the proof is made, it is error for the court to refuse to give the accused sufficient time to prepare the necessary change in defense."

39. The right of demanding a bill of particulars is often provided by statute in states where a "short form" of indictment is authorized. According to the New York statute such bill shall include ". . . such particulars as may be necessary to give the defendant and the court reasonable information as to the nature and character of the crime alleged." N.Y. CODE CRIM. PROC. §295-g.

For cases construing similar statutes see Gurein v. State, 209 Ark. 1082, 193 S.W.2d 997 (1946); Commonwealth v. Sinclair, 195 Mass. 100, 80 N.E. 799 (1907); State v. Petro, 148 Ohio 473, 76 N.E.2d 355 (1947); State v. Domansky, 57 R.I. 500, 190 A. 854 (1937).

Generally the power to grant a bill of particulars is an inherent one of the court. Sherick v. State, 167 Ind. 345, 350, 79 N.E. 193, 194 (1906).

40. U.S. v. Cohen, 145 F.2d 82 (1944); Hindman v. U.S., 292 F. 679 (1923); State v. Benham, 58 Ariz. 129, 118 P.2d 91 (1941); State v. Goodson, 116 La. 388, 40 So. 771 (1906).

In Utah the courts indicate that a bill of particulars is a statutory right. State v. Solomon, 93 Utah 70, 71 P.2d 104 (1937).

offense.[41] The ground for this view is again the assumption that in cases where time is not of the essence its insufficient allegation does not materially effect the preparation of the accused's case.[42] Again this assumption is not well taken where an alibi statute is in operation.[43] Certain alibi states have recognized this problem, holding that where the indictment alleges an uncertain time the defendant is entitled to a bill of particulars, setting forth the date and the particular place of the commission of the crime.[44]

The most troublesome feature of the laws is their provision for exclusion of evidence in case of failure by the defendant to serve notice. Full inquiry into the facts of the case may be foreclosed by the failure of the defendant's counsel to comply with the statutory requirements. Under the typical act requiring notice and providing for exclusion, the defendant has only one recourse. That is to judicial discretion which may admit evidence in cases where there is good cause shown for failure to give notice.[45] It seems doubtful that this would afford sufficient protection for the defendant. Perhaps a solution lies in a provision for the discretionary exclusion of evidence where the bad faith of the accused in avoiding notice requirement is shown instead of the present rule allowing the court to admit evidence as an exception where there is good cause for failure of notice.

Several states seem to have recognized the various problems arising under the laws and have adopted provisions which tend to soften their impact. The Indiana statute embodies a provision without parallel in the

41. U.S. v. Parker, 103 F.2d 857 (1939); U.S. v. Hosier, 50 F.2d 971 (1931); O'Neill v. U.S., 19 F.2d 322 (1927); U.S. v. Gorman, 62 F. Supp. 347 (1945); People v. Gray, 251 Ill. 431, 96 N.E. 268 (1911); State v. Fernandez, 157 La. 149, 102 So. 186 (1924); State v. King, 133 N.J.L. 480, 44 A.2d 901 (1945).

42. Refusal of a bill of particulars was held not an error or abuse of the discretion of the court where the defendant could not show surprise or injury by the failure to furnish such bill. People v. Gray, 251 Ill. 431, 437, 96 N.E. 268, 271 (1911).

43. If the time of the commission of the crime is not alleged with sufficient exactness in the indictment, the defendant may find it difficult, if not impossible, to serve the required alibi notice upon the prosecutor. A bill of particulars furnishing a reasonably exact period of time would enable the defendant to prepare an alibi and serve a notice.

44. The New York court in People v. Wright, 172 Misc. 860, 862, 16 N.Y.S.2d 593, 594 (1940), stated: "The statutory requirement in regard to alibi witnesses has made it more necessary than before that the defendant be advised with exactitude as to the time and place of the commission of the crime."

The failure to sustain the motion of the defendant to require the state to provide him with a bill of particulars was held erroneous where the defendant by his notice duly given stated his intention to assert the defense of alibi. The court held that upon this defense which would require proof of his whereabouts throughout any period during which the crime may have been committed it was vital for him to know, within reasonable limits, the time during which the offense was claimed to have been committed. State v. Collett, 144 Ohio St. 639, ——, 59 N.E.2d 417, 420 (1944).

45. The cases of record do not indicate what the courts will accept as good cause for defendant's failure to serve notice.

laws of other states which tends to eliminate the possibility of surprise on the defendant's part. When the defendant serves his advance notice he may demand a return notice from the prosecutor specifying the time and place the state intends to prove as the time and place of the crime.[46] While failure of notice on the defendant's part draws the usual sanction of exclusion, the law provides also for exclusion of the state's evidence if the prosecution fails to comply with the defendant's demand.[47]

While the defendant's interests are protected,[48] this provision would seem to impair the effectiveness of the alibi regulation which, after all, is intended to be a prosecutor's weapon. The prosecutor is denied the opportunity to vary the allegation of time of the offense.[49] If he fails to serve notice, he is bound to the time specified by the defendant; if he serves notice, he is again bound. While in some cases the statutory requirement may easily be fulfilled, in other situations setting up a precise time for the commission of the crime in advance may be difficult if not impossible.[50]

A possible explanation for the prosecutor-notice provision may be found in the fact that Indiana procedure does not allow for bills of particulars. If an indictment is so drawn as to require a grant of particulars,

46. In his notice the defendant may require the prosecutor to serve upon him a specific statement in regard to the exact date and exact place which the prosecution proposes to present at the trial. Should the prosecutor attempt to establish a time and place other than that given in his original indictment, he must serve notice on the defendant. The defendant may then serve notice as to his alibi for the revised time and place. IND. ANN. STAT. §9-1632 (Burns 1942).

47. "At the trial if it appears that the prosecuting attorney has failed to file and to serve upon the defendant or upon his counsel the prosecuting attorney's statement as prescribed herein, the court shall, in the absence of a showing of good cause for such failure by the prosecuting attorney, exclude evidence offered by the prosecuting attorney to show that the defendant was at a place other than the place stated in the defendant's original notice and that the time was other than the time stated in the defendant's original notice." IND. ANN. STAT. §9-1633 (Burns 1942).

48. In Indiana the possibility of surprise is completely eliminated as the defendant may be certain that the prosecutor will be restricted to the proof of time as given in his notice.

49. In Evans v. State, 224 Ind. 428, 433, 68 N.E.2d 546, 548 (1946), the court declared: "It is so well settled as to require no authority that, where time is not the essence of the offense, under the allegation of a specific date, the offense may be proved as occurring at any date preceding the filing of the affidavit and within the statute of limitations. This rule yields to the limitations imposed by the alibi statute when it is invoked."

50. The provision of the Indiana law indicates a possible way to relieve the prosecution of this handicap. The court may, upon showing of good cause, allow either party to introduce evidence as to time other than that they have specified. IND. ANN. STAT. §9-1633 (Burns 1942). The only Indiana case involving the duties of the prosecutor does not answer the question of what constitutes a good cause, since ". . . the record is entirely silent as to any good cause being shown to relieve the prosecuting attorney of his duty. . . ." Pearman v. State, 117 N.E.2d 362, 366 (Ind. 1954).

it is subject to quashing for uncertainty.[51] At the same time, no indictment in Indiana is deemed invalid for omitting the time at which the offense was committed or for stating it improperly in cases where time is not of the essence of the crime.[52] Thus, if the indictment contained a broad or indefinite allegation of time, the defendant would be unable to secure a bill of particulars, and could not make advance disclosure. Notice from the prosecution may be intended by the legislature as a substitute for the bill of particulars.[53]

The provision may, in certain cases, place the prosecutor in an extremely difficult position. There are cases where the circumstances make it impossible to know the exact time of the commission of the offense until it comes to trial.[54] In states where a bill of particulars is obtainable it would be in the discretion of the court to decide whether or not to direct the service of such bill, and if the court felt that presentation of exact time would work undue hardship upon the prosecutor, it could refuse the accused's motion. In Indiana, however, the statutory duty to serve notice proposing an exact time is mandatory, and noncompliance may result in an exclusion of evidence at the trial.[55] Liberal interpretation of the "good

51. The following statement is found in Sherrick v. State, 167 Ind. 345, 348-349, 79 N.E. 193, 194 (1906): "We have in this State what purports to be a complete code of criminal procedure, and in it there is no recognition of a motion for a bill of particulars . . . Under our code an indictment must contain a statement of the facts constituting the offense in plain and concise language; that is, the facts must be stated in such clear, full and certain manner as to reasonably apprise the defendant of what he is required to meet, and any failure to do this may be reached by a motion to quash."

In Hinshaw v. State, 188 Ind. 447, 455, 124 N.E. 458, 461 (1919), the court said: "The motions to require the state to make indictment or affidavit more specific, and to state facts necessary to sustain conclusions or recitals in an indictment, are not recognized by the criminal laws and procedure of this state." See also State v. Reichert, 226 Ind. 171, 177, 78 N.E.2d 785 (1948).

52. IND. ANN. STAT. §9-1127 (Burns 1942).

53. In most alibi states the use of bill of particulars is recognized either by statute or by common practice. There are statutory provisions for such bills in the following states: Arizona, ARIZ. CODE ANN. §44-712 (1939); Iowa, IOWA CODE ANN. §773.5 (1946); Kansas, KAN. GEN. STAT. §62-1341 (1949); Michigan, MICH. STAT. ANN. §767.44 (1948); New Jersey, N.J. STAT. ANN. 2:190-7 (1937); New York, N.Y. CODE CRIM. PROC. 295-g, 295-h; Ohio, OHIO CODE ANN. §13437-6 (1939); Utah, UTAH CODE ANN. §77-21-9 (1953).

The following states recognize bills of particulars under their common law: Minnesota, State v. Poelaert, 200 Minn. 30, 37, 273 N.W. 641, 645 (1937); State v. Wassing, 141 Minn. 106, 111, 169 N.W. 485, 487 (1918); South Dakota, State v. Otto, 38 S.D. 353, 357, 161 N.W. 340, 342 (1917); Vermont, State v. Truba, 88 Vt. 557, 559, 93 A. 293, 294 (1915).

54. There are cases where the acts of commission extend over a period of days, cases where the evidence of the prosecution can only fix the time as an uncertain point within a certain period of days, and cases where the proof of time may fall within a more or less definite period. Millar, *supra* note 28, at 855.

55. IND. ANN. STAT. §§9-1632, 9-1633 (Burns 1942). See Pearman v. State, 117 N.E.2d 362, 366 (Ind. 1954).

cause" exception which allows the prosecutor to show cause for his failure to serve notice might mitigate the hardship, but is this sufficient assurance upon which to plan a prosecution?[56]

The Kansas act, in its approach to the problem, provides that, if the time and place of the crime is not specifically stated in the indictment, the defendant may apply to the court to direct the prosecuting attorney to amend, or to file a bill of particulars stating time and place "as accurately as possible." If the prosecutor is unable to state the specific time or place, he notifies the court. In such case the defendant may offer evidence at the trial to prove an alibi without prior notice.[57] This act, while securing for the defendant the opportunity to use the defense of alibi, may deprive the prosecution of the benefit of the statute, allowing, as it does, the introduction of an alibi without notice. Similar to the Indiana act, this law meets the objection that it does not afford the prosecution an adequate device in meeting the alibi problem.[58]

Of the existing acts those of two states, Iowa and Oklahoma, seem to achieve partial solution of the alibi law problem.[59] Under these acts there is no exclusion provision.[60] The defendant is required to serve notice of his intention to utilize an alibi, but if he fails to do so within the required time the prosecutor may apply to the court for a continuance in order to investigate the validity of the defense.[61]

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56. The prosecutor may run the risk of having his evidence excluded if he does not present a notice including sufficiently exact time as he will not know whether or not the court will find his reasons for such noncompliance satisfactory. See note 50 *supra*.

57. KAN. GEN. STAT. §62-1341 (1949).

58. Perhaps more advantageous to the prosecution is the suggestion that it should be left open to the prosecution to apply to the court for an order regulating the statement of time to be covered in the defendant's notice. The court would direct the defendant in such case as to what period should be covered by his alibi notice, and the prosecution would be held to that time at the trial. The court, taking into consideration all the circumstances of the case, would be able to make such order as would be just to both parties. See Millar, *supra* note 28, at 856, for a discussion of this proposal.

59. The Iowa law fails in its strict requirement of advance information. See note 18 *supra*.

60. See note 20 *supra*.

61. While the Oklahoma act seems to make the granting of postponement discretionary with the court, the language employed in the Iowa statute indicates that granting of continuance is mandatory in that state.

The Oklahoma law provides that: "Whenever testimony to establish an alibi on behalf of the defendant shall be offered in evidence in any criminal case in any court of record of the State of Oklahoma, and notice of the intention of the defendant to claim such alibi, which notice shall include specific information as to the place at which the defendant claims to have been at the time of the alleged offense, shall not have been served upon the county attorney at or before five (5) days prior to the trial of the case, upon motion of the county attorney, the court may grant a postponement for such time as it may deem necessary to make an investigation of the facts in relation to such evidence." OKL. STAT. tit. 22, §585 (1941).

The law of Iowa states in part: ". . . If the defendant files said notice less than four days before the case is set for trial, the state, on motion of the county attorney,

There are many factors which may keep the defendant from giving notice. There are possibilities of late discovery of witnesses to support the alibi or of the inability of the accused to recall his whereabouts.[62] These may come within the sweep of exceptions which will move the courts to allow introduction of supporting evidence. But apart from considerations of what is or is not good cause for not giving notice, an adequate solution to the alibi problem seems to lie elsewhere. The most satisfactory law would seem to be that which requires minimum information in the advance notice, making it easier for the defendant to comply; and which provides either for exclusion only in those cases where the defendant is in bad faith or which eliminates the exclusion provision altogether. The prosecutor should be allowed a continuance to investigate the defense in the absence of notice. This would minimize the chance of unfair result and still allow for effective prosecution in alibi cases.

NONAPPLICABILITY OF "SECURITY FOR EXPENSES" LEGISLATION TO MINORITY STOCKHOLDERS' DIVIDEND SUITS

The usual state general corporation statute confers few rights upon stockholders,[1] while at the same time entrusting the directors with great powers in the management of the corporation[2] and the declaration of its

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shall be entitled to a continuance of said case for not to exceed four days." IOWA CODE ANN. §777.18 (1946).

62. The two way exclusion of evidence provided for in the Indiana law merely aggravates the problems arising under alibi legislation; the alibi law has the potentiality of becoming a liability to the prosecutor rather than an asset.

1. The Indiana general corporation law is illustrative. The act provides that the rights and powers of stockholders shall be those provided in the articles of incorporation or expressed by the board of directors prior to the issuance of the shares involved. IND. ANN. STAT. §25-205 (Burns Supp. 1953). There are no preemptive rights unless stated in the articles of incorporation or in a resolution of the board of directors. *Ibid.* Voting rights are given unless the articles of incorporation provide otherwise. *Id.* §25-207. The right to adopt the by-laws must be expressed in the articles of incorporation. IND. ANN. STAT. § 25-220 (Burns 1933). Any amendment of the articles of incorporation must be adopted by those stockholders entitled to vote. *Id.* § 25-222. Merger and consolidation must similarly be approved. IND. ANN. STAT. §§25-231, 25-232 (Burns Supp. 1953). A stockholder who dissents to a merger or consolidation may demand payment for his shares. *Id.* §25-236. The sale, lease, exchange, mortgaging or pledging of all or substantially all of the corporate assets must have the approval of the stockholders. *Id.* §25-238. A dissenting stockholder from such sale may receive payment for his shares. *Id.* §25-240. Stockholders must also approve a voluntary dissolution of the corporation. *Id.* §25-241.

For an enumeration of the general powers and rights of stockholders see 13 FLETCHER, CYCLOPEDIA PRIVATE CORPORATIONS §5717 (Wolf 1943).

2. See *e.g.*, IND. ANN. STAT. §25-208 (Burns Supp. 1953); N.Y. GEN. CORP. LAW §27 (Supp. 1953); DEL. CODE ANN. tit. 8, §141 (1953).